A

# DIGEST

OF

# DECISIONS IN CRIMINAL CASES,

CONTAINED IN THE REPORTS

OF THE

## FEDERAL COURTS AND THE COURTS OF THE SEVERAL STATES,

FROM THE EARLIEST PERIOD TO THE PRESENT TIME.

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# PREFACE.

The preparation of the following pages was undertaken by the author at the solicitation of the publishers, who, from their familiarity as booksellers with the wants of the profession, were convinced of the desirability of such a work. A digest of decisions on criminal law, compiled by Mr. John L. Hanes, was published several years ago, and it was at first designed to revise and republish Mr. Hanes' book, adding thereto the subsequent cases. That project was, however, abandoned as impracticable; it being found necessary, for purposes of condensation and rearrangement, to write an entirely new work, which has been done.

The leading features aimed at in this digest have been, the incorporation into it of all of the Federal and State decisions on criminal law of any importance, omitting such as are obsolete, or of merely local and temporary interest; the presentation of the points decided in simple and concise language, without repetition; the giving of a succinct and comprehensive statement of facts, whenever such statement is needed for the understanding of the subject; the bringing together under each head all the cases which support the same proposition, thus avoiding the needless reiteration of similar legal principles; and finally, the systematic and orderly arrangement of the whole, with appropriate cross references. How far the author has succeeded in carrying out the foregoing programme, must be determined by others; but he indulges the hope, that in view of the difficulty of such a task, of which none are so well aware as those whose opinion is of the most value, the measure of its performance may be deemed sufficient.

By an elaboration of the materials at command, the work might easily have been swelled to two volumes. Such an increase of its size would however have enhanced its cost, without

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# UNITED STATES CRIMINAL DIGEST.

# UNITED STATES CRIMINAL DIGEST.

## Abatement—Plea in.

1. When proper.
2. Validity.

1. When proper.

**1. Pendency of indictment.** The pendency of one indictment is ground for a plea in abatement to another indictment for the same cause. Com. v. Drew, 3 Cush. 279. But see Austin v. State, 12 Mo. 393.

**2. Omission by justice.** Where a person was committed for a secret assault, and the justice did not insert in his certificate that the complainant had sworn that he was wounded, and shown his wounds, it was held that this should be pleaded in abatement. Northrup v. Brush, Kirby, 108.

**3. Misnomer.** A misnomer of the surname or christian name may be cause for a plea in abatement. Lynes v. State, 5 Porter, 236; Com. v. Dockham, Thach. Crim. Cas. 238.

**4.** Where the indictment was against William Gabe, *alias* Santa Anna, and there was a motion to quash on the ground that a second christian name was alleged under an *alias dictus*, it was held that this was matter for plea in abatement, and not for a mere motion. Gabe v. State, 1 Eng. 519.

**5.** Where the prisoner was described in an indictment as A., the wife of B., it was held that if the allegation was erroneous, the proper remedy might be by a plea in abatement. Com. v. Lewis, 1 Metc. 151. In North Carolina, the want of the defendant's addition in an indictment is not ground for a plea in abatement. State v. Newman, 2 Car. Law Repos. 74. It is otherwise in Virginia. Haught v. Com. 2 Va. Cas. 3; and the same in the latter State as to a false addition. Com. v. Clark, Ib. 401.

**6. Objections to grand jury.** The incompetency of grand jurors may be pleaded in abatement. Rawls v. State, 8 Sm. & Marsh. 599; McQuillen v. State, Ib. 587; Nugent v. State, 19 Ala. 540; State v. Middleton, 5 Porter, 484. Where a statute provided that grand jurors should be freeholders, a plea in abatement to an indictment stating that some of the grand jury were not freeholders, was held good. State v. Rockafellow, 1 Halst. 332; State v. Duncan, 7 Yerg. 271; *contra*, People v. Jewett, 6 Wend. 386.

**7.** The objection that seventeen instead of sixteen grand jurors were impaneled and passed upon the indictment, should be made by plea in abatement. Shropshire v. State, 7 Eng. 190; and the question as to whether a grand jury has been summoned, drawn and impaneled according to law, can only be considered under this plea. State v. Greenwood, 5 Porter, 474; Smith v. State, 19 Conn. 493.

**8.** Where for some reason not appearing in the record, the court set aside the whole panel of grand jurors, and ordered a special venire returnable forthwith, it was held that a plea in abatement was proper. Baker v. State, 23 Miss. 243.

**9.** An objection that the indictment was found by less than twelve grand jurors, taken on motion in writing, in the nature of a plea in abatement, is not too late at the arraignment of the prisoner. State v. Symonds, 36 Maine, 128.

**10. Exemption from jury duty.** The special exemption of individuals from jury service is not a disqualification which will

abate an indictment. State v. Brooks, 9 Ala. 10; Com. v. Long, 2 Va. Cas. 318.

2. Validity.

**11. When double.** Two pleas in abatement may be pleaded to the same presentment. Com. v. Long, 2 Va. Cas. 318. But a plea in abatement which alleges several distinct matters, is bad for duplicity. Findley v. People, 1 Manning, 234.

**12. Unnecessary averment.** A plea in abatement that certain persons (naming them) were sworn and charged as members of the grand jury, need not state that they served on the grand jury. State v. Rickey, 5 Halst. 83.

**13. Plea insufficient.** A general statement in a plea in abatement that the commissioners were not authorized to make the selection of the grand jurors on the 6th day of May, is insufficient, the plea not showing that the 6th of May was not included in the May term of the board of commissioners. State v. Newer, 7 Blackf. 307.

**14.** A plea in abatement, that two of the grand jury had, before they were sworn, formed and publicly expressed opinions that were unfavorable to the defendant, was held bad on general demurrer. State v. Rickey, 5 Halst. 83.

**15.** A plea in abatement, that the grand jury were not legally qualified to find the indictment, is bad on special demurrer when it alleges objections to the drawing of several jurors having no necessary connection and dependent upon different evidence for proof. State v. Ward, 63 Maine, 225.

**16. Waiver.** Pleas in abatement in criminal, as well as in civil cases, must be pleaded at the proper time. By pleading guilty, the accused waives matter in abatement. McQuillen v. State, 8 Smed. & Marsh. 587; State v. Butler, 17 Vt. 145; State v. Carver, 49 Maine, 588.

**17. Judgment.** In cases of misdemeanor, the judgment of the court upon a plea in abatement is final, and if the plea is found against the defendant, the judgment should include the penalty. Guess v. State, 1 Eng. 147. *See* Indictment.

# Abduction.

**1. What constitutes.** On the trial of an indictment for the forcible seizure, abduction and removal of a child from the State, it appeared that the child, who was about four years old, was taken from the lawful custody of its mother, to whom it had been assigned by a decree of divorce, by the father, with force, and carried out of the State. *Held* that the child must be deemed to have been taken without its consent, and that the purpose, with which the father carried it away, was not a justification, though it might affect the measure of punishment. State v. Farrar, 41 New Hamp. 53.

**2. In Maine.** In Maine, where the defendant by false representations induced an unmarried female to go with him to a neighboring town, and there, having made her partially intoxicated, had repeated sexual intercourse with her, it was held, that he could not be convicted of enticing her away "for the purpose of prostitution" under the statute. Laws of 1861, ch. 4; State v. Stoyell, 54 Maine, 24.

**3. In Illinois.** To constitute the forcible abduction of a person within the meaning of the statute of Illinois, it is not necessary that physical force or violence be used upon the person kidnapped. It will be sufficient if, to accomplish the removal, the mind of the person was operated upon by the defendant by falsely exciting the fears, by threats, fraud, or other unlawful or undue influence, amounting substantially to a coercion of the will, so that, if such means had not been resorted to or employed, it would have required force to effect the removal. Moody v. People, 20 Ill. 315.

**4. In New York.** The taking of the female, in the sense of the statute of New York against abduction, contemplates some positive act to get her away from the person having the legal charge of her, beyond a mere attempt at her seduction. The "purpose of prostitution," mentioned in the same statute, means a design to introduce her to an indiscriminate criminal intercourse with men. A purpose of concubinage will not be

implied where the defendant was a married man living with his wife, and the female a girl under fourteen years of age. Neither in such case will there be an inference of a purpose of marriage. People v. Parshall, 6 Parker, 129.

5. The words "previous chaste character," in the statute of New York (of March 20, 1848), punishing abduction, mean actual personal virtue in the female. In order to sustain the indictment, it must be proved that she was chaste up to the commencement of the acts of the defendant, and that she was abducted for the purpose of her indiscriminate meretricious intercourse with men. But although the female had previously lost her virtue, yet if she had afterward reformed, she may be the subject of the offense. Carpenter v. People, 8 Barb. 603.

**6. In Massachusetts.** In Massachusetts, to constitute abduction within the meaning of the statute (of 1845, ch. 216, § 1), the female must be enticed away with the view and for the purpose of placing her in a house of ill fame, place of assignation, or elsewhere, to become a prostitute. Com. v. Cook, 12 Metc. 93.

**7. Indictment.** An indictment for abduction, under a statute which prescribes the punishment for taking a female under fourteen years of age from certain persons mentioned, for one of three specified purposes, is not vitiated by alleging, that the female was taken for all of those purposes; and the allegation of an intent to do further acts not mentioned in the statute may be regarded as surplusage. People v. Parshall, 6 Parker, 129.

**8. Verdict.** Where, on the trial of an indictment for abduction, some of several counts were undisposed of by the verdict, it was held error for which the judgment must be reversed. People v. Parshall, *supra*.

9. Where two were indicted for abducting a girl under the age of sixteen years, and the indictment contained several counts, some under the 3d section of the Stat. 4 and 5, Phil. and M. ch. 8, which punishes such abduction with two years' imprisonment or by fine, and some under the 4th section of the same statute, which punishes the same offense, by five years imprisonment or by fine, it was held that the joinder of the counts was good, and that there might be a general verdict of guilty; that the count under the 4th section, for abducting and marrying, included the less offense of abducting; and that the verdict found the greater degree of guilt, as well of him who contracted marriage with the girl as of him who aided him in abducting her. State v. Tidwell, 5 Strobh. 1.

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# Abortion.

1. Nature of the offense.
2. Indictment.
3. Evidence.
4. Verdict.

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1. Nature of the offense.

**1. At common law.** At common law, it is not an indictable offense to procure an abortion with the consent of the woman, unless she is quick with child. Com. v. Parker, 9 Metc. 263. And in the latter case, it is not murder or manslaughter, but a misdemeanor. State v. Cooper, 2 Zabris. 52.

**2. In Maine.** In Maine, when in an attempt to procure an abortion there is an intent to produce death, and death ensues, it is murder; but in the absence of such intent, it is only manslaughter. Smith v. State, 33 Maine, 48.

**3. In Massachusetts.** In Massachusetts, it is no defense to an indictment for procuring a miscarriage under the statute (of 1845, § 27) that the female was not pregnant with a quick child. The procuring of a miscarriage is malicious, if done from any wicked or base motive; and the consent of the woman, or the defendant's desire to screen her or himself from exposure and disgrace, furnish no justification. Com. v. Wood, 11 Gray, 85.

**4. In Vermont.** To convict a person of the attempt to procure the miscarriage of a woman pregnant with child, under the statute of Vermont (Comp. St. ch. 108), it

is not necessary that the fœtus should be alive at the time of committing the offense. State v. Howard, 32 Vt. 380.

**5. In New York.** Where the crime charged under the statute of New York (Laws of 1872, ch. 181), was that of persuading the deceased to submit to the use of an instrument upon her person, and to take drugs with intent to produce her miscarriage, in consequence of which her death and that of the child were caused, it was held that the death of the deceased was not a necessary ingredient of the crime; that of the child being sufficient to make the offense a felony. The act alleged was a crime under the third section of the statute, in the absence of the death of the mother or child; such death only increasing the degree of the crime and the punishment. People v. Davis, 56 N. Y. 95.

**6.** Whether under an indictment for using instruments upon a female, with the intent to destroy a quick child of which such female was pregnant, the prisoner can be convicted of a misdemeanor in using such instruments upon the same female, with intent to produce a miscarriage—*query*. Cobel v. People, 5 Parker, 348.

**7.** In New York, a woman who takes a drug in order to effect a miscarriage is guilty of a criminal offense of the same grade as that committed by the person who administers the drug, and is liable, upon conviction, to the same punishment. Frazer v. People, 54 Barb. 306; 3 N. Y. Rev. Statutes, 5th ed. 975, § 21.

### 2. Indictment.

**8. Averment of time and place.** A count in an indictment charged that at a certain time and place the said E. D. was pregnant, and that the defendant, with the intent to cause and produce her miscarriage, did advise and procure her then and there to take, &c. It was objected that the allegation should have been that the defendant "did then and there advise and procure the said E. D. then and there to take," &c. *Held* that time and place were sufficiently averred. Crichton v. People, 1 N. Y. Ct. of Appeals Decis. 467; affi'g 6 Parker, 363; s. c. 1 Keyes, 341.

**9. Averment of means.** An indictment averred that the defendant provided ergot, and advised, ordered and commanded B. and C. to administer it to D. then and there quick and pregnant with child, and by so ordering, commanding and advising, and by the taking and swallowing of such ergot into her stomach by the said D., he did administer the same to her unlawfully and with intent to procure her to miscarry and be prematurely delivered of said child. *Held* that the defendant was charged as a principal, and not as an accessory. And where, in addition to the foregoing, the indictment also alleged that the defendant used certain instruments, it was held not bad for duplicity, and that it would be sustained by proof of either of the means alleged. Com. v. Brown, 14 Gray, 419.

**10.** Where a statute makes the attempt to procure a miscarriage a criminal act unless such miscarriage was necessary to preserve life, an indictment is insufficient which charges that a particular instrument was unnecessarily employed to procure that result, without alleging that the miscarriage was not necessary to save the life of the woman. Bassett v. State, 41 Ind. 303; Willey v. State, 46 Ind. 363.

**11. Unnecessary averments.** An indictment for administering medicine to a pregnant woman to procure an abortion, need not allege the particular kind, quantity or or quality of the medicine. State v. Van Houten, 37 Mo. 357; State v. Vawter, 7 Blackf. 592. In New Jersey, an indictment under the statute (Nix. Dig. 177, § 103), for advising or directing a pregnant woman to take a drug with intent to cause her miscarriage, need not allege that the drug was actually taken by her. State v. Murphy, 3 Dutch. 112.

**12.** In Massachusetts, an indictment for procuring a miscarriage, and thereby causing the death of the woman, need not charge the offense of murder, or allege that it was committed feloniously; and the means employed are sufficiently described as "a certain instrument, the name of which is to the jurors

unknown." (Sts. of Mass. of 1845, ch. 27, and of 1852, ch. 37); Com. v. Jackson, 15 Gray, 187. An indictment for procuring a miscarriage under the statute (Gen. Stats. ch. 165, § 98), need not allege that the act was committed "maliciously and without lawful justification;" the words "unlawfully" and "with intent" being sufficient. Com. v. Sholes, 13 Allen, 554. In the same State it has been held that an indictment for using an instrument with intent to procure a miscarriage need not allege whether or not the woman died. The averment that the acts were done "maliciously and without any lawful justification" is sufficient, although the word "unlawfully" is used in the statute. Com. v. Thompson, 108 Mass. 461.

**13.** In Massachusetts, an indictment under the statute (of 1845, § 27), for procuring a miscarriage, need not allege that the defendant used the instrument with which he committed the offense, or state who the woman was, or that she brought forth the child prematurely, or that the child was dead. Com. v. Wood, 11 Gray, 85.

**14.** In Maine, an indictment for causing the death of a pregnant female in attempting to procure an abortion, need not allege that the deceased was quick with child. State v. Smith, 32 Maine, 369.

**15.** In Pennsylvania, in charging an attempt to procure an abortion, the indictment need only allege an intention to procure an abortion or miscarriage to cause the death or premature birth of the child, without charging that the mother was quick with child. Mills v. Com. 13 Penn. St. 631.

**16.** As pregnancy ceases when the child is removed from the body of the mother, before the severance of the umbilical cord, the averment in an indictment for procuring a miscarriage, of violence by the hand of the defendant at that period, constitutes no part of the offense, and may be rejected as surplusage. Com. v. Brown, 14 Gray, 419.

### 3. Evidence.

**17. Time.** On the trial of an indictment for procuring an abortion, the witnesses for the prosecution all testified that the operation was performed at A. on the 20th of May; and there was no testimony as to any other date. The defendant introduced testimony tending to show that on the 19th, 20th and 21st days of May, he was more than a hundred miles from A.; and he asked the court to charge the jury that there was no evidence in the case which would warrant them in finding that the defendant did the act complained of upon any other day than May 20th, and that if they were satisfied that he did not do the act on that day, they could not convict. *Held* that the instruction was properly refused, the exact day not being material, and a discrepancy as to the date only going to the credibility of the witnesses. Com. v. Snow, 116 Mass. 47.

**18. Medicine.** In Massachusetts, on the trial of an indictment under the statute (of 1845, ch. 27) for advising a woman to take medicine to procure a miscarriage, the prosecution need not prove what the medicine was, or whether it was such as would tend to produce the effect designed, or whether it was actually taken by the woman. Com. v. Morrison, 16 Gray, 224.

**19.** An indictment for advising a pregnant woman to procure a miscarriage alleged that the defendant recommended her to take "Dr. James Clark's female pills," and the proof was that he told her to take "Dr. Clark's female pills." *Held* that there was no variance. Crichton v. People, 1 N. Y. Ct. of Appeals Decis. 467; affi'g 6 Parker, 363; s. c. 1 Keyes, 341.

**20.** In a trial for procuring an abortion by administering drugs which caused the death of the female, it was held that in order to show the nature of the drugs, their probable effect, and the purpose for which the accused administered them, evidence was admissible to prove that about two years previous, the accused advertised that he could be consulted in relation to the procuring of miscarriage, and stated how he might be consulted by females without exposure. Weed v. People, 56 N. Y. 628; s. c. 3 N. Y. Supm. N. S. 50.

**21. Prosecutrix a competent witness.** On the trial of an indictment for advising and procuring a pregnant woman to take a drug, with intent to procure her mis-

carriage, she is a competent witness, although deemed an accomplice. But she is not strictly an accomplice, the law regarding her rather as the victim than the perpetrator of the crime. Dunn v. People, 29 N. Y. 523.

22. On the trial of a husband and another man jointly indicted for personal violence to the wife by inserting an instrument into her body with intent to procure her miscarriage, she is a competent witness for the prosecution. State v. Dyer, 59 Maine, 137.

23. **Declarations of woman.** The declarations of a woman on whom a miscarriage has been produced, accompanying acts done in furtherance of the criminal purpose, are admissible in evidence against one who joined in the unlawful act. And where the death of the woman resulted from the miscarriage, it was held competent to prove the declarations of the deceased made immediately after an interview had by her with the prisoner, showing the object of her visit to him and what took place. Solander v. People, 2 Col. 48.

24. On a trial for attempting to procure the miscarriage of a woman pregnant with child, resulting in her death, her declarations as to her object in going to the prisoner's house are admissible in evidence as part of of the *res gestæ;* as also are her declarations soon after she arrived there, as to her feelings, and the state of her health. State v. Howard, 32 Vt. 380.

25. On the trial of an indictment for procuring an abortion, under the statute of New York (Laws of 1872, ch. 181, § 1), the death of either the mother or child is the substance of the offense, and therefore the dying declarations of the mother are admissible. Davis v. People, 2 N. Y. Supm. N. S. 212.

26. **Prosecutrix to be corroborated.** The submission to an operation, or the taking of drugs with intent to procure a miscarriage, is a moral as well as a legal offense, and with confessed want of chastity is an impeachment of the woman as a witness, and renders her corroboration proper if not indispensable. Frazer v. People, 54 Barb. 306.

27. In Vermont, on the trial of an indictment for attempting to procure the miscarriage of a woman pregnant with child, resulting in her death, it was held that the woman must be corroborated on material points, and to such an extent as upon the whole case to leave no reasonable doubt of the prisoner's guilt. State v. Howard, 32 Vt. 380. But in Massachusetts, on a trial under the statute (of 1845, § 27), it was held not erroneous to charge the jury that the prosecutrix is not an accomplice within the rule requiring her testimony to be corroborated. Com. v. Wood, 11 Gray, 85.

28. In California, on the trial of an indictment for an attempt to produce an abortion, it is not enough that the prosecutrix is corroborated in some particulars which involve no criminality in the defendant. She must also be corroborated in at least some portion of her testimony which imputes to the defendant the commission of the crime alleged. She need not be corroborated in respect to the method employed, provided she be corroborated by testimony tending to show an attempt by the defendant to produce an abortion in any method. People v. Josselyn, 39 Cal. 393.

29. **Impeachment of prosecutrix.** On a trial for an attempt to procure an abortion, the prosecutrix testified, on cross-examination, that she had been examined as a witness in proceedings in bastardy against the present defendant, as the father of her child. She was then asked: "Did you not testify on that trial that you never had had sexual intercourse with any other man, and was he not discharged in those proceedings on the ground that he was not the father of your child? *Held* that the question was properly excluded, it being immaterial. Crichton v. People, 6 Parker, 363; s. c. 1 Keyes, 341; affi'd 1 N. Y. Ct. of Appeals Decis. 467.

30. **Presumptions.** On the trial of an indictment for procuring an abortion, it is competent to prove that the prosecutrix was in feeble health, and that there were bloody stains upon her bed a month subsequent to the alleged offense. Com. v. Wood, 11 Gray, 85. And where it was proved that ergot was administered, it was held proper to show that it was the popular belief that

that drug would cause abortion. Carter v. State, 2 Carter, 617.

**31.** On the trial of an indictment for procuring an abortion, alleged to have been committed with instruments, portions of the body of the deceased preserved in spirits may be submitted to the inspection of the jury. Com. v. Brown, 14 Gray, 419.

**32.** On the trial of an indictment for procuring the miscarriage of E., resulting in her death, it was held proper for a witness to testify to a conversation had with the defendant previous to the transaction, in which the defendant represented herself as having skill and experience in operations of the kind, that she had repeatedly performed them with success, and that she was willing to undertake the performance of such an operation upon E., which conversation was communicated to E. Com. v. Holmes, 103 Mass. 440.

**33. For defense.** Where it was claimed that one H. was the father of the child of which the prosecutrix was *enciente*, it was held that H. was a competent witness to prove that he had never had sexual intercourse with her. Dunn v. People, 29 N. Y. 523.

**34.** On the trial of an indictment under § 148 of the act of Congress of June 8, 1872 (17 U. S. Stats. at Large, 302), as amended by § 2 of the act of March 3, 1873, making it a misdemeanor for any person knowingly to deposit for mailing or delivery anything having a tendency to prevent conception or procure abortion, evidence is not admissible to show that the article deposited in the mail by the defendant had no such tendency, and that its harmlessness in this respect was known to the defendant, it being proved that the article was put up in a form and described in a manner to insure its use for the prohibited purpose. And where the evidence shows the deposit of a notice, stating that certain articles contraband by the statute can be obtained at a designated place, it is immaterial whether or not the information in the notice is true. U. S. v. Bott, 11 Blatch. 346; s. c. 2 Green's Crim. Reps. 239.

4. Verdict.

**35. Defendant need not be present.** In Illinois, the offense of abortion being only a misdemeanor, the defendant need not be present when the verdict is given. Halliday v. People, 4 Gilman, 111.

**36. Of guilty, when.** It is not erroneous on a trial for procuring an abortion, and thereby causing the death of the female, to charge the jury that if they find that a abortion was committed upon the deceased, or an attempt at it made, and that the defendant was connected with it, and that the death resulted therefrom, they must convict. Weed v. People, 3 N. Y. Supm. N. S. 50; 56 N. Y. 628.

**37.** In New York, on the trial of an indictment for causing the abortion of a quick child, which by statute is a felony, the prisoner may be convicted, though it appear that the child was not quick, and the offense therefore a misdemeanor. People v. Jackson, 3 Hill, 92.

**38. For manslaughter.** An indictment alleged that the defendant feloniously, willfully, knowingly, maliciously, and inhumanly forced and thrust a wire up into the womb and body of one B. C., she being then pregnant and quick with child, with a wicked, malicious, and felonious intent, to cause her to miscarry and bring forth the child with which she was then pregnant and quick; that by the means thus employed she brought forth the said child dead; and that she afterward, in consequence of the means so used, became sick and distempered in her body, suffered and languished, and by reason thereof died. *Held* that as an intent to kill the child was not charged, there could only be a verdict for manslaughter. State v. Smith, 32 Maine, 369.

**39. For offense against person not named.** Where an indictment for manslaughter in the second degree alleged the killing of the quick child of B., by instruments used on her body in order to procure an abortion, and the verdict was "Not guilty of manslaughter in the second degree, but guilty of a misdemeanor, to wit., in the use and employment of instruments and other means upon the person of a pregnant woman

with intent thereby to procure the miscarriage of such woman," it was held that the verdict was erroneous, in finding that the offense was committed on a woman not named, instead of upon B., as charged in the indictment. Cobel v. People, 5 Parker, 348.

# Accessory.

1. Who deemed.
2. Liability.
3. Absence of liability.
4. Indictment.
5. Trial.
6. Evidence.

## 1. Who deemed.

**1. Distinction as to guilt or innocence of principal.** A felony may be committed through the instrumentality of others, though the principal be not present. But this is where the agent is an innocent party. When the person employed is guilty, he is the principal, and his employer but an accessory. Wixon v. People, 5 Parker, 119. The following charge of the court to the jury was held erroneous: "That although W. had no part in breaking the store and taking the goods, yet if he knew it was to be done by A. and B., or either of them, and the goods were immediately taken to his house, and he aided in furnishing a box to secrete the goods, and directed where they should be placed to avoid discovery, and prevent the owner from finding them, so as to convert them to his own use, he was guilty of larceny. Ib.

2. At common law, a person may be a principal in an offense without being an eye witness of the transaction, or within hearing. It is sufficient that he had knowledge of the crime, and watched near enough to assist those actually engaged, if required. Doan v. State, 26 Ind. 495. But to convict a party of felony who is constructively present at its commission, he must be of the party, and do some act in execution of the common design, or be near enough to the scene of operations to assist in carrying it out, or to aid those who are immediately engaged in it to escape, should necessity require. Wixon v. People, *supra*.

3. On a trial for an attempt to burn insured goods, with intent to prejudice the insurer, it appeared that the prisoner gave one D. matches, and hired him to set fire to the prisoner's shop, in which the insured goods were; that D. set the shop on fire, but that the fire was extinguished without destroying either the shop or any of the goods. *Held* that although the prisoner was not present when D. set the shop on fire, yet that he was equally guilty with him. Mackesey v. People, 6 Parker, 114.

4. On the trial of an indictment for grand larceny in stealing a horse, it appeared that the animal was never in the possession of the prisoner, but that it was taken by one C. on the prisoner's order, and the testimony tended to implicate C. in the transaction. After conviction, the following charge of the judge to the jury was held correct: "That they were to determine upon the evidence whether or not C. was an innocent agent of the prisoner in taking the horse; that if they so found, and if they further found a felonious intent upon the part of the prisoner in the taking by C., he could be convicted; but that if they found that C. had a knowledge of the prisoner's felonious intent, then their verdict should be not guilty, the prisoner in that case being only an accessory before the fact." People v. McMurray, 4 Parker, 234.

5. If a person in one State commits a crime in another State through an innocent agent, the law will regard him as personally present, and hold him responsible. If a person in one State procure the commission of a misdemeanor in another State through even a guilty agent, the procurer is regarded as a principal, and as being present where the offense was committed, and he is answerable there. An accessory before the fact in one State to a felony committed in another State, is guilty of a crime in the State where he becomes an accessory, and answerable there, while the principals are indictable in the latter State. State v. Chapin, 17 Ark. 561.

6. If goods be feloniously taken and removed by a servant, under his master's in-

structions, who is absent, and the master afterwards assists in secreting the goods, he can only be held as an accessory. Norton v. People, 8 Cow. 137.

7. A wife is not shielded from responsibility for crime committed by her husband's order, unless she is within his presence and control. Com. v. Feeney, 13 Allen, 560.

8. **Encouraging design.** Where upon the trial of one as accessory to murder, the court charged that it was immaterial whether the principal had formed the intention to kill the deceased before his interview with the accessory; that if the accessory encouraged him in that design they must find the defendant guilty—it was held correct. Keithler v. State, 10 Sm. & Marsh. 192.

2. Liability.

9. **As principal.** In Illinois, an accessory before the fact is deemed a principal. Baxter v. People, 3 Gilman, 368. In Tennessee, by the statute (of 1829, ch. 23), § 64, an accessory after the fact to obtaining goods by false pretenses is punishable as principal. Long v. State, 1 Swan, 287.

10. If an accessory aid and abet a principal who is not amenable to the law, he cannot be arraigned unless his acts are such as to render him liable as principal. U. S. v. Libby, 1 Woodb. & Minot, 221.

3. Absence of liability.

11. **Principal for act of agent.** As a general rule, the principal is not responsible *criminaliter*, for the illegal act of his agent, unless done by his express authority; nor are the declarations of the agent, in the performance of such illegal act, competent evidence against the principal when sought to be charged in a criminal proceeding. Nall v. State, 34 Ala. 262; Watts v. State, 5 W. Va. 352; s. c. 2 Green's Crim. Reps. 676.

12. **Person present at felony.** One who is present when a felony is about to be committed, and does not interfere, does not thereby participate in the felony. Although he has a right to prevent if he can the perpetration of the felony, yet he is not bound to do so, or otherwise partake of the guilt. State v. Hildreth, 9 Ired. 440.

13. When several are doing what is lawful, and some of them without the co-operation of the others, though in their presence, commit a felony, the latter can neither be regarded as principals nor as accessories. U. S. v. Jones, 3 Wash. C. C. 223.

14. **Person out of State.** *Held* in Indiana, that a person who out of the State becomes an accessory before the fact to a felony committed within the State, cannot be punished by the laws of the State. Johns v. State, 19 Ind. 421.

4. Indictment.

15. **Accessory charged as principal.** In Kansas, under the statute (Gen. Stat. 839), an accessory before the fact may be charged and convicted as a principal. State v. Cassady, 12 Kansas, 550. In Iowa, under the statute (Rev. Stats. 153), accessories before the fact are deemed principals, and may be charged as such in the indictment. Bonsell v. U. S. 1 Iowa, 111. But in Alabama, it was held that a defendant who was charged in the indictment as principal could not be convicted upon proof that he was only an accessory before the fact. Hughes v. State, 12 Ala. 458.

16. In Nevada, an accessory before the fact being regarded as a principal, an indictment against him need not allege the special act by which he aided or abetted, but only the ultimate act itself, the same as in the case of a principal (State v. Chapman, 6 Nev. 320); and it is not essential to his conviction that the guilt of the principal be first proved. State v. Jones, 7 Nev. 408.

17. In Illinois, an accessory to a murder may be indicted and punished as principal. But the prosecution must establish the guilt of the principal before the jury can find the accessory guilty. Baxter v. People, 2 Gilman, 578.

18. If one be present, aiding and assisting another to commit murder, he may be indicted as an accessory and convicted of manslaughter; and it is the same where one aids and assists another in committing manslaughter. State v. Colman, 5 Porter, 32.

19. **Requisites.** An indictment against an accessory must, in addition to other matter, contain all the averments which would be

necessary in an indictment against the principal. People v. Theall, 50 Cal. 415.

20. The indictment of an accessory need not state that the principal has been convicted, but it must allege his guilt, and it must be proved that his guilt was legally ascertained. Holmes v. Com. 25 Penn. St. 221; State v. Crank, 2 Bail. 66; State v. Sims, Ib. 29; Com. v. Williamson, 2 Va. Cas. 211; State v. Simmons, 1 Brev. 6; State v. Ricker, 29 Me. 84; State v. Rochelle, 2 Brev. 338.

21. An indictment alleging that A. entered a dwelling-house in a burglarious manner for the purpose of stealing, and stole therein, and that B. was accessory to "the offense aforesaid," is good. Stoops v. Com. 7 Serg. & Rawle, 491.

22. In Vermont, an indictment against an accessory under the statute (Rev. Stat. ch. 102, § 11), must allege that he does not stand in the relation contemplated by the excepting clause of the statute, unless the exception is in a separate section of the statute, or in a proviso distinct from the enacting clause. State v. Butler, 17 Vt. 145.

### 5. Trial.

23. **May be with principal.** If the court choose, and the accessory and principal are willing, they may be tried together. Samson v. Com. 5 Watts & Serg. 385. In South Carolina, it is in the discretion of the court to allow an accessory a separate trial. State v. Yancy, 1 Const. Ct. 241.

24. **Principal to be first convicted.** At common law, the principal must first be convicted before the accessory can be put on trial against his consent. And when the principal dies before conviction, the accessory must be discharged. Com. v. Phillips, 16 Mass. 423; Whitehead v. State, 4 Humph. 278; Stoops v. Com. 7 Serg. & Rawle, 491; State v. Pybass, 4 Humph. 442; Com. v. Woodward, Thach. Crim. Cas. 63; Holmes v. Com. 25 Penn. St. 221.

25. In New York, an accessory cannot be tried before the conviction of the principal. He may be tried in the county where he committed his part of the offense, notwithstanding the principal offense was committed in another county. But he cannot be tried in the county where the principal offense was committed unless his offense as accessory was committed in that county. Baron v. People, 1 Parker, 246.

26. In Ohio, the accessory may be first tried and convicted if the principal cannot be found. But if the principal be acquitted, the accessory must be discharged. U. S. v. Crane, 4 McLean, 317. In Indiana, where a person charged as an accessory before the fact to an assault and battery with intent to murder was tried before the principal and found guilty, but before judgment the alleged principal was tried and acquitted, it was held that the accessory was entitled to be discharged. McCarty v. State, 44 Ind. 214; s. c. 2 Green's Crim. Reps. 715.

27. In North Carolina, the accessory cannot be tried before the conviction of the principal, unless the latter is beyond the reach of the law. State v. Goode, 1 Hawks, 463; State v. Groff, 1 Murph. 270.

28. An accessory before the fact to arson, cannot be tried until after the conviction of the principal felon. Smith v. State, 46 Ga. 298. An accessory before the fact to murder is not entitled to his discharge without trial because the principal felon has escaped, and two terms have elapsed since the finding of the indictment. Com. v. Sheriff, 16 Serg. & Rawle, 304.

29. When several are charged as principals, the court in its discretion may arraign one as accessory to such of the principals as are convicted, and if he be found guilty as accessory to them or any of them, judgment will pass upon him. But if he be acquitted, he may be tried as accessory to the others; and he may be regarded as accessory to him who has been convicted, though the evidence shows that he was accessory to several. But when all of several charged as principals, are not convicted, it is error to arraign one as accessory to all so charged, against his own consent. Stoops v. Com. 7 Serg. & Rawle, 491; see Com. v. Woodward, Thach. Cr. Cas. 63.

30. Although an accessory may be tried and convicted when one only of several principals named in the indictment has been convicted, yet in such case, the accessory

must be tried as accessory to the convicted principal in the same manner as though the convicted principal only was named in the indictment. Starin v. People, 45 N. Y. 333.

**31.** Aiders and abettors may be convicted, though the chief actor or principal has been acquitted. People v. Newberry, 20 Cal. 439.

6. Evidence.

**32. Conviction of principal.** When the accessory is tried, the record of conviction of the principal must be produced, unless the principal dies or is pardoned before trial, or the accessory consents to be arraigned without the production of the record, or both are tried; or unless the accessory is charged as being present aiding and abetting. State v. Crank, 2 Bail. 66.

**33.** On the trial of an accessory to a felony, the record of the principal's conviction is conclusive as to that fact, and *prima facie* evidence of the principal's guilt. State v. Chittem, 2 Dev. 49. But the presumption may be rebutted by proving that there was no offense committed by the principal. Com. v. Knapp, 10 Pick. 478; and the confession of the principal that he committed the offense is not admissible. Ogden v. State, 12 Wis. 532.

**34.** An accessory cannot take advantage of an error in the record of conviction of the principal; and the attainder of the principal while unreversed is *prima facie* evidence against the accessory of the principal's guilt. State v. Duncan, 6 Ired. 236.

**35.** On the trial of an accessory before the fact, the original minutes of the trial in the Oyer and Terminer, are not at common law competent proof of the conviction of the principal. But the copy certified by the clerk corresponds to the sworn copy of the record of conviction, and the revised minutes to the original record; and under the statute (3 R. S. 1851) either is competent, if no record has been made. People v. Gray, 25 Wend. 465.

**36.** Where a principal and accessory are jointly indicted, and the accessory is tried separately, evidence of the conviction of the principal is not admissible, unless judgment has been first rendered against the principal. State v. Duncan, 6 Ired. 98.

**37. Threats of principal.** A witness for the prosecution, on the trial of an accessory before the fact in a capital case, being asked by the defense whether he had stated before the examining magistrate what he was then testifying, replied that he had not, for the reason that he had been deterred by the threats of the principal, and was proceeding to state the conversation between himself and the principal, when the defense objected. *Held* that the evidence was proper. State v. Duncan, 6 Ired. 98.

**38. Defendant charged as principal.** An indictment which charges A. as principal, and B. as accessory, is sustained if the jury find the former guilty as accessory, and the latter guilty as principal. State v. Mairs, Coxe, 453.

**39. Confession of principal.** The confession of a principal cannot be given in evidence against an accessory. State v. Newport, 4 Harring. 567. But the principal is a competent witness against him. People v. Whipple, 9 Cow. 707.

*See* Indictment.

## Accomplice.

*See* Accessory; Evidence; Pardon; Witness.

## Acquittal.

*See* Former Acquittal or Conviction; Verdict.

## Adjournment.

*See* Continuance.

## Adultery.

1. What constitutes.
2. Place of trial.
3. Indictment.
4. Evidence.
5. Verdict.
6. Judgment.

1. What constitutes.

**1. Meaning of.** Adultery is the illicit commerce of two persons of the opposite sex,

one of whom at least is married, and includes the crime of fornication. State v. Hinton, 6 Ala. 864; Hull v. Hull, 2 Strobh. Eq. 174; Miner v. People, 58 Ill. 59; Helfrich v. Com. 33 Penn. St. 68. A man may be guilty of the offense although he effected the carnal intercourse by force. State v. Sanders, 30 Iowa, 582.

2. In Connecticut the solicitation of another to commit adultery is indictable. State v. Avery, 7 Conn. 267. But it has been held otherwise in Pennsylvania. Smith v. Com. 54 Penn. St. 209. Adultery is not a crime at common law, except when connected with other matters which of themselves are a misdemeanor; and the same is true of fornication. Anderson v. Com. 5 Rand. 627; Com. v. Isaaks, Ib. 634; State v. Cooper, 16 Vt. 551. The latter may be defined the carnal and illicit intercourse of an unmarried person with the opposite sex. Terr. of Mont. v. Whitcomb, 1 Mont. 359.

3. In Alabama (Code, § 3231; Clay's Dig. p. 431, § 3), adultery and fornication are distinct offenses. Therefore under an indictment for adultery which has but a single count the defendant cannot be convicted if the evidence shows that both parties were unmarried. Smitherman v. State, 27 Ala. 23.

**4. By whom committed.** In Maine, the offense may be committed if either the man or woman is married. State v. Hutchinson, 36 Maine, 261. But when a divorce from the bonds of matrimony has been decreed on the application of one party for the misconduct of the other, the latter by marrying again, is not guilty of adultery. State v. Weatherby, 43 Maine, 258.

5. In New Hampshire, adultery may be committed by intercourse between an unmarried man and a married woman from which spurious issue may arise; and both both parties are guilty. State v. Wallace, 9 New Hamp. 515.

6. In Indiana, an unmarried man who has illicit intercourse with a married woman may be convicted of adultery. State v. Pearce, 2 Blackf. 318. And in Massachusetts, it has been held that the offense may be committed by a married man with an unmarried woman. Com. v. Call, 21 Pick. 509; Com. v. Reardon, 6 Cush. 78.

7. In Georgia, it has been held that a married man who has criminal intercourse with his daughter, a single woman, is guilty of incestuous adultery, and she of incestuous fornication. Cook v. State, 11 Ga. 53.

8. In Minnesota, illicit connection between a married man and an unmarried woman does not constitute adultery within the statute, but fornication. State v. Armstrong, 4 Minn. 335.

9. In Pennsylvania, under the statute of 1705, an indictment against an unmarried man for adultery cannot be sustained; but he may be convicted of fornication. Resp. v. Roberts, 2 Dall. 124.

10. In Virginia, where an indictment charged a single man with illicit intercourse with a married woman, the offense was held to be fornication in the man. Com. v. Lafferty, 6 Gratt. 672.

**11. Where husband absents himself.** If the husband absent himself from his wife for the space of seven years, and a man, supposing that she has no husband, marries and cohabits with her as his wife, he will not be criminally punishable for adultery, although it afterward appear that the former husband was then living. Com. v. Thompson, 6 Allen, 591. But such exemption from liability does not exist when the desertion is on the part of the wife. s. c. 11 Allen, 23.

**12. Must be open and notorious.** In Illinois, the crime of adultery cannot be sustained by proof of a single act of illicit intercourse, or of a number of acts. The living together must be open and notorious, as if the relation of husband and wife existed, and the illicit intercourse must be habitual. Miner v. People, 58 Ill. 59; s. c. 1 Green's Crim. Reps. 655. In Missouri, to constitute the offense of living in a state of open and notorious adultery within the statute (Wagn. Stat. p. 500, § 8), the parties must reside together publicly in the face of society, as if the conjugal relation existed between them. State v. Crowner, 56 Mo. 147; s. c. 2 Green's Crim. Reps. 616. And see People v. Gates, 46 Cal. 52; s. c. 2 Green's Crim.

Reps. 425. The same is true in Mississippi, under the statute. Rev. Code, art. 8, p. 573. Carotti v. State, 42 Miss. 334. And see Terr. of Mont. v. Whitcomb, 1 Mont. 359.

**13.** In Alabama, under the penal code (ch. 6, § 3; Clay's Dig. 431), it was intimated that if the adulterous connection existed but for a single day, the parties might be convicted; and where the supposed paramour of the defendant lived but half a mile distant, and visited and remained with her all of one night every week for seven months, it was held sufficient to sustain a conviction. Collins v. State, 14 Ala. 608. But it seems that in that State, a single act of criminal intimacy is not "living in adultery or fornication" within the statute (Code, § 3231), although committed by pre-arrangement. Smith v. State, 39 Ala. 554. And the same has been held as to occasional acts of illicit intercourse. A man and woman had carnal intercourse with each other as many as half a dozen times, the woman having a husband, but the man and his mistress did not live together. *Held* not to be adultery within the meaning of the statute of Texas. Richardson v. State, 37 Texas, 346.

2. Place of trial.

**14. Improper change of venue.** A change of venue on a trial for adultery, on the application of the defendant, in a case not allowed by statute, *Held* not a ground for a reversal of the judgment on the defendant's motion, the court which tried the indictment having jurisdiction. Porter v. State, 5 Mo. 538, Napton, J., *dissenting.*

3. Indictment.

**15. Parties.** One of two parties charged with fornication and adultery, may be indicted and tried without or before the other. State v. Parham, 5 Jones, 416; or the parties may be jointly indicted. State v. Bartlett, 53 Maine, 446. In North Carolina, a separate indictment may be found against the man for fornication. State v. Cox, 2 Tayl. 165. And when the indictment alleges fornication and adultery, it is sufficient to charge an unlawful "bedding and cohabiting" together. State v. Jolly, 3 Dev. & Batt. 110.

**16. Township.** The defendant's township need not be stated in an indictment for adultery. Duncan v. Com. 4 Serg. & Rawle, 449.

**17. Must be certain.** Every material fact constituting the offense should be alleged with precision as to time and place. An indictment charging that the defendant at A., on the 25th of March, 1851, did commit adultery with B., the wife of C., she, the said B., being a married woman, and the lawful wife of C., was held bad for uncertainty. State v. Thurstin, 35 Maine, 205.

**18.** Where an indictment alleged that a man and woman "did live in a state of adultery or fornication," without averring that they thus lived with each other, it was held demurrable. McGuire v. State, 37 Ala. 160.

**19.** In Georgia, an indictment charged that on a certain day, the defendant, being an unmarried woman, had carnal connection with J. F., a married man. *Held* bad on demurrer under the statute, in not charging the offense as "adultery and fornication." Bigby v. State, 44 Ga. 344 (Code, § 4458).

**20. Must charge that woman is not wife.** The indictment must allege that the woman with whom the illicit connection is charged to have taken place, was not the wife of the accused. Moore v. Com. 6 Metc. 243. An indictment charged that the defendant having "a living lawful wife, from whom he had never been divorced, did cohabit and live in adultery with one L. S." *Held* insufficient, in not averring that L. S. was not the wife of the defendant. Tucker v. State, 35 Texas, 113.

**21.** Where the indictment charges that the female, with whom the defendant is alleged to have committed adultery is the lawful wife of a person other than the defendant, such allegation is equivalent to an averment that she is not the lawful wife of the defendant. Com. v. Reardon, 6 Cush. 78. Where the indictment alleged that E. H., being then and there a married man, and having a lawful wife alive, did commit the crime of adultery with L. H., the wife of M. H., it was held a sufficient averment that the defendant was married to some other person

than L. H. State v. Hutchinson, 36 Maine, 261.

22. In Massachusetts, as adultery may be committed by a married man with an unmarried woman, the indictment need not show that the female was married, or describe her by name, provided it is charged and shown that she is not the defendant's lawful wife. Com. v. Tompson, 2 Cush. 551.

4. Evidence.

23. **Time.** The prosecution being called upon to elect upon which of several acts of adultery testified to, he would go to the jury, made choice of one occurring on the evening of January 15th. The time was identified by the circumstances attending the loss by the defendant of his ticket to a fair. These circumstances made it certain however that the evening in question could not have been January 15th, but some date between February 7th and February 28th. *Held* that the error in the assumed date was not material, provided the act charged was sufficiently identified by other circumstances. Com. v. O'Connor, 107 Mass. 219.

24. **Marriage.** There must be proof of actual marriage, reputation and cohabitation not being sufficient. Miner v. People, 58 Ill. 59; s. c. 1 Green's Crim. Reps. 655; State v. Rood, 12 Vt. 296.

25. On the trial of an indictment for adultery, proof of the marriage of the defendant by those present is sufficient. Com. v. Norcross, 9 Mass. 492. Or it may be proved by the defendant's admissions. Cook v. State, 11 Ga. 53; State v. McDonald, 25 Mo. 176; State v. Sanders, 30 Iowa, 582; State v. Libby, 44 Maine, 469; State v. Medbury, 8 R. I. 543; or by the testimony of the husband or wife, together with proof of continued cohabitation. State v. Wilson, 22 Iowa, 364; State v. Dudley, 7 Wis. 664. It is not necessary to produce the license, or to show that the person officiating was authorized to solemnize the marriage. Murphy v. State, 50 Ga. 150.

26. Where a statute provides that a copy of the town clerk's record shall be proof of marriage, such copy is not better evidence than proof of the marriage by persons who were present at it. State v. Marvin, 35 New Hamp. 22.

27. On a trial for adultery, the court instructed the jury that "if from all the testimony in the case, introduced for the purpose of proving the marriage of the defendant, they were satisfied beyond a reasonable doubt that he was legally married, and his wife to whom he was legally married was living at the time of the crime alleged to have been committed, they were authorized to find the fact of marriage." *Held* correct. State v. Libby, 44 Maine, 469.

28. But in the same State, where on a trial for adultery, it was not proved that the marriage was solemnized by any one professing to be either a justice of the peace, or an ordained or licensed minister of the gospel, or that it was consummated with a full belief on the part of either of the persons married that they were lawfully married (R. S. ch. 59, § 17), and the only evidence of the marriage of either was the testimony of the *particeps criminis*, that she was married two years previous, by C. L., at his house, it was held that the conviction could not be sustained. State v. Bowe, 61 Maine, 171; s. c. 2 Green's Crim. Reps. 459.

29. **Burden of proof.** Where it appeared that the defendant four or five years previous to the commission of the alleged offense, was living with a man as his wife, that she held herself out to the world as such, and so declared, it was held that it was incumbent on her to show his death. Com. v. Reardon, 6 Cush. 78.

30. **Must support indictment.** When a single act is charged in one count, acts committed at different times and places cannot be proved. State v. Bates, 10 Conn. 372.

31. When the indictment alleges that the act was committed by living openly and notoriously together, proof of occasional unlawful intercourse will not be sufficient. Wright v. State, 5 Blackf. 358; People v. Gates, 46 Cal. 52; s. c. 2 Green's Crim. Reps. 425.

32. An indictment for adultery charged that the offense was committed with Adaline Winders. The proof showed that the

woman's name was Mary Adaline Winders. Held that the variance was fatal. State v. Dudley, 7 Wis. 664.

**33.** An indictment charged adultery with B., in a certain town. It was proved that there were two persons in such town of the same name, father and son, and that the latter had the addition of junior to his name. It was held that there could not be a conviction without proving that the offense was committed with the father. State v. Vittum, 9 New Hamp. 519.

**34. Husband not competent witness.** Where the act is charged to have been committed with a married woman, the husband of the woman is not a competent witness for the prosecution, though at the time of the trial he is divorced from his wife on account of the adultery. State v. Jolly, 3 Dev. & Batt. 110; Com. v. Sparks, 7 Allen, 534; State v. Welch, 26 Maine, 30; Miner v. People, 58 Ill. 59; s. c. 1 Green's Crim. Reps. 655; *contra*, State v. Bennett, 31 Iowa, 24.

**35.** A wife and her paramour being jointly indicted for adultery, the wife was tried separately and acquitted. *Held*, on the trial of the other defendant, that the husband was not a competent witness to prove that he saw his wife in the act of adultery. State v. Wilson, 2 Vroom (31 N. J.) 77.

**36. Admissions.** On the trial of a joint indictment for adultery, the confession of one party is not admissible in evidence against the other. Frost v. Com. 9 Mon. 362. Therefore the admission of the woman in her paramour's absence, that she was the wife of another is not admissible in evidence against the man. Com. v. Thompson, 99 Mass. 444. Parties cannot be jointly convicted of a single act of adultery upon the admission by one of an act of adultery committed at one time, and by the other of a different act of adultery committed at another time. Com. v. Cobb, 14 Gray, 57.

**37. Presumptions.** On the trial of an indictment for adultery, the fact that the defendant resided in the same house with the woman, that he had means of access to her, that she was delivered of a child which was apparently a bastard, that he applied to a physician prior to the birth of the child to attend her in her confinement, and then called her his wife, are circumstances proper to be considered by the jury in connection with his admissions, as evidence of his guilt. Com. v. Tarr, 4 Allen, 315.

**38.** On the trial of an indictment for fornication, the court charged the jury as follows: "That if the jury believed the parties were found on the bed together, that the door of the room was closed, that there was no one else present in the room, that the woman was a prostitute, and that the defendant was in the habit of frequently visiting her house, they were bound to find the defendant guilty." *Held*, that as the effect of the instruction was to exclude from the consideration of the jury every circumstance in the case, except such as were referred to by the court, it was erroneous. Ells v. State, 20 Ga. 438.

**39.** A record of conviction of bigamy in another State does not prove the commission of adultery. Wilson v. Wilson, Wright, 128.

**40.** It is erroneous to admit in evidence rumor and talk in the neighborhood that adultery openly and notoriously existed. Belcher v. State, 8 Humph. 63.

**41.** On the trial of an indictment for adultery, evidence of acts of familiarity of the parties prior to the time relied on by the prosecution, is admissible as tending to show guilty intent. Com. v. Pierce, 11 Gray, 447; Com. v. Durfee, 100 Mass. 146; Com. v. Lahey, 14 Gray, 91; State v. Wallace, 2 New Hamp. 515; *contra*, Com. v. Thrasher, 11 Gray, 450.

**42.** Although parties cannot be convicted of living in adultery, on proof of acts which occurred more than twelve months before the finding of the indictment, yet evidence of such acts is admissible to show an adulterous intercourse between the parties within the period covered by the indictment. McLeod v. State, 35 Ala. 395. The prosecution offered to prove that the defendant was guilty of other acts of familiarity with the woman about the time of the offense charged. The cross-examination of the witness left it doubtful whether or not

the acts occurred about the time or a year previous. *Held* that the evidence was not incompetent, the nearness of the time going only to its effect, and if in doubt, being a matter for the determination of the jury. Com. v. Morris, 1 Cush. 391.

43. Where a witness who testifies to a single act of adultery is sought to be impeached, other acts between the defendant and the same woman committed a short time previous to the act proved may be shown in corroboration. Com. v. Merriam, 14 Pick. 418.

44. On the trial of an indictment for adultery, the defendant and his alleged paramour having testified that the acts charged had never been committed by them, it was held proper to cross-examine them as to their intimacy with and relations with each other at various places in other States. Com. v. Curtis, 97 Mass. 574.

45. Where it was proved that the defendant and the woman with whom he was alleged to have committed the offense met several times in the defendant's barn, it was held competent to show that on one occasion she was seen alone near the barn, with appearances upon her dress which looked as though she had recently been in the barn. And where the husband of the woman is a witness, he may testify as to whether or not he is living with her at the time of the trial. State v. Marvin, 35 New Hamp. 22.

**46. Acts subsequent to indictment.** Evidence tending to show criminal conduct between the parties subsequent to the finding of the indictment is *prima facie* irrelevant, and only admissible when connected with other relevant evidence. Smithmerman v. State, 40 Ala. 355; State v. Crowley, 13 Ib. 172. Therefore, on the trial of an indictment for adultery with H. S., at T., in the county of B., it is not competent for the prosecution to prove that the defendant, subsequent to the time charged in the indictment, had illicit intercourse with H. S. in another county, called her his wife, and stated that he had resided at T. Com. v. Horton, 2 Gray, 354.

**47. Proof of divorce.** Where, on the trial of an indictment for adultery, the defendant sought to prove that he obtained a divorce from his wife in California, who was not there at the time, and had no notice of the proceedings, a certificate of the county clerk of the city and county of San Francisco, and *ex officio* clerk of the district court of California, of the judgment, record, and decree of divorce entered in said court was held inadmissible, there being no proof that the court had jurisdiction. Com. v. Blood, 97 Mass. 538.

5. Verdict.

**48. Designation of time.** On the trial of an indictment for adultery, the verdict need not designate the time of the commission of the offense; and it will not be a variance if the proof does not show that the crime was committed on the day alleged, provided it be shown that the act was committed on some day within the statutory period. Com. v. Cobb, 14 Gray, 57.

**49. For less offense.** Where an indictment charges in separate courts the commission by the defendant, of rape and adultery, he may be acquitted of the former and convicted of the latter. Com. v. Squires, 97 Mass. 50.

**50.** In North Carolina, under an indictment for adultery and fornication, the defendants may be acquitted of the adultery and convicted of the fornication. State v. Cowell, 4 Ired. 231.

6. Judgment.

**51. For support of child.** In Pennsylvania, if the offense is pardoned, the court cannot give judgment for costs, but may make an order for the support of the child which is the fruit of the adultery. Duncan v. Com. 4 Serg. & Rawle, 449.

*See* Bigamy; Incest.

# Affray.

1. What constitutes.
2. Indictment.
3. Evidence.
4. Verdict.

1. What constitutes.

**1. Meaning.** An affray is a fighting by

mutual consent, by two or more persons, in some public place, to the terror of the people. Simpson v. State, 5 Yerg. 356; Duncan v. Com. 6 Dana, 295. But consent is not essential. Cash v. State, 2 Overt. 198; *contra*, Klum v. State, 1 Blackf. 377. A person who aids, assists and abets an affray is guilty as principal. Hawkins v. State, 13 Ga. 322. See State v. Lanier, 71 N. C. 288; s. c. 2 Green's Crim. Reps. 753.

**2. By words.** Mere words, when accompanied by acts, such as the drawing of knives and attempting to use them in a public street, will constitute an affray. Hawkins v. State, 13 Ga. 322. And if a person, by such abusive language toward another as is calculated and intended to bring on a fight, induces the other to strike him, he is guilty of an affray, though he may be unable to return the blow. State v. Perry, 5 Jones, 9; State v. Sumner, 5 Strobh. 53; *contra*, O'Neil v. State, 16 Ala. 65.

**3.** On the trial of A. and B., for an affray, it was proved that they quarreled in front of the latter's house, and that the latter ordering the former to leave, which he declined to do, B. went to his house, several yards distant, and returned with a pistol in his hand; that A. having meanwhile retired some thirty yards, came back, daring him to shoot, which he did, wounding him in the leg. *Held* proper for the court to charge the jury that both of the defendants were guilty. State v. Downing, 74 N. C. 184.

**4. Where to be.** The place of fighting must have been public. State v. Sumner, 5 Strobh. 53. An inclosed lot, thirty yards from the street of a village, and seen from the street, is a public place, within the common-law definition of an affray. Carwile v. State, 35 Ala. 392. But a highway is not necessarily a public place, within the statute against affrays. State v. Weekly, 29 Ind. 206. And where a field, surrounded by a dense wood, is situated a mile from any highway or other public place, it does not lose its private character by the casual presence of three persons, so as to make two of them who fight, guilty of an affray. Taylor v. State, 22 Ala. 15.

**5.** Where a fight commenced in private, is kept up until the parties reach a public place where it is continued, they are guilty of an affray. Wilson v. State, 3 Heisk. 278; s. c. 1 Green's Crim. Reps. 550.

2. Indictment.

**6. Must state what was done.** An indictment which merely alleges that the defendants made an affray, without specifying what was done, is insufficient. State v. Woody, 2 Jones, 335. And an information for an affray which alleged that the defendants fought in a public place, but did not state whom or what they fought, was held bad. State v. Vanloan, 8 Ind. 182. But an indictment which charged that two persons, with force and arms, did make an affray by fighting, was held sufficient. State v. Benthal, 5 Humph. 519; State v. Vridely, 4 Ib. 429.

**7. Averment of place.** Where the indictment charges a fighting in a public place, it is sufficient without further description of the place. Wilson v. State, 3 Heisk. 278; s. c. 1 Green's Crim. Reps. 550. But an allegation in an indictment for an affray, that the fighting was in the town of Clarksville, is not sufficient. State v. Heflin, 8 Humph. 84.

3. Evidence.

**8. Time and place.** On a trial for murder, it appeared that there were two affrays between the prisoner and the deceased, in the second one of which the deceased was killed. The two affrays occurred about four miles apart, and the time between them was about an hour, while the parties were driving along the same road. *Held* that one affray could not be deemed a continuation of the other, so as to make the conversations of the deceased and his companions in the interval, in the absence of the defendant, admissible in evidence as a part of the *res gestæ*. State v. Potter, 13 Kansas, 414.

**9.** Proof that two persons were seen lying on the ground in close combat, will not sustain an indictment for an affray against them. Klum v. State, 1 Blackf. 377.

**10. Declarations.** On the trial of an indictment for discharging a gun at a per-

son and wounding him, in an affray which took place on the premises of the defendant, it was held that the defendant might prove the declarations of the prosecutor, made while on his way to the place where the affray occurred; and also, previous threats, made by the prosecutor as to the defendant, and previous affrays between them, if so connected with the affray in question, as to have a tendency to show that the defendant at the time had just cause to fear serious injury to his person or property. State v. Goodrich, 19 Vt. 116.

4. Verdict.

**11. Where one is acquitted.** On the trial of several for an affray, one or more may be acquitted and the rest convicted. Cash v. State, 2 Overt. 198. But where two persons are indicted for an affray, the successful defense of one, will have the effect of acquitting the other. Hawkins v. State, 13 Ga. 322.

**12. For assault and battery.** Although every affray includes an assault, yet under an indictment alleging that the defendants made "an affray by then and there fighting, to the terror," &c., they cannot be found guilty of an assault and battery. Childs v. State, 15 Ark. 204. But in Virginia, where an indictment against two persons for an affray contained no count for assault and battery, and both were acquitted of the affray, it was held that a verdict of assault and battery by the one on the other could be found. Com. v. Perdue and Dillon, 2 Va. Cas. 227; *contra*, State v. Allen, 4 Hawks, 356.

*See* Assault and battery; Former acquittal or conviction; Homicide.

# Alibi.

*See* Evidence.

# Amendment.

**Of Process.** The rule that criminal processes cannot be amended except by consent of the party against whom they are issued, applies only to such matters as are required to be stated under the oath of the party making the complaint or presentment. State v. Smith, 54 Maine, 33.

# Animals.

1. Cruelty to.
2. Rescuing.

1. Cruelty to.

**1. Nature of offense.** Maiming or wounding an animal without killing it, is not an indictable offense at common law. State v. Beekman, 3 Dutch. 124; State v. Manuel, 72 N. C. 201; People v. Stokes, 1 Wheeler's Cr. Cas. 111, *contra*.

**2.** In Massachusetts, the cruel treatment of animals which the statute contemplates (Gen. Stats. ch. 165, § 41), is the same whether inflicted by the owner of the animal or by another; and if the defendant's object would have been lawful for any person, and his act was not an excessive and cruel use of force, he cannot be convicted. Com. v. Lufkin, 7 Allen, 579.

**3. Indictment.** An indictment for malicious mischief in wounding and cruelly beating and abusing an animal, which omits to name the owner of the animal, is insufficient. State v. Smith, 21 Texas, 748. But in Massachusetts, an indictment under the statute (Gen. Stats. ch. 165, § 41), for cruelly beating a horse, need not allege that the horse was the property of any person, or describe the horse. Com. v. McClellan, 101 Mass. 34.

**4.** A complaint for killing a deer contrary to law, which alleges that the defendant "did drive, worry and kill a live animal called a deer," is not bad for duplicity. State v. Norton, 45 Vt. 258.

**5. Evidence.** On the trial of an indictment for cruelly whipping a horse, evidence is admissible to show that the horse was kind and manageable unless harassed with the whip; and a witness may state that he saw nothing vicious or obstinate in the horse, and also the apparent effect of the blows

upon the horse. State v. Avery, 44 New Hamp. 392.

6. On the trial of a complaint for willfully and cruelly overdriving a horse, it is not necessary to prove that the defendant's purpose was to torture the animal. Pain inflicted in wanton and reckless disregard of the suffering it might occasion, would be equally criminal. The following instructions were held all that the defendant could claim: That, "if in the proper exercise of his own judgment, he thought he was not overdriving the horse, he must be acquitted; and that he could not be convicted unless he knowingly and intentionally overdrove. Com. v. Wood, 111 Mass. 408.

7. In the same case, the defendant's mother testified that she had seen him driving the horse, and that he was not then overdriving. On cross-examination, she denied that she had said that the defendant was guilty. Having been re-examined by the defense as to the alleged conversation, it was held competent for the prosecution to prove that she had said so. Com. v. Wood, *supra*.

2. Rescuing.

**8. Indictment.** An indictment for rescuing cattle while being driven to the pound, should allege that they were found either damage feasant, or going at large contrary to the statute, and that the complainant was about to impound them for that cause; and the defendant well knowing the premises, unlawfully and against the will of the complainant, with force and arms, rescued the said animals out of his custody and prevented the complainant from impounding the same, contrary to the form of the statute, &c. State v. Barrett, 42 New Hamp. 466.

## Appeal.

**1. By State.** The State is not entitled to an appeal in a criminal prosecution. State v. Jones, 1 Murphy, 257.

**2. Jurisdiction.** If an appeal has been given in all cases within the jurisdiction of the sessions, and afterwards its jurisdiction is extended to new cases, an appeal will lie in those new cases, because it would be a reasonable presumption that the Legislature did not intend that its jurisdiction should in any case be final. Com. v. Messenger, 4 Mass. 462.

3. An appeal from the decision of a circuit judge denying a writ of *habeas corpus*, will not be heard, if before the application for the hearing of the appeal the petitioner has been set at liberty, and has gone beyond the jurisdiction of the court. *Ex parte* Pereira, 6 Rich. 149.

**4. Objection on.** An objection to the admissibility of evidence, different from that made at the trial, cannot be entertained on appeal. Where therefore, on a trial for murder, a witness was asked if he saw a knife on the premises, which was objected to as leading, admitted, and exception taken, it was held that it could not be urged on appeal, that the evidence was improper on the ground that the indictment contained no averment that the homicide was produced by the knife. Shufflin v. People, 6 N. Y. Supm. N. S. 215.

**5. Judgment.** Where the defendant demurred to an indictment for a misdemeanor, in the court below, and judgment was there rendered against the people, which was reversed on error, it was held that the appellate court must give a final judgment for the people on the demurrer, and pass sentence on the defendant; and that he could not be permitted to withdraw the demurrer and plead. People v. Taylor, 3 Denio, 91.

*See* Writ of error.

## Arrest.

1. Nature and power of, in general.
2. By private person.
3. By officer.

1. Nature and power of, in general.

**1. What is an arrest.** No manual touching of the body or actual force is necessary to constitute an arrest. It is sufficient if the party be within the power of the officer and submit to the arrest. Gold v. Bissel, 1 Wend. 215; *contra*, 2 New Hamp. 318; Huntington

v. Schultz, Harper, 453; U. S. v. Benner, 1 Bald. 239; Lawson v. Buzines, 3 Harring. 416; State v. Mahon, Ib. 568.

**2. Law governing.** The law of the State in which an arrest is made governs as to its legality, and when made in another State under legal process it will be *prima facie* justifiable. Stouffer v. Latshaw, 2 Watts, 165.

**3. Exemption from.** Members of the State militia who are exempted by law from arrest on civil process while under military duty, do not cease to be exempt when the force to which they belong is mustered into the service of the United States. People v. Campbell, 40 N. Y. 133, Grover, Lott and James, JJ., *dissenting*.

**4. Ground of, may be inquired into.** The court may inquire as to whether any evidence was given of the defendant's guilt on the application for his arrest, and if none was produced, quash the indictment; but it cannot pass upon the sufficiency of the evidence if any was given. An information not supported by oath or affirmation will not authorize a warrant of arrest. U. S. v. Shepard, 1 Abb. 431.

**5.** Where an arrest is made regular and lawful in form by the perjury of the party procuring it, he will not be permitted to derive any benefit from it. Strong v. Grannis, 26 Barb. 122.

2. By private person.

**6. Without warrant.** A private individual may lawfully arrest without warrant one who has committed a felony; and he may arrest on suspicion where a crime has been committed, and there is good reason to suspect the person arrested. Burns v. Erben, 40 N. Y. 463. But for mere misdemeanors, after their commission, an arrest can only in general be made upon a warrant from a magistrate. People v. Adler, 3 Parker, 249.

**7.** The felony which will justify an arrest by a private individual upon suspicion without a warrant, must be an offense that may be tried by the courts of the State in which the arrest is made. Mandeville v. Guernsey, 51 Barb. 99.

**8.** A private person may arrest another while in the act of committing an affray, without warrant. Knot v. Gay, 1 Root, 66. It is a defense to an indictment for assault and battery that the complainant had committed petit larceny, and that the alleged assault and battery by the defendant consisted in arresting the complainant therefor without process and delivering him to a public officer. People v. Adler, 3 Parker, 249.

**9.** It is lawful for a private person to arrest one who, after trial and conviction and sentence to the house of reformation, has escaped therefrom without actual breaking or force. State v. Holmes, 48 New Hamp. 377.

**10. Disposal of prisoner.** A private person who may have arrested another for treason or felony actually committed, may convey him to the jail of the county, or may take him before a justice of the peace. Com. v. Deacon, 8 Serg. & Rawle, 47.

**11. By command of officer.** Where an officer verbally authorizes another to assist him in arresting another, the acts of such person are valid if he take the prisoner. But both should be in pursuit, though the officer be not in sight when the arrest is made. Com. v. Field, 13 Mass. 321.

**12.** Where an indictment charged that one B. was arrested by W., a deputy sheriff, by *lawful authority*, and that B. resisting the officer, the defendant was summoned by the officer to assist but he refused, it was held that the indictment was insufficient in not setting forth the authority of the officer to make the arrest. State v. Shaw, 3 Ired. 20.

**13. Must give notice.** Unless a private person in arresting another for felony notifies the party arrested of his purpose, he will be guilty of trespass. State v. Bryant, 65 N. C. 327.

3. By officer.

**14. Without warrant.** At common law, a constable may arrest for a reasonable cause of suspicion, or for a breach of the peace in his presence, and deposit the prisoner in jail, and the jailer is bound to receive him. And it is his duty to present to the court all offenses inquirable into by it. McCullough

v. Com. 67 Penn. St. 30; Com. v. Deacon, 8 Serg. & Rawle, 47.

15. In cases of misdemeanor, a peace officer may arrest on view, or under a warrant. In cases of felony, he may arrest without a warrant upon information, where he has reasonable cause. But when a private person arrests another for felony on suspicion, nothing short of proving the felony will justify the arrest. Doering v. State, 49 Ind. 56; Eames v. State, 6 Humph. 53; Rohan v. Sawin, 5 Cush. 281.

16. A person standing in the streets of a city used abusive language to a sergeant on duty in a fort, whereupon the sergeant arrested him with his military guard, and conducted him with fixed bayonets to the garrison. *Held* that the sergeant was justified. Oglesby v. State, 39 Texas, 53.

17. An officer cannot lawfully arrest one without a warrant for a crime proved or suspected, if such crime be not a felony. Com. v. Carey, 12 Cush. 246; Com. v. McLaughlin, lb. 615; *contra*, State v. Brown, 5 Harring. 505.

18. A police officer may lawfully enter a disorderly house to suppress the disorder, and arrest the disorderly persons therein. State v. Lafferty, 5 Harring. 491.

19. **Right to break open doors.** An officer, acting under criminal process may break open the outer doors of a dwelling-house, either in the day or night time, in order to execute such process, having first demanded admittance and been refused. Bell v. Clapp, 10 Johns. 263; State v. Smith, 1 New Hamp. 346; State v. Shaw, 1 Root, 134; Kelley v. Wright, 1 Root, 83.

20. If an officer having a warrant to arrest a man, finds him at his house, he may not break into the house until he has demanded admittance and been refused. He may not attack the house, or the persons within, with violence until he has been resisted; and if he proceeds to do so, he justifies violence. If an officer comes without lawful authority to arrest a man in his own house, the party is not bound to yield, but may resist force with force, provided he do not go beyond the line of resistance proportioned to the character of the assault. If death ensue from the abuse of the power to arrest, or of the right to resist, it will be an unlawful killing; but unless there is malice, it will be manslaughter only. State v. Oliver, 2 Houst. Del. 585.

21. **How made.** An officer must make the arrest peaceably and with as little violence as possible. But if resisted, he may use force sufficient to effect his purpose. State v. Mahon, 3 Harring. 568.

22. If a statute require that a criminal process shall be executed by a specified person, the execution of such process by any other person is void. Reynolds v. Orvis, 7 Cow. 269; Wood v. Ross, 11 Mass. 271; Com. v. Foster, 1 Mass. 488.

23. An officer cannot lawfully arrest another by a wrong name, though he was the person intended to be arrested, unless it be shown that he was known as well by one name as the other. Griswold v. Sedgwick, 1 Wend. 126; s.c. 6 Cow. 456; Mead v. Hawes, 7 Cow. 322; Gurnsey v. Lovell, 9 Wend. 319.

24. **Notice of authority.** When an arrest is made by one who is not a known officer, he is bound at the time to show his authority. State v. Kirby, 2 Ired. 201. A party arrested has a right to see the warrant at the time; although if he resists before an opportunity is given to the officer to comply with his demand, the officer may secure the arrest first. Drennan v. People, 10 Mich. 169, per Campbell, J., referring to Com. v. Cooley, 6 Gray, 350; State v. Phinney, 42 Me. 384; Com. v. Field, 13 Mass. 321; State v. Curtis, 1 Hayw. 471; Arnold v. Steves, 10 Wend. 514.

25. An officer may arrest a person for felony, although the warrant is in the possession of another officer; but he should tell the accused the reason of his arrest. Where the officer, instead of doing this, simply told the defendant that he had a warrant for him, and when the defendant asked to see it, he refused, saying he was not bound to show it, and at once seized the defendant, who cocked and pointed a loaded revolver at the officer, it was held that a conviction of the defendant for an assault with intent to murder could not be sustained. Drennan v. People, 10 Mich. 169.

**26. When notice not required.** When both the official character of the party making the arrest, and the charge upon which it is made, are known to the party arrested, notice is not required without demand. State v. Townsend, 5 Harring. 487. Where therefore on a trial against an officer for manslaughter, alleged to have been committed in the attempt to arrest the deceased without a warrant, it appeared that the deceased knew the officer and the cause of arrest, it was held error for the court to charge that, if the deceased had no notice of the cause of arrest, it was lawful for him to resist, and if in such resistance the deceased fired upon the defendant, the latter had no right to return the fire until he had desisted from the attempted arrest in such manner that the deceased had notice that the illegal attempt to arrest him was abandoned. Wolf v. State, 19 Ohio, N. S. 485.

27. Where a person is taken in the commission of an offense, or upon fresh pursuit afterward, or when a violent assault is made upon the officer, notice is not required, because in either case, the accused is presumed to know the cause of his arrest. Lewis v. State, 3 Head, 127; People v. Pool, 27 Cal. 592.

**28. On void process.** If a criminal process is insufficient on the face of it, and such defect is apparent, the officer will not be justified, and if he act under it, he will be liable as a trespasser. Sandford v. Nichols, 13 Mass. 286; Lampson v. Landon, 5 Day, 508; Griswold v. Sedgwick, 6 Cow. 456; Reynolds v. Corp, 3 Caines, 269; Grumond v. Raymond, 1 Conn. 40.

29. If an officer, who has two warrants, the one legal and the other illegal, says at the time of arrest that he makes the arrest by virtue of the illegal warrant, it is not false imprisonment, the lawfulness of the arrest not depending upon his declaration, but upon the sufficiency of his authority. State v. Kirby, 2 Ired. 201.

30. On the trial of an indictment for the murder of a constable while endeavoring to arrest the defendant on a warrant which had been indorsed served by a deputy sheriff, it was held that if it appeared from parol evidence, that the warrant had never in fact been served, but that it had been given back by the magistrate to the officer for service, it was so far valid in the hands of the deceased as to authorize him to arrest the defendant on it and take him before the magistrate. Com. v. Moran, 107 Mass. 239.

**31. Out of State.** Where a person indicted for forgery escaped to another State, where he was arrested and taken back without process and imprisoned, it was held, on an application to release him by a writ of *habeas corpus*, that though the arrest was illegal, it was not a ground for the prisoner's discharge. Dow's Case, 18 Penn. St. 37.

32. Where a deputy sheriff having a warrant for the arrest on a charge of grand larceny of a person who was in Canada, got a police officer there to take him by force across the State line, where he was arrested, committed by a magistrate and subsequently indicted, it was held that there was no reason for quashing the indictment or discharging the prisoner from arrest. People v. Rowe, 4 Parker, 253.

**33. Re-arrest.** A police officer having arrested a person for being disorderly, while intoxicated, released him on his promise to go home peaceably. It was held that the officer had a right to re-arrest such person upon his going into a drinking saloon before he had left the officer's sight. Com. v. Hastings, 9 Metc. 259.

34. Where a person arrested by warrant indorsed pursuant to the statute of New York, is discharged by a magistrate of the county in which the arrest is made, upon a recognizance, the officer cannot lawfully make a re-arrest without a new warrant. Doyle v. Russell, 30 Barb. 300; disapproving Clark v. Cleveland, 6 Hill, 349, Hogeboom, J., *dissenting*.

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# Arrest of Judgment.

*See* JUDGMENT.

# Arson.

1. What constitutes.
2. Subject of.
3. Indictment.
4. Evidence.
5. Verdict.

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1. What constitutes.

**1. The burning.** To constitute arson at common law, there must be an actual burning of the whole or some part of the house; but it is not necessary that any part of the house should be wholly consumed. Mary v. State, 24 Ark. 44; State v. Sandy, 3 Ired. 570; People v. Butler, 16 Johns. 203; Com. v. Van Schaack, 16 Mass. 105. It is sufficient if the wood of the house be charred in a single place, so as to destroy its fibre. People v. Haggerty, 46 Cal. 354; s. c. 2 Green's Crim. Reps. 431.

**2.** On the trial of an indictment for setting fire to a barn, and thereby burning a dwelling-house, the defendant requested the judge to charge that the jury "must be satisfied that some portion of the dwelling-house had been actually on fire by reason of the burning of the barn, and had been burned and consumed thereby; and that the substance and fibre of the wood of such portion so on fire was actually destroyed." The judge declined so to charge, but instructed the jury that "they must be satisfied that some portion of the dwelling-house had been actually on fire by reason of the burning of the barn, and had been burned thereby, so that the substance of the wood of such portion so on fire was actually burned." *Held* correct. Com. v. Tucker, 110 Mass. 403; s. c. 2 Green's Crim. Reps. 266.

**3.** Where the language of a statute was: "If any person shall willfully and maliciously set fire with intent to burn, to the dwelling-house of another, or any outbuildings adjoining thereto, or to any other building," &c., it was held that it was to be understood the same as *put fire to* or *place fire upon, or against*, or *put fire in connection with*, and that it was not necessary to a conviction that the building should have been actually set on fire. State v. Dennin, 32 Vt. 158.

**4. Guilty intent.** A design to produce death is not necessary to constitute arson in the first degree, either at common law or under the statute of New York; and it is immaterial whether the prisoner knew that the building burned had usually, or at any time been occupied by persons lodging therein. People v. Orcutt, 1 Parker, 252.

**5.** The intent maliciously to set fire to the building of another, and in pursuance of such intent, to apply fire to a boat in the same, or to other combustible matter, is a misdemeanor at common law. Com. v. Francis, Thach. Crim. Cas. 240.

**6.** In New York, it is not error for the court, on a trial for arson, to refuse to charge, that if the fire did not reach the house of P. until after she was aroused, and she had time to escape before the fire reached her house, and she neglected to do it, it was not arson in the first degree, the statute making the fact that some human being is in the house at the time it is set on fire, the test of peril, and drawing no distinction as to its imminency. Woodford v. People, 5 N. Y. Supm. N. S. 539.

2. Subject of.

**7. House of another.** At common law, the burning must be of the house or outhouse of another, and it is necessary to aver and prove ownership in another. In Connecticut, to constitute arson in burning an office, store, or shop, under the statute, the building must be the property of another. But the absolute title or entire interest need not be in the person named in the information as the party injured. Such a possession as gives a special property while it exists is sufficient. State v. Lyon, 12 Conn. 487.

**8. What deemed a dwelling-house.** In New York, any building is a "dwelling-house," within the meaning of the statute defining arson in the first degree, which is wholly or in part usually occupied by persons lodging therein at night, although other parts or the greater part may be used for an entirely different purpose. People v. Orcutt, 1 Parker, 252. And the court will

not inquire into the tenure or interest of the occupant. People v. Van Blarcum, 2 Johns. 105.

9. Where, in an indictment for burning a dwelling-house, the building was described as built and designed for a dwelling-house, and constructed in the usual manner, and it appeared that it was not yet painted, and that not quite all the glass was set in one of the outer doors, and that the building had never been occupied, and was not parcel nor appurtenant to any other, it was held that this was not a dwelling-house in such a sense as that to burn it constituted arson. State v. McGowan, 20 Conn. 245.

10. In Massachusetts, to constitute arson, within the statute (1 R. S. ch. 126, § 1), the building burned must be a residence, and if the occupier is temporarily absent there must be the purpose of return. It cannot be the dwelling-house of an individual before he has begun to occupy it. Com. v. Barney, 10 Cush. 478.

11. In Georgia, although a person is temporarily absent from a dwelling-house in which he lives and has his household effects, yet if the house is burned during such temporary absence, it is the burning of an occupied dwelling-house within the meaning of the statute punishing arson. Johnson v. State, 48 Ga. 116.

12. On the trial of an indictment for setting fire to and burning a house, the evidence tended to prove that the building had been erected and used as a dwelling-house, and for no other purpose (except as a place of deposit for some fodder for a short time), until about ten months before it was burned, and that the owner had been in the habit of renting it out as a dwelling, and had done so, and ordered it to be cleaned for the tenant a short time before it was burned, who had not taken possession. *Held* not a dwelling-house within the statute of Virginia. Code, ch. 192, § 2; Hooker v. Com. 13 Gratt. 763.

13. As arson is the burning of the dwelling-house of another, where the husband lives with his wife, and has a rightful possession jointly with her of the dwelling-house which she owns, and they both occupy, he cannot be guilty of arson in burning it. Whether if the family relation is broken up in fact, and the husband and wife are living apart, the same exemption from criminal liability exists—*query*. Snyder v. People, 26 Mich. 106; s. c. 1 Green's Crim. Reps. 547.

14. If the building set on fire is appropriated to ordinary domestic uses, and is situated so near to the dwelling-house as to endanger it, it is arson. Gage v. Shelton, 3 Rich. 242. A dwelling-house, within the meaning of the statute of Maine punishing the burning of a dwelling-house within the curtilage, must be a house either actually occupied by some person, or temporarily left with the intention of returning, and the fact that the house was intended for occupation, or capable of being so occupied, is not sufficient. State v. Warren, 33 Maine, 30. And see State v. Shaw, 31 Ib. 523; Com. v. Flynn, 3 Cush. 529.

15. **Burning one's own house.** Setting fire to one's own house in a city, the house being occupied by himself and other tenants, is a great misdemeanor. Ball's Case, 5 City Hall Rec. 851.

16. It is not a crime at common law for a man to destroy his own property by fire, unless it be accompanied by an injury to or by a design to injure some other person. Bloss v. Tobey, 2 Pick. 325.

17. In New York, arson in the first degree may be committed by a person burning his own house. Shepherd v. People, 19 N. Y. 537; overruling People v. Henderson, 1 Parker, 560. In New Hampshire, under a statute (Gen. Stats. ch. 262, § 1), providing that "If any person shall willfully and maliciously burn any dwelling-house," he should be punished, etc., it was held that an indictment might be sustained which charged the defendant with feloniously, willfully, and maliciously burning his own dwelling-house. State v. Hurd, 51 New Hamp. 176.

18. **Tenant setting fire to house.** In Indiana, an indictment for arson cannot be maintained against one who is in possession of a house as a tenant for a year, and willfully burns it. McNeal v. Woods, 3 Blackf. 485.

19. In Alabama, where a person under a lease of a house on public land for one year went into possession, but it appeared afterward that the same premises had been previously let by parol without his knowledge to another person, who, during the absence of the first tenant, took possession, it was held that the first tenant was not guilty of arson by reason of his burning the house. Sullivan v. State, 5 Stew. & Port. 175.

**20. By setting fire to adjoining building.** The willful and malicious setting fire to a building, the burning of which is only a misdemeanor, will become a felony if the dwelling-house of another, or barn with grain in it, be thereby burned, when such burning is the probable consequence of the first illegal act. State v. Laughlin, 8 Jones, 354.

21. A barn eighty feet from a dwelling-house, in a yard or lane, with which there is a communication from the house by a pair of bars, is within the curtilage. People v. Taylor, 2 Mich. 250.

22. In the New York statute, which provides that "every person who shall willfully set fire to or burn, in the night time, any building not being the subject of arson in the first degree, but adjoining to or within the curtilage of any inhabited dwelling-house, so that such house shall be endangered by such firing, shall, upon conviction, be adjudged guilty of arson in the second degree," the term "adjoining," is used in its strictest sense, as indicating actual contact. Peverelly v. People, 3 Parker, 59.

**23. Burning jail.** In New York, setting fire to a jail by a prisoner, merely for the purpose of effecting his escape, is not arson. People v. Cotteral, 18 Johns. 115. And in Texas, it has been held that a person committing such an offense, cannot be convicted of the willful burning of a house, under the statute. Delany v. State, 41 Texas, 601. In Virginia, where a county jail was burnt, and the indictment for burning the same described the jail as the house of B., sheriff and jailer of the county, the burning of such jail was held to be a felony, under the statute (Rev. Code, ch. 160, § 4), and that the description of the house as the sheriff's might be rejected as surplusage. Stevens' Case, 4 Leigh, 683.

24. In North Carolina, under the statute which punishes the burning of a jail (R. S. ch. 34), it was held that the burning must be both willful and malicious, though the word "or" was inserted in the statute, between the words "willfully and maliciously." State v. Mitchell, 5 Ired. 350. If a prisoner set fire to the jail, without intending to destroy it, he is not guilty under the statute. But if he put fire to the jail, with an intent to burn it down and destroy it, he is guilty, notwithstanding the fire goes out or is put out by others. Ib.

**25. School-house.** Under the statutes of Maryland and Connecticut, it was held to be arson to burn a school-house. Jones v. Hungerford, 4 Gill & Johns. 402; State v. O'Brien, 2 Root, 516. And in Kentucky, the statute makes it an indictable offense, although at common law such an act would not be arson. Wallace v. Young, 5 Monr. 156.

**26. Other buildings.** The prisoner was indicted under a statute making it a felony to set fire to or burn "any building erected for the manufacture of cotton or woolen goods, or both." The frame of the whole building was not up at the time of the fire, and that part which had been raised, was not entirely inclosed. The floors were not laid, the stairs not up, and no part of it ready for use. *Held* that it was not a building within the purview of the statute, and that the defendant must be discharged. McGary v. People, 45 N. Y. 153, Grover, Peckham and Folger, JJ., *dissenting*; rev'g 2 Lans. 227.

27. A saw-mill is not necessarily a building within the prohibition of a statute (R. S. of N. H. ch. 215), punishing the burning of any building other than such as are specified. State v. Livermore, 44 New Hamp. 386.

28. To burn a barn containing hay and grain is arson at common law. Sampson v. Com. 5 Watts & Serg. 385.

### 3. Indictment.

**29. The burning.** Under a statute defining arson to be "the burning or causing to

be burned," &c., the indictment need not allege that the defendant "set fire to" the house. People v. Myers, 20 Cal. 76; overruling People v. Hood, 6 Cal. 236. But in Virginia, an indictment for arson, under the statute (Rev. Code, ch. 160), which does not contain the word "burn," but merely charges "a setting fire to," is insufficient. Howell v. Com. 5 Gratt. 664.

30. In Maine, in an indictment founded upon the statute (R. S. ch. 119, § 4), punishing the willful and malicious *burning* of any building, it is sufficient to allege the "*setting fire to*" a building. State v. Taylor, 45 Maine, 322. And if the building is alleged to have burned in the day time, it is not necessary to allege whether or not it was within the curtilage of a dwelling-house. Ib.

31. An indictment for arson which alleged the "setting fire to, and the same house then and there by the spreading of such fire, feloniously burning," was held sufficient. Palston v. State, 14 Mo. 463.

32. An indictment for an attempt to commit arson need not describe the combustibles alleged to have been used by the defendant. Com. v. Flynn, 3 Cush. 529.

33. An indictment which charges the burning of "a certain barn and an outhouse thereto adjoining," need not separately charge the burning of each. Com. v. Lamb, 1 Gray, 493. In New Hampshire, an indictment under the statute (Gen. Stat. ch. 262, § 2), which alleges that the defendant burned a building called a barn, need not state whether or not a dwelling-house was also burned. State v. Emerson, 53 New Hamp. 619; s. c. 2 Green's Crim. Reps. 362.

34. Where the consequence of a single act is the destruction by fire of thirty-five dwelling-houses, the prisoner may be indicted as for one offense; and if the destruction of every house constitutes the same degree of arson, the indictment need contain but one count. Regarding the entire fire as one transaction, the condition, situation and occupancy of the several houses are matters of detail, and evidence may be given as to the burning of all of them. Woodford v. People, 5 N. Y. Supm. N. S. 539.

35. An indictment for arson charged the prisoner with setting fire to the dwelling-house of P., and the dwelling-houses of several others, naming some of them and describing others as "divers persons, to the jurors unknown," and then used this language: "there being then and there, within the said dwelling-houses, some human being." *Held* that the words charged the presence of a human being in each of the dwelling-houses. Woodford v. People, *supra*. In Missouri, an indictment under the statute, for setting fire to a dwelling-house in which there was a human being, need not state the name of the person in the house. State v. Aguilar, 14 Mo. 130.

36. In Massachusetts, an indictment under the statute (R. S. ch. 133, § 12), which charges in one count, a breaking and entering the building in the night time, and in another count, an attempt to burn the building after breaking and entering it, is not bad for duplicity. Com. v. Harney, 10 Metc. 422.

37. **Time.** In Virginia, an indictment charging the felonious, willful and malicious burning of a dwelling-house, contrary to the form of the statute, need not state whether the offense was committed in the day time or at night. Curran's Case, 7 Gratt. 619.

38. **Place.** An indictment for burning a barn and outhouse "at A., in the county of B.," is sufficient without the words "there situate." Com. v. Lamb, 1 Gray, 493.

39. Where an indictment for burning a barn charged the offense as having been committed at S., in the county of B., it was held that the omission of an allegation that the dwelling-house within the curtilage of which the barn was, was also in S., did not render the indictment substantially defective. Com. v. Barney, 10 Cush. 480.

40. **Intent in general.** An indictment for arson which charges that the act was done "feloniously, willfully and unlawfully," omitting the word "maliciously," is insufficient. Killenbeck v. State, 10 Md. 431. But an indictment was held sufficient which charged that the act was done feloniously, unlawfully and maliciously, without alleging that it was done willfully. Chapman v.

Com. 5 Whart. 427; People v. Haynes, 55 Barb. 450.

41. Where the indictment is for setting fire to the dwelling-house of another, whereby it was burned, the intent is sufficiently indicated. But if the accused did not set fire to the house itself, but caused its destruction by kindling another fire, the intent to do more must be set out. State v. Hill, 55 Maine, 365; State v. Watson, 63 Ib. 128.

42. An indictment for arson, which alleges that the defendant set fire to the house with intent to injure the owner, instead of charging that the intent was to burn the house, is bad. Mary v. State, 24 Ark. 44.

43. **To prejudice insurer.** An indictment for an attempt to burn insured goods with intent to prejudice the insurer, need not allege the particular manner in which the attempt was made. Mackesey v. People, 6 Parker, 114. But an information under a statute which punishes the setting fire to a building, or to any other material with intent to cause such building to be burned, or attempting by any other means to cause a building to be burned, is not sufficient which merely alleges that the defendant solicited a person to burn the building, although it also alleges that the defendant furnished such person with combustibles for the purpose. McDade v. People, 29 Mich. 50, Cooley, J., *dissenting*.

44. An indictment for burning a building insured against loss by fire, with intent to defraud an insurance company, must allege that the company is incorporated. People v. Schwarz, 32 Cal. 160. But in New York, an indictment for setting fire to a shop with intent to burn the prisoner's goods therein, which were insured by the North American Fire Insurance Company, was held not defective in not alleging that the said company was a corporation, or had the right to insure the goods of the prisoner. Mackesey v. People, 6 Parker, 114.

45. In New York, to convict of arson in the third degree under sec. 5 of the statute (2 Rev. Stat. 667), it must be alleged that the house was insured against loss or damage by fire, and that the offense was committed with intent to defraud an insurance company. People v. Henderson, 1 Parker, 560. And see Martin v. State, 29 Ala. 30.

46. In New York, where an indictment for arson charged that the prisoner in the night time feloniously set fire to his own dwelling-house, in which there were at the time divers human beings, with intent to burn the said dwelling-house, and with intent thereby to defraud a certain fire insurance company, it was held on demurrer that the indictment was not sufficient to bring the offense within arson in the first degree, because it was not the dwelling-house of another, nor the third degree because it was not charged that the property was insured. People v. Henderson, 1 Parker, 560.

47. **Property burned.** An indictment for arson at common law need not state that the house alleged to have been burned was a dwelling-house. Com. v. Posey, 4 Call, 109.

48. An indictment for arson alleging that the defendant did maliciously, &c., set fire to and burn a house used as a dwelling-house, in the night time, the property of M. H., sufficiently shows that the house burned is a dwelling-house. McLane v. State, 4 Ga. 335.

49. In Massachusetts, under the statute (Rev. Stat. ch. 126, § 5), describing the building burned as not then completed, was held sufficient, the question whether it was such a structure as to constitute it a building being a question of fact for the jury. Com. v. Squire, 1 Metc. 258.

50. In New York, it is sufficient in an indictment for arson in the first degree to describe a building which has been usually occupied by persons lodging therein at night, as a "dwelling-house," although it may not be a dwelling-house according to the ordinary and popular acceptation of that term. People v. Orcutt, 1 Parker, 252.

51. Where the second floor of a building was occupied by the prisoner and his wife, and the residue by a tenant who habitually lodged therein, it was held proper to describe it in an indictment for arson as the dwelling-house of the tenant. Shepherd v. People, 19 N. Y. 537.

52. An indictment for arson which charged

that the defendant did willfully and maliciously set fire to and burn a "certain building called a saloon"—*held* bad in not showing for what purpose the building was occupied. State v. O'Connell, 26 Ind. 266.

53. In Pennsylvania, an indictment under the statute (act of March 21st, 1806), which charged that the defendant set fire to "a certain barrack," was held insufficient in omitting to allege that the barrack contained hay. Chapman v. Com. 5 Whart. 427. An indictment which alleges that the defendant on a certain day set fire to and burned a stack of hay, and also a building used as a stable and granary, is bad for duplicity. State v. Fidment, 35 Iowa, 541.

54. An indictment charging that "S., with force and arms in said county, unlawfully, wickedly, maliciously and mischievously did set fire to, burn and consume one hundred barrels of tar, of the goods and chattels," &c., was held good. State v. Simpson, 2 Hawks, 460.

55. **Ownership.** An indictment for arson at common law must correctly allege the ownership of the property burned. McGary v. People, 45 N. Y. 153; rev'g 2 Lans. 227; Martha v. State, 26 Ala. 72; Martin v. State, 28 Ib. 71. Where the indictment charged the burning of a certain dwelling-house which was the property of one L., and the dwelling-house of one C., it was held bad, it being uncertain whether the building burned was the property of L. or C. People v. Myers, 20 Cal. 76.

56. Where an indictment for arson alleged that the building burned was the property of "The Phœnix Mills Company," and it was proved on the trial that the name of the company was "The Phœnix Mills, of Seneca Falls," it was held that the variance was fatal. McGary v. People, 45 N. Y. 153, Grover, Peckham and Folger, JJ., *dissenting*; rev'g 2 Lans. 227.

57. Arson being an offense against the security of the dwelling-house, and not against the building as property, the proper mode of describing the subject of the burning in an indictment, is to call it the house of the person who dwells in it. Where the building was alleged to be the building of the owner, and it was proved, that at the time of the offense, it was in the possession of a tenant, it was held that the prisoner could not be convicted. People v. Gates, 15 Wend. 159.

58. Where part of a building is let for a year, which part has no communication with other parts of the building, the part so occupied, may be laid in an indictment for arson, as the property of the lessee. State v. Sandy, 3 Ired. 570. Where the house consists of two distinct tenements owned and occupied severally, in one of which the crime was committed, it is a misdescription to call it the dwelling-house of both occupants; and the fact that there is an interior communication between tenements which are owned and occupied in severalty, with no communication in actual use between them, does not render them by legal intendment one habitation. State v. Toole, 39 Conn. 342.

59. An indictment for arson may allege the ownership of the building destroyed to be in the widow of the deceased owner, she having occupied the same since her husband's death, notwithstanding there are heirs, and there has been no assignment of dower. State v. Gailor, 71 N. C. 88.

60. An indictment for burning a barn sufficiently alleges ownership by the words "then and there *belonging to*." Com. v. Hamilton, 15 Gray, 480.

61. An indictment for arson in burning a public building need not allege that it belonged to any one. State v. Roe, 12 Vt. 93.

62. When on a trial for arson, the proof of ownership varies from the allegation, and a *nolle pros.* is thereupon entered, this does not prevent a subsequent prosecution under a new indictment, in which the ownership is alleged to be in a different person; and if the second indictment contains several counts, in one of which the allegation of ownership is the same as in the first indictment, and the defendant pleads to the whole indictment *autrefois acquit* and discontinuance, the record of the former prosecution does not sustain either plea. Martha v. State, 26 Ala. 72.

63. An indictment for arson, each count of which charges the offense in the first degree, but alleges a different house and different ownership, is not bad on demurrer. Miller v. State, 45 Ala. 24.

64. **Averment of value.** In Indiana, an indictment for arson must allege the value of the property destroyed, and aver the property burned to belong to the person or persons in the actual possession, in his or their own right. Ritchey v. State, 7 Blackf. 168.

65. An indictment for burning a barn, under a statute which makes the offense punishable without reference to the value of the building, is not defective by reason of its not alleging value. Com. v. Hamilton, 15 Gray, 480.

66. **Conclusion.** When arson is forbidden by more than one statute, the conclusion *contra formam statuti* in the indictment is bad. And in like manner, a conclusion *contra formam statutorum* is bad, where there is but one statute. State v. Sandy, 3 Ired. 570.

67. In Pennsylvania, an indictment for burning a barn, which did not conclude "against the form of the statute in such case made and provided," was held fatally defective. Chapman v. Com. 5 Whart. 427.

### 4. Evidence.

68. **Property burned.** When an indictment for arson alleges that the building burned was *called* a barn, it may be proved that it was thus called and designated, although it was used for a pupose other than that indicated by its name. State v. Smith, 28 Iowa, 565.

69. Whether a building is within the curtilage of a dwelling-house, is a question to be determined by the jury upon the evidence. Com. v. Barney, 10 Cush. 480.

70. Where the indictment charged the accused with setting fire to a dwelling-house, and the evidence showed that he did not set fire to the house, but attempted to burn up some personal property belonging to himself, with intent to defraud the insurers, it was held that the variance was fatal, although the offense proved was embraced in one of the inferior statutory degrees of arson. Dedieu v. People, 22 N. Y. 178.

71. An indictment for burning stacks of wheat is not sustained by evidence of burning shocks of wheat. Denbow v. State, 18 Ohio, 11.

72. **Ownership.** On the trial of an indictment for burning a dwelling-house in the night, the ownership of the house is material, and must be proved as laid. Carter v. State, 20 Wis. 647; Com. v. Wade, 17 Pick. 395.

73. On a trial for maliciously setting fire to a building, proof that it was in the actual occupation and possession of the persons named, is evidence of ownership. State v. Taylor, 45 Maine, 322.

74. On the trial of an indictment for arson, proof that the defendant was in possession of the building burned, paying rent to the alleged owner, is sufficient evidence of ownership. People v. Simpson, 50 Cal. 304. But such an indictment is not sustained by proof that the defendant was in possession of the property under a contract of purchase. State v. Fish, 3 Dutch. 323.

75. **Burning.** On a trial for the malicious burning of an outhouse, a piece of the side of the building charged to have been burned, was offered in evidence as exhibiting the whole of the part burned. *Held* a question of fact for the jury to determine whether the building was actually burned. Com. v. Betton, 5 Cush. 427.

76. An indictment for arson in burning a gin-house is sustained by proof that it was burned by the ignition of matches, which the defendant put amidst the unginned cotton in the gin-house, with the intention of causing it to take fire in the necessary or probable handling of the cotton. Overstreet v. State, 46 Ala. 30.

77. **Guilty motive.** On a trial for arson, proof that the property burned was insured is admissible to show motive on the part of the prisoner. Didieu v. People, 4 Parker, 593; Freund v. People, 5 Ib. 198; also, that the prisoner lived unhappily with his wife, who was burned with the building. Shepherd v. People, 19 N. Y. 537.

78. On the trial of an indictment for

burning a dwelling-house, which the defendant occupied with his family, and also used as a provision store, it appearing that there was an insurance on his furniture and stock of provisions, it was held competent for the purpose of showing motive to prove that the property was insured for much more than it was worth. Com. v. Hudson, 97 Mass. 565.

79. Where, on the trial of an indictment for setting fire to the defendant's barn, whereby it and his adjoining dwelling-house were consumed, it was proved that the defendant held a policy of insurance on the buildings, which he surrendered before the trial to the agent of the company, who was out of the jurisdiction of the court, it was held that parol evidence of the contents of the policy was admissible on the question of motive. State v. Watson, 63 Maine, 128

80. Where, on a trial for arson, it appeared that there was a very large insurance upon the goods of the defendant which were destroyed by fire, it was held that the place and amount of such insurance might be proved by parol. State v. Cohn, 9 Nev. 179.

81. Where an indictment for arson alleges that the burning was "with intent to charge or injure an insurance company," the jury must be satisfied from the evidence that the defendant had knowledge of the insurance. Martin v. State, 28 Ala. 71.

82. On the trial of an indictment for burning a building with intent to defraud an insurance company, the existence of the company as a corporation need not be proved by its charter; nor need a compliance on its part with the laws of the State be proved. It is sufficient to show a corporation *de facto*, and that the agents by whom the contract of insurance was made were the agents *de facto* of the corporation. People v. Hughes, 29 Cal. 257. Neither is it necessary to prove that the policy was valid; and a variance between the name of the insurance company in the indictment, and that proved, will not be a ground for arrest of judgment. Ib.

83. On the trial of an indictment for burning a barn, it was held that threats of revenge made by the defendant on account of an arrest and imprisonment caused by the owner of the barn, and uttered from one to two years previously, were admissible in evidence. Com. v. Goodwin, 14 Gray, 55.

84. Where, on the trial of an indictment for burning a barn, there is proof of the hostility of the defendant toward the occupant of the property destroyed, it is not a case requiring the judge to instruct the jury whether or not uncorroborated confessions will warrant a conviction. Com. v. McCann, 97 Allen, 580.

85. On a trial for setting fire to a jail, the indictment under which the defendant was confined in the jail at the time he set fire to it is competent evidence to show the cause of his detention, and his intent. Luke v. State, 49 Ala. 30.

86. **Presumptions.** It is competent to prove that the defendant, some five or six months before the burning charged in the indictment, requested another person to burn the house. Martin v. State, 28 Ala. 71.

87. A hay barn was burned in the same village in which arson was committed, about three hours previous thereto, and it was proved that the prisoner was seen in the vicinity of the barn before and after it took fire. *Held*, that the evidence was proper to show the whereabouts and conduct of the prisoner shortly before the occurrence with which he was charged, as bearing upon the question of opportunity and guilty intent. Woodford v. People, 5 N. Y. Supm. N. S. 539.

88. On the trial of an indictment for arson, it is competent to prove that goods stolen from the burnt house were found in the possession of the prisoner. Johnson v. State, 48 Ga. 116.

89. On a trial for arson it is not erroneous to charge the jury that the fact that two of the witnesses acted upon their belief and knowledge that the person they saw was the accused, and caused him to be arrested within an hour after the fire was set, tended to corroborate their testimony as to identifying him, notwithstanding they swore less positively as to his identity before the committing magistrate. State v. Dennin, 32 Vt. 158.

Evidence. Verdict.

**90.** On the trial of an indictment for burning a barn and slaughter-house, after proof that the fire was set by means of a box containing a lighted candle, that the box was prepared for incendiary purposes, and that it was made at the defendant's shop, an anonymous letter in the defendant's handwriting, dated five days before the fire, was put in evidence, stating that the writer and another person had been engaged in setting fire to buildings by means of boxes, and that they expected to receive more of such boxes, and to use them for setting other fires. It was then proved that another box was found a few weeks before the fire, similar to the first mentioned box, and that it was made at the defendant's shop. The jury were instructed that if they should be satisfied that the defendant made the latter box the evidence was not to be used to show that he also made the box with which the fire was set, but only to show that he possessed the requisite skill, materials, tools, and opportunity to have made it, unless they should find that one hand must have made both. *Held*, no ground of exception. Com. v. Choate, 105 Mass. 451.

**91.** On the trial of an indictment for willfully setting fire to, and burning a barn, it appeared that the owner of the barn kept a watch-dog, which usually slept in the kitchen of the house; that the dog was there when the barn was burnt, and did not bark until strangers began to collect around the building, after the alarm of fire had been given. *Held*, that it was not competent to prove that the dog generally barked when strangers passed the house, and was quiet when inmates of the house passed, in order to show that the person who committed the offense was an inmate of the house, or to corroborate the declaration of the defendants that they intended to set fire to the barn, and must do it soon after leaving the house, before the dog forgot them. Com. v. Marshall, 15 Gray, 202.

**92.** On the trial of an indictment for arson, it was held competent for the prosecution to prove another and different firing of the premises, three or four weeks previous to the firing charged in the indictment, under circumstances tending to cast suspicion on the defendants. State v. Rohfrischt, 12 La. An. 382.

**93.** Where, on a trial for arson, the prosecution has proved the burning of the house, as charged, and offered evidence tending to show that the defendant was the person who set fire to it, evidence that another house was subsequently burned, owned by the prosecutor, is irrelevant; nor is it made relevant by being offered in connection with proof of defendant's declaration made after the first, but before the second burning, that he was not yet done with the prosecutor, especially if this declaration is proved to have been made in a conversation, when "no reference was made to either of the burnings, the parties speaking of a civil case which defendant brought before the prosecutor as a justice of the peace, the defendant complaining that the prosecutor had treated him rascally." Brock v. State, 26 Ala. 104.

**94.** On the trial of an indictment for burning a house which is insured, with intent to injure or defraud the insurer, after evidence tending to establish a conspiracy to commit the offense between the defendant and another, the acts or declarations of such other person showing an effort to procure payment from the insurer of the amount of the loss insured against are admissible. People v. Trim, 39 Cal. 75.

**95.** Where two persons are separately indicted for arson, the production of the record of conviction of one of them is not evidence against the other. Kazer v. State, 5 Ham. 280.

### 5. Verdict.

**96. Degree of guilt.** In New York, under an indictment for a higher degree of arson, the defendant may be found guilty of a lower degree; and although charged with setting fire to a building, he may be tried for setting fire to the goods and furniture in the building. Didieu v. People, 4 Parker, 593; Freund v. People, 5 Ib. 198.

# Assault and Battery.

1. Simple.
   - (*a*) *What constitutes.*
   - (*b*) *Justifiable use of force.*
   - (*c*) *Indictment.*
   - (*d*) *How tried.*
   - (*e*) *Evidence for prosecution.*
   - (*f*) *Evidence for defense.*
   - (*g*) *Verdict and judgment.*

2. Assault with intent to kill.
   - (*a*) *What constitutes.*
   - (*b*) *Indictment.*
   - (*c*) *Evidence.*
   - (*d*) *Verdict.*

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## 1. Simple.

### (*a*) *What constitutes.*

**1. Meaning of assault.** An assault is an attempt or offer to commit personal violence: as the striking at one with or without a weapon, or presenting a gun at him within a distance which the gun will carry, or pointing a pitchfork at him, standing within the reach of it, or by holding up one's fist at him in a threatening manner. State v. Morgan, 3 Ired. 186; U. S. v. Hand, 2 Wash. C. C. 435. An assault may be committed on one or more persons at the same time, and by the same act. State v. Bradley, 34 Texas, 95.

**2. Must be violence.** In order to constitute an assault, there must be something more than mere menace. There must be violence begun to be executed. But where there is a clear intent to commit violence, accompanied by acts which, if not interrupted, will be followed by personal injury, the assault is complete. People v. Yslas, 27 Cal. 630. A mere purpose to commit violence, however plainly declared, if not accompanied by an effort to carry it into immediate execution, does not constitute an assault. Smith v. State, 39 Miss. 521. Handy, J., dissenting, held that if a party make an advance upon another, armed with a dangerous weapon, likely to produce great bodily injury, and in a hostile attitude, to all appearances indicating an intention to do the other great bodily harm, it is an assault, though the party did not intend to do the other any bodily injury. The mere fact of a person going to a place with the design to commit an assault upon another, will not make him liable, unless he carry his intention into effect. Yoes v. State, 4 Eng. 42. So, the drawing of a pistol without presenting or cocking it, is not an assault. Lawson v. State, 30 Ala. 14.

3. If a person ride his horse so near to another as to endanger his person, and create a belief in his mind that it is his intention to ride upon him, it is an assault. State v. Sims, 3 Strobh. 137.

4. An offer to strike by rushing upon another, will be an assault, although the assailant be not near enough to reach his adversary, if the distance be such as to induce a man of ordinary firmness to suppose that he will instantly receive a blow. State v. Davis, 1 Ired. 125; State v. Benedict, 11 Vt. 236. A. approached B. in a threatening manner, with a stick in his hand, which he raised in the attitude to strike when he was stopped by a third person before he was near enough to B. to reach him with the stick. *Held* an assault. State v. Vannoy, 65 N. C. 532. On the trial of a complaint for an assault, the following instruction was held correct: That "if the defendant, within shooting distance, menacingly pointed at H. a gun which H. had reasonable cause to believe was loaded, and H. was actually put in fear of immediate bodily injury therefrom, and the circumstances were such as ordinarily to induce such fear in the mind of a reasonable man, an assault was committed, whether the gun was in fact loaded or not. Com. v. White, 110 Mass. 407; s. c. 2 Green's Crim. Reps. 269.

5. There may be an assault without personal injury. State v. Myers, 19 Iowa, 517. But a criminal conviction for an assault cannot be upheld where no battery has been committed, and none attempted, intended, or threatened by the party accused. People v. Bransby, 32 N. Y. 525. In Massachusetts, where the defendant snatched two bank bills from another's hand, touching the hand as he did so, but without any force, and running away, it was held that it did not con-

stitute an assault with force and violence within the statute (R. S. ch. 125, § 16). Com. v. Ordway, 12 Cush. 270.

**6.** To constitute an assault with a gun, it is not necessary that the person holding it should raise it to his shoulder. State v. Epperson, 27 Mo. 255. Upon the occurrence of an altercation between A. and B., A. got up from his seat and took his gun down from its rack, whereupon a bystander immediately, before he turned around with it, seized hold of him and prevented his using it. *Held*, that if A. took the gun from the rack with the intention of making an immediate battery with it, he was guilty of an assault. Higginbotham v. State, 23 Texas, 574. But to constitute an assault with a pistol, the pistol must be presented within a dangerous distance. Tarver v. State, 43 Ala. 354.

**7.** Any forcible taking of property from the possession of another, by means which overcome resistance, however slight, constitutes an assault. State v. Gorham, 55 New Hamp. 152; but not the striking of the horses of the prosecutor in a rude and angry manner while he is driving his team in a field, in the act of gathering corn. Kirkland v. State, 43 Ind. 146; s. c. 2 Green's Crim. Reps. 706.

**8.** Sprinkling paint from the second story window of a house upon a person in the street below, is an assault and battery. People v. McMurray, 1 Wheeler's Cr. Cas. 62.

**9.** Addressing another with threatening language, and then placing the open hand on his breast and pushing him back, constitutes assault and battery. State v. Baker, 65 N. C. 332.

**10.** Where a person who was about to be arrested by an officer for a breach of the peace, drew back a knife within striking distance, and ordered the officer to stand, which he did, it was held that the person was guilty of an assault. Stockton v. State, 25 Texas, 772.

**11.** If a person unlawfully detain another, he is liable to an indictment for assault and battery. Long v. Rogers, 17 Ala. 540; and if the opposition is such as a prudent man would not risk, it is false imprisonment. Smith v. State, 7 Humph. 43.

**12. Threats.** Threats aggravate an assault; and it matters not that the threats were conditional, if the conditions were such as the party had no right to impose. Crow v. State, 41 Texas, 468. A person drew a pistol, cocked it, pointed it toward another's breast, the parties being close together, and said, "If you do not pay me my money, I will have your life." *Held* an assault. Keefe v. State, 19 Ark. 190. An instruction that "if the prosecutor gave up his gun to the prisoner through fear of bodily harm reasonably excited in his mind by the conduct or manner of the prisoner, then the prisoner might be guilty of an assault," is not erroneous. Balkum v. State, 40 Ala. 671.

**13.** When a person presents a pistol at another, threatening to shoot, and putting him in fear, it is an assault; and it is doubtful whether the act can be excused by proving that the pistol was not loaded, without also proving that the other person knew that fact. In such case, the burden of proof is with the defendant, to show that the pistol was not loaded, and that the party assaulted knew that it was not. State v. Cherry, 11 Ired. 975; State v. Smith, 2 Humph. 457; State v. Shepard, 10 Iowa, 126; Crow v. State, 41 Texas, 468. But see Agitone v. State, Ib. 501.

**14.** Defendant having lost his pocket-book, took a pistol, and holding it in his hand, told his clerk that he believed he had the money, that if he knew he had it he would kill him, at the same time pointing his finger at his head to show where he would shoot him. Being told by a third person to put up the pistol, he did so, and then put his hands on the clerk's pocket to see if the pocket-book was there. *Held* an assault and battery. Johnson v. State, 17 Texas, 515.

**15.** Where several armed men pursue another with threats and insults, and induce him to go home sooner than, or by a different route than the one he intended, they are guilty of an assault upon him, although a gun was not pointed at him, and they did not approach nearer him than seventy-five yards. State v. Rawles, 65 N. C. 334.

**16.** Where the defendant placed himself

immediately in front of the prosecutor, assumed an attitude to strike within striking distance, and in an angry manner exclaimed, "I have a good mind to strike you," it was held an assault. State v. Hampton, 63 N.C. 13. And where the defendant drew a pistol, advanced within ten steps of the prosecutor, who was retiring, threatened to shoot him if he did not leave, and drove him from the place, which was where he had a right to be, it was held an assault, although the pistol was neither cocked nor presented. State v. Church, 63 N. C. 15.

17. If one offers to strike with a deadly weapon, although he announces his purpose not to do so if his terms are instantly complied with, and although his terms be such as he has a right to exact, he is guilty of an assault, for the reason that he ought first to resort to milder measures, and not put in use a deadly weapon at the outset. Where, therefore, under an indictment charging an assault to have been committed on S., it was proved that the defendant stood in the door of his grocery with a pistol in his hand presented, sometimes bearing upon S. and sometimes not, and swearing that if S. came in he would shoot him, it was held that the defendant was properly convicted. State v. Myerfield, Phil. N. C. 108.

18. A conviction cannot be had for an attempt to discharge a pistol when the individual indicted has proceeded no further toward an actual discharge than to raise and point the pistol uncocked at another, at the same time threatening to discharge it if the other puts his hand on him or advances toward him. Mulligan v. People, 5 Parker, 105.

19. Where the defendants, with their comrades, in all six in number, with loud oaths, dealt heavy blows with dangerous weapons, inflicting terrible wounds, the provocation being that their entrance was resisted into a lawful and peaceable gathering, which, by a formal vote previously made known to them, had excluded all who had not received tickets of admission, it was held that they were rightly convicted of an unlawful assembly and riotous assault. State v. Yeaton, 53 Maine, 125.

20. **Ability to injure.** Whatever may have been the intention of a person, as manifested by threatening gestures and words, if he had not the ability to commit a battery, he cannot be convicted of an assault. Smith v. State, 32 Texas, 593.

21. **Absence of intention.** If when a person raises his whip to strike another he says: "Were you not an old man I would knock you down," and has no present intention to strike, it is not an assault. State v. Crow, 1 Ired. 375; Com. v. Eyre, 1 Serg. & Rawle, 347.

22. The pointing of a pistol at another playfully, or accompanied with a declaration that he did not intend to shoot, or other words showing the absence of a criminal intent, would not be an assault, unless the other had good reason to apprehend danger. Richels v. State, 1 Sneed, 606.

23. A. went up to B. with a cocked pistol in his hand, but which he did not raise or point, and addressing B., said: "I am now ready for you." B. thereupon seized him by the collar and pushed him back several feet, when A. struck him with his pistol, extricated himself from his grasp, and went into a neighboring store. *Held*, that A. was not guilty of an assault. Warren v. State, 33 Texas, 517.

24. Where person presents a gun within shooting distance of another, who is armed with a knife, and about to attack him, it is not an assault, if there be no attempt to use the gun, or intention to use it until first attacked. State v. Blackwell, 9 Ala. 79.

25. On the trial of an indictment for assault and battery and false imprisonment, proof that the defendants were employed to arrest and forcibly imprison a child, they being wholly ignorant of an intent on the part of their employer to cause the child to be sent out of the State, will not, in law, charge them with such intent. Com. v. Nickerson, 5 Allen, 518.

26. **By infant.** Although at common law a boy under the age of fourteen is not liable to indictment for an ordinary assault and battery, yet it is otherwise when the battery is aggravated, or when from numbers it

amounts to riot, or when it is prompted by lust. State v. Pugh, 7 Jones, 61.

**27. By mutual consent.** Two persons may commit an assault and battery each upon the other at the same time, as when they mutually fight by agreement. Each would be guilty of a distinct and several offense, but the offenders may be joined in the same indictment if severally charged. State v. Lonon, 19 Ark. 577.

**28.** There need not be mutual blows to constitute a mutual combat. There must be a mutual intent to fight, but if this exists, and but one blow be struck, the mutual combat exists, even though the first blow kills or disables one of the parties. Tate v. State, 46 Ga. 148.

**29.** Where an indictment which charged that the defendant and one T. "did commit an affray by fighting together by mutual and common consent in public view" was indorsed "a true bill" as to the defendant alone, it was held that he might be convicted of assault and battery. State v. Wilson, Phil. N. C. 237.

**30.** On the trial of an indictment for assault and battery, the jury were instructed that if the defendant took the prosecutrix into a room and locked himself in with her, with intent to have connection with her, she being ignorant of his intent, he was guilty of an assault, although she afterward assented to his wishes, and to his having connection with her. *Held*, error. People v. Bransby, 32 N. Y. 525.

**31. Inciting.** One who incites or procures another to commit an assault and battery, without directly participating in it himself, is guilty as a principal. State v. Lymburn, 1 Brev. 397; Baker v. State, 12 Ohio, N. S. 214.

**32.** The following instruction was held correct: That if in a tumultuous crowd the defendant saw a person by him known to be an officer in the discharge of his duty, assaulted, and used words, acts, or gestures which tended to incite and encourage the person then assaulting the officer to assault him, he might be convicted of an assault, notwithstanding he did not in person touch or injure the officer. Com. v. Hurley, 99 Mass. 433.

**33.** Where several persons, without process of law, enter a man's premises in order to search for stolen property, and one of them commits an assault and battery on the owner, the others are not liable, unless the assault was committed during the prosecution of their original unlawful purpose, or within such a time afterward as to satisfy the jury that it was connected therewith. Thompson v. State, 25 Ala. 41.

**34. By direction of another.** The forcible taking away a child nine years of age, against the will of his father, or of those to whom his father had committed him for nurture or education, will constitute an assault and battery and imprisonment of the child, whatever may have been the apparent wishes or satisfaction of the child in being thus taken, and although the defendants acted by direction of the mother of the child. Com. v. Nickerson, 5 Allen, 518.

**35.** Where two persons cultivated land on shares, and the agent of one of them went on to the land to remove his principal's share of the crops, which he attempted to do from a cart in which the other had deposited crops gathered by him, and a servant of the latter forcibly removed the agent from the land, by his master's orders, it was held that the servant was guilty of an assault and battery. Com. v. Rigney, 4 Allen, 316.

**36. By husband on wife.** A husband cannot lawfully inflict corporal chastisement on the wife, or offer any violence to her, except to prevent her improper interference with the exercise of his parental authority. Gorman v. State, 42 Texas, 221; or to defend himself against her, and restrain her from acts of violence toward himself or others. People v. Winters, 2 Parker, 10.

**37.** In North Carolina a man could not formerly be convicted of assault and battery for moderately whipping his wife, although done without provocation. State v. Rhodes, Phil. N. C. 453. But in that State the old doctrine, that a husband has a right to whip his wife, provided he uses a switch no larger than his thumb, is not now law. State v. Oliver, 70 N. C. 60. Where a husband, seiz-

ing his wife by her left arm, said he would kill her, and then, brandishing a knife over her, drew back as if to strike, when his arm was caught by a bystander, it was held that the husband was guilty of an assault. State v. Mabrey, 64 N. C. 592; approving State v. Rhodes, *supra.*

**38. By parent.** On the trial of an indictment for assault and battery, it appeared that the defendant lived with the mother of the boy; that although they were not married, they lived together as man and wife; that the mother committed the care of the boy to the defendant, and that for some misconduct the defendant whipped the boy. *Held*, that as the defendant acted *in loco parentis*, and the injury to the boy was not lasting, the defendant was justified. State v. Alford, 68 N. C. 322.

**39. By teacher.** As a general rule, teachers, in chastising their pupils, exceed the limits of their authority when they cause lasting mischief, but act within the limits of it when they inflict temporary pain. State v. Pendergrass, 2 Dev. & Batt. 365. Courts and juries should hold a strong and stern hand over teachers who abuse their authority by the infliction of excessive corporal punishment. Gardner v. State, 4 Ind. 632. Whether, under the circumstances, the punishment of a pupil by a teacher is excessive, must be left to the jury. Com. v. Randall, 4 Gray, 36.

**40.** Where the relation of schoolmaster and scholar, parent and child, master and apprentice, or any similar relation is established, in defense of a prosecution for assault and battery, the legal presumption is that the chastisement was proper; and the burden of proof is on the prosecution to show that it was excessive or without proper cause. Anderson v. State, 3 Head, 455.

**41.** Where the teacher of a private school requests one of the pupils to leave for insubordination and misconduct, which he refuses to do, the teacher may lawfully avail himself of the assistance of a third person to remove the pupil, and a schoolmate of the latter offering resistance in his behalf, will be guilty of assault and battery. State v. Williams, 27 Vt. 755.

**42. By master.** A master cannot lawfully punish his apprentice for obedience to a subpœna or any other legal process. Where an apprentice had testified as a witness on a trial, it was held that whether he had been subpœnaed or attended voluntarily, his master could not lawfully chastise him for it. People v. Sniffin, 1 Wheeler's Cr. Cas. 512.

**43.** The authority of a master over his apprentice is strictly personal, and he has no right to direct or permit a person in his employ to chastise the apprentice. People v. Phillips, 1 Wheeler's Cr. Cas. 155.

**44.** The keeper of an almshouse, for the purpose of maintaining order, may lawfully restrain its inmates by a reasonable amount of preventive force; but he has no right to confine and chain a pauper 79 years of age, although directed to do so by the selectmen of the town. State v. Hull, 34 Conn. 132.

**45. By officer.** An officer will not be excused, who without intending to commit an assault and battery uses in making an arrest more force than is necessary. Golden v. State, 1 Rich. N. S. 292.

**46.** An agricultural society has no right to exclude public travel from any portion of the highway, although there is sufficient room for public travel on the highway outside of the limits included in their lines. Therefore on the trial of a complaint against the officers of such a society for assault and battery, it was held that the jury were properly instructed that the defendants were not justified in arresting the complainant without legal process, because he refused when directed to fall back within lines fixed by the society within the highway, or because when thus directed, he struck the horse of one of the marshals, without any malicious intent to injure the horse or its rider. Com. v. Ruggles, 6 Allen, 588.

**47. In resisting officer.** If an officer take property under an attachment in which the defendant has no attachable interest, he cannot be lawfully resisted by the owner; and if the owner do so, he will be liable to an indictment for assault and battery. State v. Buchanan, 17 Vt. 573. But in Alabama, where an officer attempts to seize under exe-

cution articles exempt by law from levy and sale, after being warned of the fact, the owner may employ as much force as is necessary to prevent the levy. State v. Johnson, 12 Ala. 840. The subsequent failure of the officer to make a complaint before a magistrate against his prisoner for the offense for which he had arrested him, is not a defense to an indictment for an assault upon the officer. Com. v. Tobin, 108 Mass. 426.

**48. By conductor.** Where the conductor of a railroad train, soon after it left the depot, demanded from a passenger his ticket, without offering him a check, and upon his refusal to surrender his ticket, forcibly ejected him from the car, it was held on the trial of an indictment for assault and battery against the conductor therefor, that the latter was liable, on the ground that the passenger was not bound to give up his ticket until a check was first tendered him. State v. Thompson, 20 New Hamp. 250.

(*b*) *Justifiable use of force.*

**49. In ejecting passenger from car.** A passenger who does not purchase his ticket before entering the cars may be required to pay a higher rate of fare, and on his refusal, may be expelled from them by force with no unnecessary violence. State v. Chovin, 7 Iowa, 204, Stockton, J., *dissenting*.

50. A railroad company has a right to fix rates of fare by a tariff posted at their stations, and to allow a discount on such rates to persons who buy their tickets before they enter the cars; and one entering the cars without buying his ticket cannot claim the discount, though he had no knowledge of the regulation, and if he refuses to pay the full fare, he may be put off of the train at a regular station. State v. Goold, 53 Maine, 279.

51. Where the conductor of a train called upon a passenger for his fare, told him what it was, and referred to the regulation of the company fixing it at the amount demanded, and the passenger replied that he should only pay a less sum, naming it, and that the conductor would have to put him off, as he should only pay the sum which he had offered, it was held the duty of the conductor to put the passenger off of the cars immediately, with as much expedition as was consistent with the delinquent's safety and the safety and convenience of other passengers, and that after the train was stopped for that purpose, the conductor was not bound to receive the fare when tendered, and permit the passenger to remain on the train. People v. Jillson, 3 Parker, 234.

52. If the regulation for the collection of railway tickets is a reasonable one, and essential to the interests of the company, a passenger who refuses to comply with it may be required to leave the car, and if he refuses to go, be ejected without unnecessary violence. People v. Caryl, 3 Parker, 326.

53. A passenger on the cars had an excursion ticket "good for one passage on the day sold only," and also a regular ticket; and upon being called on by the conductor to show his ticket, he produced the one for the excursion which had expired, and kept the other out of view. Upon refusing to pay his fare, he was forcibly ejected. *Held* that he had no right afterward to enter the cars upon producing his regular ticket. State v. Campbell, 3 Vroom (32 N. J.) 309.

54. A person purchasing a railroad ticket acquires the right to be carried directly to his place of destination; but not to be transported from one point to another upon the route at different times, and by different lines of conveyance. If, therefore, without the permission of the company, he gets out at a way station, and upon taking another train refuses to pay the fare, the conductor may remove him from the cars, using no more force than is necessary. The reasonableness of the regulation is a question of law for the court. State v. Overton, 4 Zabr. 435.

55. Where a party takes passage on a railroad train, the company is not bound to furnish him ingress and egress to and from the cars at any intermediate station; and if he leaves the cars at any intermediate point, he does so at his own risk. When a train stops on a side track, awaiting the passage of another train out of time, a passenger may rightfully leave the car if no objection

be made or notice given; but he for the time surrenders his place as a passenger, and takes upon himself the direction and responsibility of his own motions during his absence. If he has left the car without objection, and is on the platform or near the track when the train is about to start, the company should give him reasonable notice to return; and if there be an established signal by blowing the whistle, that should be sounded. But they are not bound to go after him if out of sight and out of the reach of the voice. State v. Grand Trunk R. R. 58 Maine, 176.

56. A conductor may eject a passenger from the car, not only for such misconduct as disturbs the peace and safety of the other passengers, but also for grossly profane or indecent language. People v. Caryl, 3 Parker, 326.

57. **Defense of property.** A man may order another out of his house, and if he refuse to go, use sufficient force to put him out. But no violence will be justifiable. State v. Lazarus, 1 Rep. Con. Ct. 34.

58. The idea that is embodied in the expression that a man's house is his castle, is not that he has a right to defend it by more extreme means than he might lawfully use to protect his shop, office, or barn. An assault on the house, can be regarded as an assault on the person, only in case the purpose of such assault be injury to the person of the occupant or his family. In such case, the inmate need not flee from the house in order to escape injury, but may meet his assailant at the threshold, and prevent him from breaking in by any means rendered necessary by the exigency. State v. Patterson, 45 Vt. 308.

59. Where an assault is made on a house with the intent of doing the inmate great bodily harm, he may use a deadly weapon if it be necessary, or the inmate has reason to believe, and does believe it necessary to prevent the perpetration of such crime. Ib.

60. Where a tenant at sufferance placed windows in the dwelling-house occupied by him, and after the expiration of the tenancy, and after the house so occupied was sold to another, who had taken possession by his tenant, went back to remove the windows from the house, and was proceeding to do so, when the occupant forcibly siezed and took away the windows, causing some injury to the former tenant. *Held* not assault and battery. State v. Elliott, 11 New Hamp. 540.

61. On the trial of a complaint for assault and battery, it appeared that the defendant had charge of a church as sexton, and that it was his duty to conduct funerals there; that although the complainant had no right to insist upon conducting a funeral, yet that he did so, and that upon being requested to desist and leave the church, he refused. *Held* that the defendant upon his refusal, had a right to remove him, and that if he used no more force than was necessary, he was justified. Com. v. Dougherty, 107 Mass. 243.

62. A person has no right to use force to protect his possession, or to prevent an injury to his property, unless it is really necessary. A fear, or mere suspicion that another may encroach upon his possession will not justify an assault. McAuley v. State, 3 Greene, 435. A person took hold of the horse of another, and turned the horse's head, whereupon he was told by the owner to let go, which he did and then struck the horse on the head with his hand, causing the horse to step back. The owner of the horse then beat the other and knocked him down with the butt of his whip. *Held* that the battery was unjustifiable. Com. v. Ford, 5 Gray, 475.

63. A tenant in common of a barn floor occupied by his cotenant and himself, has no right to use force and violence to prevent his cotenant from entering the door, though it be for the declared purpose of removing the former's wagon. Com. v. Lakeman, 4 Cush. 597.

64. **Defense of person.** The rules which justify self-defense, have been held to extend only to the relations of parent and child, husband and wife, and master and servant. It would seem however that the relations of brother and brother, or brother and sister, or sister and sister, in this respect may be said to stand upon the same footing of rea-

son and justice. Armistead v. State, 18 Ga. 704, per Starnes, J.

65. On the trial of an indictment for assault and battery, the defendant will not be held excused, unless it appear, that he acted clearly in self-defense. The fact that a party has been struck, gives him no right to retaliate by an assault, when it is in his power to keep aloof from the party striking. State v. Gibson, 10 Ired. 214.

66. If a gun be pointed at one in a threatening manner, under such circumstances as to induce a reasonable belief that it is loaded, and will be discharged and thereby produce death or inflict a great bodily injury on the person threatened, he will be justified in using whatever force may be necessary to avert the apparent danger, though it may afterward appear that the gun was not loaded, and that he was in no danger whatever. People v. Anderson, 44 Cal. 65.

67. When a man goes to another to assail him or demand explanations, or in anger, and the person addressed puts his hand in his pocket, the bare fear that he has a concealed weapon which he is about to draw and use, will not justify the commission of acts of violence on his person. Mitchell v. State, 41 Ga. 527. See Braswell v. State, 42 Ib. 609.

68. Every assault will not justify a battery; and whether the degree of force used by the defendant was justified by the occasion, is to be determined on the evidence. The party assaulted may strike, or use a sufficient degree of force to prevent the intended blow, without retreating. He must however take care that he use no more violence than may be necessary to prevent the violence of the assailant. Gallagher v. State, 3 Minn. 270; State v. Quin, 3 Brev. 515; s. c. 2 Const. Rep. 694.

69. **Abusive language.** Abusive words will not excuse an assault. State v. Wood, 1 Bay, 351. But on the trial of an indictment for assault and battery, the following charge was held proper: That if the jury believed the prosecutor used insulting and abusive language to the defendant, it might or might not amount to a justification, depending on the extent of the battery; and if they believed from the evidence, that the defendant used the first insulting and opprobrious words, they might take that into consideration in determining whether the defendant was justified in making the alleged assault. Arnold v. State, 46 Ga. 455.

(c) *Indictment.*

70. **Finding.** Where an indictment charges an assault and battery, the grand jury have no right to find a true bill for the assault alone, but must find for the entire charge, State v. Wilburn, 2 Brev. 296.

71. **Venue.** An indictment which alleges that the defendant did with force and arms make an assault in and upon W., laborer, on the ...day of...., and then and there did, with force and arms, beat, wound, &c., does not lay the venue sufficiently, even though the name of the county be in the margin. Kennedy v. Com. 3 Bibb, 490.

72. **Time.** Where an indictment for an assault and battery omitted to state a certain day and year, it was held ground for arrest of judgment. State v. Beckwith, 1 Stew. 318. And an information for an assault, which did not allege the day on which the offense was committed was held fatally defective. State v. Eubanks, 41 Texas, 291.

73. **Person injured.** In an indictment for assault and battery, the name of the person alleged to have been assaulted, is used only for the purpose of identification; and when such person is known equally well by two names, the use of either of them is sufficient. State v. Bundy, 64 Maine, 507. Where the indictment omitted to name the person assaulted, but alleged that the defendant did then and there the said J.L. beat, wound, &c., it was held sufficient. Herne v. State, 39 Md. 552; s. c. 2 Green's Crim. Reps. 394.

74. An indictment which alleges that an assault and battery was made on the body of the "deceased," is good; the word "deceased" meaning in this connection, that the person injured was dead when the indictment was found. Com. v. Ford, 5 Gray, 475.

75. An indictment against a woman for assaulting a female child, and willfully and

maliciously leaving her exposed in the street of a city in the night, without proper clothing, shelter or protection, without alleging that the child was of tender years, or unable to take care of herself, or that she was the defendant's child, ward, servant, or apprentice, or in her care or keeping, or that the child was injured, is insufficient, but may be supported as an indictment for an assault. Com. v. Stoddard, 9 Allen, 280.

**76.** An indictment alleged that the defendant committed an assault and battery upon a female "with clenched fists and open hands," but did not allege that the offense was committed by an adult male, or show its character. *Held* that there could not be a conviction of an aggravated assault. Blackburn v. State, 39 Texas, 153. But an indictment which alleges that the defendant made an assault upon a constable while in the discharge of his official duties, charges an aggravated assault. State v. Coffey, 41 Ib. 46. Where however, an indictment alleged that the defendant "went into the residence of A. and did then and there assault, strike, and beat," it was held that it did not charge an aggravated assault for the reason, that there was no averment that A. had a family. State v. Cass, 41 Texas, 552.

**77.** One who assaults two persons at the same time, may be charged in a single count with the assault upon both, and be convicted upon proof of an assault upon either. Com. v. O'Brien, 107 Mass. 208. And an indictment is good, which charges two persons with committing an assault and battery upon three others. Fowler v. State, 3 Heisk. 154; s. c. 1 Green's Crim. Reps. 295. But an indictment against several, which charges that they with a knive, which they then and there with their right hand held, made an assault, &c., is bad. State v. Gray, 21 Mo. 492.

**78. For resisting officer.** In an indictment for resisting an officer in the service of an execution, the place of service, as well as the time the execution was delivered to the officer, must be stated. State v. Hooker, 17 Vt. 658.

**79.** In Vermont an indictment under the statute, for impeding an officer in the execution of his official duty, must show the nature of the official duty, the manner of its execution, and the mode of resistance. State v. Burt, 25 Vt. 373. But not when the indictment is laid for an assault of an officer in the execution of his office, as at common law, or under the general statute, upon the matter of a breach of the peace. Ib.

**80.** Where an indictment for an assault upon a constable, charged that the officer was in the due execution of the duties of the office of constable, and that the defendant, while the said officer was in the due and lawful execution of his said office, unlawfully, knowingly, and designedly did hinder and oppose him; it was held that it sufficiently charged that the defendant, knew that the officer assaulted was a constable. Com. v. Kirby, 2 Cush. 577.

**81. Charging offense.** Where the indictment charged that the defendant "maliciously, wickedly and unlawfully did bite or cut off the ear of C.," it was held that the disjunctive "*or*" would have been a fatal objection but for the assault and battery, which was the offense; the mode in which the injury was inflicted being only a circumstance in aggravation. Scott v. Com. 6 Serg. & Rawle, 224.

**82.** An indictment charged that the defendant committed an assault and battery upon the person of S., a deputy sheriff, while in the lawful execution of the duties of his office, and unlawfully, knowingly and designedly obstructed, hindered and opposed him, contrary to the form of the statute, &c. *Held* not bad for duplicity; the averments as to the official position of S. and as to the effect of the assault in hindering him being matters in aggravation. State v. Dearborn, 54 Maine, 442.

**83.** In Massachusetts, an indictment under the statute (of 1849, ch. 49, § 1), is sufficient which charges that the accused "by and in pursuance of a previous appointment and arrangement made to meet and engage in a fight with another person, to wit, with one C., did meet and engage in a fight with the said C., against the peace," &c. Com. v. Welsh, 7 Gray, 324. In the same State, under section 2 of the same statute, an indict-

ment is sufficient which charges that "M., at S., on," &c., "was present as an aid and second, and did advise, encourage, and promote a fight, in which one W. did then and there, by previous appointment and arrangement, go to meet and engage with one C., against the peace," &c. Ib.

84. An indictment charges but one offense which alleges that the defendants assaulted a certain person and attempted thereby, by intimidation, to prevent his voting. State v. Hardy, 47 New Hamp. 538.

85. An indictment is good which charges assault and battery and false imprisonment in a single count. Francisco v. State, 4 Zabr. 30. In Massachusetts, although in an indictment under the statute (Gen. Stats. ch. 160, § 27), it is not necessary to allege a battery, yet if alleged, there is no duplicity. Com. v. Thompson, 116 Mass. 346.

86. **Immaterial averments.** An indictment for an assault need not state the particular acts of the defendant. Bloomer v. State, 3 Sneed, 66. As every intentional maiming and disfiguring of a person necessarily includes an assault and battery, an indictment which charges such disfiguring, with proper specifications as to the manner, time, venue, person injured, and other formal parts of the indictment is sufficient, without alleging that the defendant assaulted the person. Benham v. State, 1 Iowa, 542. An indictment for an assault in presenting a gun at another within the distance the gun would carry, need not allege that the gun was pointed at the party assaulted. State v. Smith, 2 Humph. 457.

87. Where an indictment alleged that A., in and upon one B. did make an assault, and he, the said B., then and there did beat, wound and ill-treat, it was held good, and that the words he the said B. then and there might be rejected as surplusage. Com. v. Hunt, 4 Pick. 252.

88. The fact that it is not alleged in an indictment for assaulting an officer while in the discharge of his duty, that the defendant knew the party assaulted was an officer at the time the assault was committed, is not good cause for arrest of judgment, but may be ground for entering judgment for a simple assault. Com. v. Kerby, 2 Cush. 577.

89. An indictment for an assault upon an officer, who at the time of the assault had an execution against the body of the defendant, which he was about to execute, need not contain an allegation that the sum due on the execution had been demanded of the defendant, or that he refused to pay it. State v. Hooker, 17 Vt. 658.

90. An indictment for an assault and battery need not allege that the person assaulted was late of the county, nor that the beating and wounding were to the prosecutor's damage. State v. Wimple, 8 Blackf. 214.

91. An indictment for assault and battery need not contain the word "unlawfully." State v. Bray, 1 Mo. 180. Where the indictment charged that A. feloniously and of his malice aforethought, assaulted B. with a sword, and then and there struck him, the allegation of feloniously, and of his malice aforethought, apply also to the stroke. State v. Owen, 1 Murphy, 452.

92. An indictment for assault and battery need not charge that the person beaten was in the peace of the State; and the words force and arms are not necessary. State v. Elliott, 7 Blackf. 280.

93. In an indictment for assault and battery, the words "and other wrongs to the said L. then and there did and committed," may be rejected as surplusage. Com. v. Randall, 4 Gray, 36.

94. **Averment of intent.** It is not sufficient in an indictment for assault and battery to allege that the defendant used unlawful violence upon the person of another; but the intent to injure must also be charged. Grayson v. State, 37 Texas, 228.

95. An indictment for an assault with a dangerous weapon, under the 22d section of the crimes act, of March 3d, 1825 (7 L. U. S. 401), need not allege that the assault was committed with a felonious intent; the act contemplating only a misdemeanor. U. S. v. Gallagher, 2 Paine, 447.

96. An indictment which charges an assault with intent to do bodily harm upon the person of another, designates the offense

as a simple assault. People v. Martin, 47 Cal. 112.

97. Where a statute prescribed the punishment for an assault with a dangerous weapon with intent to kill *or* murder, and the indictment charged such an assault with intent to kill *and* murder, it was held that the prisoner might be convicted of an assault with intent to kill, without the intent to murder being proved. State v. Reed, 40 Vt. 603.

**98. Conclusion.** An indictment for an assault and battery which concluded with the words "contrary to the statute," instead of "statutes in such case made and provided," was held sufficient. State v. Berry, 4 Halst. 374.

**99. Abatement.** Where the complainant under an indictment for assault and battery dies before trial, the indictment does not abate. Com. v. Cunningham, 5 Litt. 292.

(*d*) *How tried.*

**100. Under joint indictment.** When one of several jointly indicted for an assault and battery pleads guilty, the others who plead not guilty, cannot insist as a matter of right, to be tried separately. Thompson v. State, 25 Ala. 41.

**101. Election of offenses.** Where two assaults and batteries are committed on the same day, within a short time of each other, the prosecution may elect which it will try, but cannot submit both to the jury. Tompkins v. State, 17 Ga. 356. In South Carolina, where two assaults are alleged in an indictment, it is customary to require the prosecution to elect for which assault it will proceed, after the evidence has been heard, and not before. State v. Sims, 3 Strobh. 137.

**102.** An indictment charged an assault by striking with a stick and cutting with a knife. It was proved that during an altercation between the parties, the prisoner "held a stick in his hand, which he raised in a threatening attitude, and approached within about four feet of the prosecutor to strike him, which he would have done if the prosecutor had not got out of the way," and that soon afterwards, at the same place, the prisoner followed the prosecutor over a fence for about thirty yards with a drawn knife in his hand, and threatened him at a distance of eight or ten feet. *Held* that it was not a case for an election of offenses. Johnson v. State, 35 Ala. 363.

**103.** In South Carolina, where a person complaining of an assault has commenced a civil action and public prosecution therefor at the same time, the attorney general will enter a *nolle prosequi* upon the indictment unless the party makes his election. State v. Blythe, 1 Bay, 166.

**104.** In Georgia, as a person has a right to proceed both civilly and criminally for an assault and battery, he cannot be compelled to elect as to which he will pursue; yet the court will not give a severe judgment upon the criminal conviction unless the prosecutor will agree to relinquish his civil remedy. State v. Beck, Dudley, 168.

**105.** An assault in the presence of the court is indictable, even after the party has been fined for the contempt. State v. Yancey, 1 Car. L. Rep. 519.

(*e*) *Evidence for prosecution.*

**106. Record.** A conservator may lawfully enter the dwelling-house of his ward to discharge any of the duties of his office requiring such entry; and on the trial of a complaint for an assault and battery by the ward on the conservator while entering the house of the ward, the record of the appointment of the conservator is admissible to prove his appointment. State v. Hyde, 29 Conn. 564.

**107.** The complaint or affidavit made before a magistrate, upon which a prosecution for assault and battery is based, may be given in evidence on the trial, either to contradict or sustain the complainant's testimony. State v. Lazarus, 1 Rep. Const. Ct. 34.

**108. Time and place.** On the trial of an information for an assault, the prosecution must prove the time when and place where the offense was committed. Baker v. State, 34 Ind. 104. See Clark v. State, Ib. 436, and Hampton v. State, 8 Ib. 336, as to the

necessity of showing that the offense was committed on a particular day.

**109.** But where an indictment alleged the commission of an assault in a certain town, and the proof showed an assault in a different town in the same county, it was held that the variance was not material. Com. v. Tolliver, 8 Gray, 386.

**110. Person injured.** At common law, a wife can testify against her husband in cases of violence to her person committed by him. Mathews v. State, 32 Texas, 117.

**111.** Where on the trial of an indictment alleging that H. assaulted R. and shot and wounded him, it was proved that a person by the name of R. was shot by H., but it was not shown that the R. who was shot was the party named in the indictment—it was held that a conviction could not be sustained. Hardin v. State, 26 Texas, 113.

**112.** The defendant was charged with an assault and battery on T. A., a deputy sheriff. On the trial, it was proved that the person upon whom the assault and battery was committed was commissioned a deputy sheriff by the name of T. A. *junior*. *Held* no variance. Com. v. Beckley, 3 Metc. 330.

**113.** A variance between the indictment and evidence as to the name of the person assaulted, is not material where the names may be sounded alike. Ward v. State, 28 Ala. 53. But where the indictment charged that the defendant assaulted Silas Melville, and it was proved that the person assaulted was Melvin, it was held that the variance was fatal. State v. Curran, 18 Mo. 320. Proof that the defendant had beaten Catharine Swails will not sustain an indictment for an assault and battery on Ratharine Swails. Swails v. State, 7 Blackf. 324.

**114.** The charge of an assault upon two is in legal sense so different from a charge of an assault upon one of them, that proof of the commission of the act in regard to one will not sustain the indictment. State v. McClintock, 8 Iowa, 203.

**115. Weapon.** On the trial of an indictment for assaulting another with a dangerous weapon, under the statute of New York (Laws of 1854, ch. 74), the prosecution need not prove with what weapon the assault was made. It is sufficient to show that a sharp dangerous weapon to the jurors unknown was employed by the prisoner. Nelson v. People, 5 Parker, 39.

**116.** Where an indictment for an assault charges the defendant with having committed the assault with several weapons, it is immaterial whether he used one or all of the weapons. State v. McClintock, 1 Iowa, (Greene), 392.

**117. Character of weapon, how determined.** Where it is practicable for the court to declare whether or not a weapon is a dangerous weapon, it is matter of law. But where the question is, whether an assault with a dangerous weapon has been proved, and the weapon might be dangerous to life or not, according to the manner in which it was used, or the part of the body attempted to be stuck, it is matter of fact to be determined by the jury. U. S. v. Small, 2 Curtis C. C. 241.

**118. Act committed.** Where, under an indictment for an assault by striking with a stick, the evidence only shows an attempt or offer to strike with a stick, the variance is fatal. Johnson v. State, 35 Ala. 363.

**119.** An indictment against A. for an assault and battery upon B. is not sustained by proof that A. assaulted and beat B. in a fight with the fists by mutual agreement, the offense, under the statute (of Ohio), being an affray. Champer v. State, 14 Ohio, N. S. 437.

**120.** An indictment charged that the defendant and four others made an assault upon a person named. It was proved that the assault was made by the defendant and *five* others. *Held*, that the variance was fatal. State v. Harvell, 4 Jones, 55.

**121.** The section of the code of Alabama on which the indictment was framed read thus: "All persons, to the number of two or more, who abuse, whip, or beat any person, upon any accusation, real or pretended, or to force such person to confess himself guilty of any offense." (Code, § 3108). *Held*, that to make out the offense contemplated by this section, the accusation must be the moving cause of the abuse or violence. Underwood v. State, 25 Ala. 70.

**122. Intent.** The preconceived intention of committing the assault may be proved in aggravation. Yoes v. State, 4 Eng. 42.

**123.** On the trial of an information for assault and battery it is competent to prove, on the question of intent, that the defendant, while the assault and battery were being committed, declared that the person assailed had, three years before, assaulted and drawn a pistol on him, and that defendant was now having his revenge for it. Hamilton v. State, 36 Ind. 280.

**124.** To convict of an assault with a deadly weapon, with intent to inflict a bodily injury, it must be proved that the defendant had both the ability and the intention to make the assault. Therefore, where the evidence showed that he pointed and attempted to discharge a capped pistol at another, beyond striking distance, it was held that to warrant a verdict of guilty it must be shown that the pistol was loaded. State v. Napper, 6 Nev. 113.

**125. Burden of proof.** Where, on a trial for assault and battery, the defendant does not set up any independent fact in defense, but contends that taking the facts and circumstances as proved on both sides, he is entitled to acquittal, the burden is on the prosecution to show his guilt beyond a reasonable donbt. Com. v. McKee, 1 Gray, 61.

**126.** Where, on a trial for assault and battery, it was proved that the prosecutor was taking away from the presence of the defendant his personal property, it was held that he had a right to strike in defense of the same, if the prosecutor was not then a lawful officer, and that to make the defendant criminally liable the *onus* lay on the State to show that the prosecutor was at the time a lawful officer, and was armed with a lawful process. State v. Briggs, 3 Ired. 357.

**127. Presumptions.** Evidence that an assault upon the prosecutor followed soon after his declaration, "that no honest man would avail himself of the bankrupt law," is admissible, as tending to point out the individual who committed the offense. State v. Griffiths, 3 Ired. 504.

**128.** On a trial for an assault and battery upon the person of Mrs. B., the defendant claimed that the collision resulted from the act of Mrs. B. herself, and was on the defendant's part accidental, and not willful or malicious. It was proved that Mrs. B. was stricken down in the encounter and seriously injured, and that she was for some time confined to her room, under the care of a physician. *Held*, that on the question as to who was the aggressor, it was competent to show that the defendant did not call on Mrs. B., or manifest toward her any sympathy while she was suffering from the injury; and also, that the two grown up daughters of the defendant, who were living with her, and who were present at the assault, wholly neglected Mrs. B. after the injury. State v. Alford, 31 Conn. 40.

**129.** When the wife commits an assault in the presence of her husband, she is presumed to act under his coercion. State v. Williams, 65 N. C. 398. Where the assault of which a married woman was charged was committed in the presence of her husband, it was held error for the court, when requested, to refuse to charge the jury that "the presumption was that she acted under the coercion and control of her husband." Com. v. Eagan, 103 Mass. 71.

**130.** It is sufficient proof that a person assaulted was a police officer, that at the time he was acting as such, and had so acted during the four previous years. Com. v. Kane, 108 Mass. And see Com. v. Tobin, 108 Mass. 426.

**131.** On the trial of an indictment for an assault and battery on an officer while serving a warrant on the defendant, a witness for the defendant who has explained the relative position of the parties at the time of the transaction, and stated who were present, and how he and the others were engaged, cannot be asked "if he would have been likely to have heard if anything had been said by the officer to the defendant. Com. v. Cooley, 6 Gray, 350.

**132.** In Massachusetts, on the trial of an indictment for prize fighting, under the statute, it need not be proved by direct evidence that there was a previous appoint-

ment or arrangement, but it may be inferred from circumstances, and it is not material whether or not it was made in the State. Com. v. Welsh, 7 Gray, 324.

**133. What need not be proved.** Under a complaint for an assault, which alleges that the defendant pointed a gun at another, and threatened to shoot, it is not necessary to prove a threat to shoot. Com. v. White, 110 Mass. 407.

**134.** On the trial of an indictment for impeding an officer, averments in relation to the character of the person assaulted need not be proved, being merely descriptive of the person. State v. Burt, 25 Vt. 373.

**135.** On the trial of an indictment for ejecting a passenger from a railway car, it is error for the court to receive evidence of the general temperance and sobriety of the prosecutor, his conduct on the passage in question being alone in issue. People v. Caryl, 3 Parker, 326.

*(f) Evidence for defense.*

**136. Where person assaulted is unknown.** It can be no defense, to a person indicted for an assault upon a person unknown, that the person assaulted becomes known prior to, or at the time of the trial. But it must appear that the grand jury knew such person at the time they found the indictment, and that it was found for an assault upon some other person who was not made known to them. People v. White, 55 Barb. 606.

**137. Self-defense.** It is erroneous for the court to charge the jury that the facts proved are no justification of the assault and battery. The facts should be submitted to them, with instructions as to what would, and what would not, in law, be a justification. Com. v. Goodwin, 3 Cush. 154.

**138.** Whether A. was justified in firing a pistol at B. and wounding him, on the ground that B. was throwing missiles at A., and that the latter was in fear of his life, and fired in order to frighten B. and deter him from further violence, is a question of fact for the jury in considering the character of the assault of B. on A. Com. v. Mann, 116 Mass. 58.

**139. Defense of property.** The defendant may prove that he owned the premises on which the assault and battery were committed, and that he did the acts complained of in defense of his possession; and in New York, if the assault and battery were committed in resisting persons entering upon the premises to open and work a highway, the defendant may prove that the alleged highway was laid through his orchard of four years' growth, without his consent. Harrington v. People, 6 Barb. 608.

**140. Character of prosecutor.** On the trial of an indictment for assault and battery, the defendant cannot set up the general reputation or conduct of the prosecutor as an overbearing, tyranical and dangerous man. But when it is shown that the defendant was under reasonable fear of his life, or great bodily harm from the prosecutor, the temper of the latter, in connection with previous threats, is admissible in evidence. Harman v. State, 3 Head, 243. Evidence that the person assaulted was a quarrelsome man, is not available to the defendant without proof that the fact was known to him. State v. Meader, 47 Vt. 78.

**141.** On the trial of an indictment for an indecent assault upon a female, evidence is admissible of the bad character of the prosecutrix for chastity. Com. v. Kendall, 113 Mass. 210.

**142. Character of defendant.** On the trial of an indictment for assault and battery, it is competent for the defendant to prove his general good character. Hance v. State, 8 Fla. 56; Drake v. Com. 10 B. Mon. 225, *contra.*

**143. Wife as witness.** On the trial of the husband for an assault and battery committed by him on his wife, she is a competent witness in his behalf. Com. v. Murphy, 4 Allen, 491.

**144.** On the trial of an indictment against a father and son for assault and battery, it appeared that the son struck the prosecutor, and that the father took no other part than by words of encouragement to the son. *Held* that the wife of the father was a competent witness for the son. State v. Mooney, 64 N.

C. 54; citing with approval, State v. Rose, Phil. 406, and State v. Ludwick, Ib. 401.

**145. Mitigating circumstances.** On the trial of an indictment for assault and battery, it appeared that the language and deportment of the party injured, were in the highest degree reprehensible, and calculated to provoke violence on the part of the defendant, who was an old man. *Held* that they did not justify the assault, but could only be considered by the jury in mitigation of the fine. State v. Harrington, 21 Ark. 195.

**146.** On the trial of the husband for an assault and battery committed by him, on his wife, he may show in mitigation that when he committed the offense, he was provoked to do so by the misbehavior and misconduct of his wife. Robbins v. State, 20 Ala. 36.

**147.** On the trial of a railroad conductor for assault and battery, in forcibly removing a passenger from the train, who had conducted himself in a violent and disorderly manner, so as seriously to disquiet the other passengers, it was held competent for the defendant to give evidence of misconduct during the entire passage, as it was a short one, if it was apparent that the disposition and feeling which prompted it, continued and influenced the complainant's conduct up to the time of his removal. And one of the grounds of justification being that the complainant improperly refused to surrender his ticket when requested, it was held that the judge improperly rejected evidence to prove that the regulation and custom of the company had always been for the conductor to collect tickets at a certain point, as that would have shown that the defendant was not influenced by any hostile motives when the ticket was demanded. People v. Caryl, 3 Parker, 326.

**148.** Evidence that the person assaulted "was a lazy vagabond, who would not work if he could help it, that money could not be made out of him by legal process, that he had owed the defendant a long time and would not pay, and that the defendant, on the day on which the assault was committed, had offered him ten dollars an hour if he would work for him in payment of said indebtedness, and he had refused to do it," is not admissible for the defendant in mitigation. Ward v. State, 28 Ala. 53.

**149.** A party who, when an officer is endeavoring to arrest him, by his violent conduct deprives the officer of the opportunity to read the warrant or state the cause of arrest, cannot avail himself of the omission of the officer to do so, as a justification of his resistance and efforts to escape. Com. v. Cooley, 6 Gray, 350.

**150.** On the trial of an indictment for assault and battery in resisting an officer in serving an attachment against property in which the defendant in the attachment had no attachable interest, evidence is not admissible in behalf of the accused to show that the attachment was obtained by connivance between the plaintiff and defendant therein, with intent to get possession of his goods and defraud him out of the same. State v. Buchanan, 17 Vt. 573.

**151.** In South Carolina, it was held on the trial of an indictment for assault and battery that under the plea of not guilty no evidence of mitigating circumstances could be offered, but that such evidence must be presented at the time of sentence. State v. Smith, 2 Bay, 62.

**152. Declarations of defendant.** On the trial of an indictment for assault and battery, the remark of the accused to the person beaten, "If I had known you were a one legged man I would not have struck you," made as soon as the blow was given was held admissible in evidence in mitigation. Riddle v. State, 49 Ala. 389. But the defendant cannot be allowed to prove what transpired between him and the prosecutor at a previous interview, in the forenoon of the same day. Rosenbaum v. State, 33 Ala. 354.

**153.** On the trial of an indictment for assault and battery by firing a loaded pistol at one B., it was proved that the defendant took aim and fired at B. after announcing his intention to do so, and that the ball penetrated B.'s clothing, and indented his watch; that B. then said, "Now you've done it," and the defendant replied "Didn't I say, I'll hit

you?" and that B. then went away. *Held* that the defendant could not show that after B. left, he stated to persons present that he did not know the pistol was loaded, that he was not in the habit of carrying a pistol, that the one used was an old one knocking about in a club room, that it was frequently snapped by persons frequenting the place, and that just before B. came in, the defendant put the muzzle into his mouth, and snapped the pistol several times, the cylinder not revolving of itself, when the pistol was snapped. Com. v. McLaughlin, 5 Allen, 507.

(*g*) *Verdict and judgment.*

**154. Under plea of former conviction.** The plea of former conviction to an indictment for assault and battery is an admission of the charge, and when overruled, the court should pronounce judgment against the defendant as upon a conviction. State v. Epps, 4 Sneed, 552.

**155. Without plea.** On a trial for assault and battery, a verdict where there has been neither an arraignment or plea, is a nullity; and the court cannot direct a plea of not guilty to be entered for the defendant without his consent, and then render judgment against him on the verdict. Davis v. State, 38 Wis. 487. See State v. Cole, 19 Ib. 129.

**156. Where there are two indictments.** Where there were two indictments, one for resisting legal process, and the other for an assault, it was held that if the same testimony would support both charges, the party could not be found guilty of both. State v. Johnson, 12 Ala. 840.

**157. Against several.** Some of several jointly indicted may be convicted of assault, and others of a battery, or of assault and battery committed on the same occasion upon the same party. White v. People, 32 N. Y. 465; Lewis v. State, 33 Ga. 131.

**158. For part of offense charged.** On the trial of an indictment for an assault with intent to murder, a *nolle prosequi* may be entered as to the intent to murder, and the defendant be convicted of an assault. Baker v. State, 12 Ohio, N. S. 214; *contra,* Grant v. State, 2 Cold. Tenn. 216; approving Britain v. State, 7 Humph. 159.

**159.** In Maine, under the statute (R. S. ch. 131, § 4), when an indictment charges a riot with an assault and battery, the defendant may be acquitted of the former and found guilty as to the latter. State v. Ham, 54 Maine, 194.

**160.** Under an indictment for manslaughter, the defendant may be convicted of common assault and battery. State v. Scott, 24 Vt. 127.

**161.** On the trial of an information for rescuing a prisoner from the sheriff, and for assault and battery, the defendant may be acquitted of the rescue and convicted of the assault and battery. Rose v. State, 33 Ind. 167.

**162.** On the trial of an indictment for maiming, the defendant may be found guilty of an aggravated assault and battery. Guest v. State, 19 Ark. 405.

**163.** Where the indictment charges a riot and assault, a finding that the defendant is guilty of a riot is insufficient. State v. Creighton, 1 Nott and McCord, 256.

**164.** On the trial of an indictment for assault and battery, the jury rendered the following verdict: "Guilty of an assault, but not with the intention of injuring the parties, and not of the battery." *Held* bad for uncertainty. State v. Izard, 14 Rich. 209.

**165.** Where an indictment charges an assault and battery, and rescue, and the defendant is convicted generally, if the averments as to the rescue are bad for uncertainty, they may be rejected as surplusage, and the defendant be sentenced upon the verdict as for an assault and battery. State v. Morrison, 2 Ired. 9.

**166. Construction.** The legal effect of the following verdict: "We find the prisoner guilty of an assault with intent to do bodily harm," is, that the prisoner is guilty of a simple assault. Hussy v. People, 47 Barb. 503.

**167. Settlement.** An assault and battery cannot be compromised after the defendant is found guilty. People v. Bishop, 5 Wend. 111.

2. Assault with intent to kill.

(a) *What constitutes.*

**168. Need not be wounding.** A person may assault another with intent to kill without striking or wounding. State v. McClure, 25 Mo. 338. Where a person went to another's house after being told not to come, and at the request of some of the inmates, went in, and being ordered out by the owner, asked him to go out with him, and the owner refusing, he stopped at the door, and drew a pistol upon the owner, it was held an assault with intent to murder. State v. Boyden, 13 Ired. 505.

**169. Act must be adapted to design.** To justify a conviction for an assault with intent to murder, there must be some adaptation in the act done to accomplish the alleged purpose. An instruction that the presenting of a pistol loaded and cocked, within carrying distance, by one man at another, with his finger on the trigger, in an angry manner, is of itself an assault with intent to murder, is erroneous. Morgan v. State, 33 Ala. 413. In Ohio, the discharging a gun loaded with powder and wad at a person so far distant that no injury would probably result from the act, is not a violation of the statute. (Crimes Act, § 24.) Henry v. State, 18 Ohio, 32.

**170.** A person having been arrested as a deserter from the United States army, the party arresting him, with a pistol in one hand, and holding him by the collar with the other, forced him into a grocery and detained him in confinement one hour. But it did not appear that the pistol was presented in a menacing manner, or that any effort was made to shoot, or threat to do so. *Held* that a conviction for an assault with a deadly weapon with intent to inflict bodily injury could not be sustained. Tarpley v. People, 42 Ill. 340.

**171.** But if the object fail of accomplishment by reason of an impediment which was unforseen by the offender, who employs means ostensibly appropriate, the criminal attempt is committed. Kunkle v. State, 32 Ind. 220; disapproving State v. Swails, 8 Ib 524. On a trial for an assault with intent to murder, committed on M., it was proved that the defendant attempted to cut M.'s throat with a pocket knife, but that before any blow was struck with it, M.'s wife caught the knife, and it fell out of the defendant's hand; whereupon the defendant took up M.'s gun, and M. seized it and took it away from him. *Held* sufficient to sustain a conviction. Weaver v. State, 24 Texas, 387.

**172.** Where, after a party had been illegally arrested, and he had voluntarily taken the officer to the room where his baggage was, and submitted it to the inspection of the officer, he shot the officer, it was held that a conviction of assault with intent to murder was proper. Johnson v. State, 30 Ga. 426.

**173.** Where on the trial of an indictment for assaulting and shooting another, it was proved that the defendant, being in search of the prosecutor with a loaded gun, with a deliberate purpose to take his life, saw the prosecutor's gun presented towards him, and instantly fired his own gun, in pursuance of his original purpose to kill, it was held that he was guilty of the offense charged. Davidson v. State, 9 Humph. 455.

**174.** Where one, with great violence and force, pushed another down, threw him into a pond, and endeavored to strangle him by holding his head under water, it was held to be an assault and battery with intent to kill. Southworth v. State, 5 Conn. 325.

**175. Weapon need not have been deadly.** In Missouri, to constitute a felonious assault within the statute (Crimes Act, art. 2, § 38), if the injury inflicted be of such a dangerous nature as to be liable to cause death, the instrument used need not have been a deadly weapon. Cameo v. State, 11 Mo. 579.

**176. The intent.** Where, under an indictment for an assault with intent to murder, the circumstances are such that, if death had ensued, the killing would have been murder, the offense is complete. People v. Scott, 6 Mich. 287; Maher v. People, 10 Ib. 212. But under the statute of New York, prescribing the punishment for an assault and battery upon another, by means of a deadly weapon with the intent to kill, maim, ravish, &c., it is not necessary that

the defendant should entertain the intent essential to the crime of murder. An intent to commit any felony is sufficient to constitute the offense. People v. Kerrains, 1 N. Y. Supm. N. S. 333.

**177. Need not be malice in fact.** If A., without any malice in fact against B., intending to divert himself by frightening B., shoots at him, not caring whether he hit him or not, A. is guilty of an assault with intent to murder. Collier v. State, 39 Ga. 31.

**178. Meaning of assault with intent.** There is no material difference between an assault with intent and assault with attempt to commit a crime. Johnson v. State, 14 Ga. 55. An intent to do a wrongful act, coupled with overt acts toward its commission, constitutes the attempt spoken of by the statute of New York (3 R. S. 5th ed. p. 583, § 3), which provides that "every person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act toward the commission of such offense, but shall fail in the perpetration thereof, and shall be prevented or intercepted in executing the same, shall be, upon conviction, punished," &c. McDermott v. People, 5 Parker, 102.

**179. When deemed a felony.** An assault with intent to kill was not known as a felony at common law. Hall v. State, 9 Fla. 203; Ludwick v. State, Ib. 404. Under the statute of New York, it is only a felony when committed with some deadly weapon, or with some other means or force likely to produce death. O'Leary v. People, 4 Parker, 187.

(*b*) *Indictment.*

**180. Averment of acts constituting offense.** An indictment for an assault with intent to commit a felony must specify the felony. State v. Hailstock, 2 Blackf. 257; and set forth the facts. Trexler v. State, 19 Ala. 21; State v. Jordan, 19 Mo. 212; Beasley v. State, 18 Ala. 535. But in Missouri, under the statute (R. C. 1835, art. 35), requiring the indictment to state the circumstances attending the commission of the offense, it is sufficient to charge that the assault is made feloniously and with a dangerous weapon. Jennings v. State, 9 Mo. 852.

**181.** An indictment for an assault with intent to murder charged the defendant as principal in the second degree in being present, aiding and abetting the chief perpetrator, and specified the acts whereby the aiding and abetting were done. *Held* that the averment descriptive of such acts could not be stricken from the indictment without the consent of the defendant. Fulford v. State, 50 Ga. 591.

**182.** An indictment charging that the defendant feloniously assaulted one D. with a pistol loaded with powder and ball, with intent him, the said D., of his malice aforethought, to kill and murder, is sufficient, without specifying the particular acts constituting the assault. People v. English, 30 Cal. 214. And see State v. Robey, 8 Nev. 312; s. c. 1 Green's Crim. Reps. 674.

**183.** An indictment for an assault with a dangerous weapon, is sufficient which alleges that the defendant, being armed with a gun loaded with powder and shot and capped, made an assault in and upon A., with the felonious intent to kill and murder him with said gun by feloniously discharging the same at him, and by beating, bruising and wounding him with said gun, and thereby inflicting upon him a mortal wound; and it will be supported by proof that the defendant beat A. with the gun. Com. v. Creed, 8 Gray, 387.

**184.** In Massachusetts, an indictment under the statute (Gen. Stats. ch. 160, § 32), which provides for the punishment of "whoever mingles any poison with food, drink or medicine, with intent to kill or injure another person," alleging that the defendant mingled poison with water which he knew was to be drunk by his wife, and with intent to kill her, is sufficient without stating that the mixture was poisonous or known to be so by the defendant. Com. v. Galavan, 9 Allen, 271.

**185. Description of weapon.** If an assault with intent to kill, be made with a weapon the ordinary name of which *ex vi termini* imports its deadly character, it is sufficient to describe it in the indictment by

such name; but in other cases, the instrument used should be described and charged to be deadly. If the weapon be insufficiently described, a conviction may be sustained for assault and battery. Kruget v. State, 1 Kansas, 365.

186. Where an assault is made with an axe, it will be deemed a deadly weapon, without being so described in the indictment. Dollarhide v. U. S. 1 Morris, 233.

187. In New York, an indictment charging an assault and battery with "an intent to kill," without setting forth some of the means which the statute names, will not warrant a conviction of any offense higher than assault and battery. People v. Davis, 4 Parker, 61. In Texas, the indictment need not state the instrument or means employed. Martin v. State, 40 Texas, 19; Bittick v. State, Ib. 117. And it is the same in Iowa and Tennessee. State v. Seamons, 1 Iowa, 418; Harrison v. State, 2 Cold. Tenn. 232.

188. When two commit a joint assault with intent to murder, the one with a knife and the other with a gun, an indictment which charges them jointly is not bad for duplicity. Shaw v. State, 18 Ala. 547.

189. An indictment charging that the defendant made "an assault with a certain gun, the same being then and there a deadly weapon, and him the said W., did attempt with the gun aforesaid to shoot, with intent &c., was held bad in not averring that the gun was loaded, or otherwise show that the defendant had a present ability to inflict an injury. Robinson v. State, 31 Texas, 170.

190. In Indiana, it was held on a charge for an assault with intent to murder, that the manner in which the firearm was loaded, and the possibility of death being produced by the discharge, were matters of evidence, and not of averment. Rice v. State, 16 Ind. 298. In Iowa, it has been held that the indictment need not allege that the gun was loaded, or pointed, or discharged, or the manner in which it was used. State v. Shepard, 10 Iowa, 126.

191. An indictment for an assault with intent to murder by shooting, need not allege that the person assaulted was within the distance to which the gun would carry, nor that the gun was a deadly weapon. Shaw v. State, 18 Ala. 597.

192. **Person injured.** An indictment for an assault with intent to murder, was as follows: "With intent in so striking and beating him the said J. W., with the club aforesaid, in and upon the head as aforesaid, then and there and thereby feloniously, willfully, and of his (the said J. P.'s), malice aforethought, to kill and murder, against," &c. *Held* bad for uncertainty, in not naming the person the defendant intended to kill. State v. Patrick, 3 Wis. 812.

193. Where an indictment charges the defendant in two different counts, with an assault with intent to murder, upon different persons, the court may quash the indictment, or compel the prosecution to elect on which count it will proceed. State v. Fee, 19 Wis. 562.

194. **Averment of malice.** An indictment for an assault with intent to kill, must allege that the act was done feloniously with malice aforethought. State v. Howell, Geo. Decis. pt. 1, 158. In Missouri, an indictment under the statute (R. C. 1855, p. 565), which charged an assault to have been committed unlawfully and feloniously, and with an intent to kill, omitting the words "on purpose" and "of malice aforethought," was held fatally defective. State v. Harris, 34 Mo. 347. In Iowa, the indictment need not allege that the assault was committed with malice aforethought. State v. Newberry, 26 Iowa, 467. In Mississippi, an indictment under the statute which did not charge that the offense was committed with express malice, was held bad on motion in arrest of judgment. Anthony v. State, 13 Smed. & Marsh. 263.

195. An indictment for an assault with a deadly weapon with intent to do bodily injury, must either aver that there was no considerable provocation, or that the circumstances of the assault showed an abandoned and malignant heart. Baker v. People, 49 Ill. 308.

196. An indictment for an assault with a deadly weapon with intent to kill, charged that the defendant at, &c., "in and upon one

J. P. feloniously did make an assault with a deadly weapon, to wit, a pistol loaded with powder and ball, with intent then and there to kill said J. P., without any just cause or provocation, but with an abandoned and malignant heart." *Held* insufficient, there being no allegation of premeditation or malice aforethought. People v. Urias, 12 Cal. 325.

**197. Charging intent.** In Mississippi, an indictment under the statute (How. & Hutch. 698, § 39), for an assault with an intent to kill, must charge that the accused shot at a certain person with intent to kill that person; charging an intent to kill generally, is not sufficient. Jones v. State, 11 Smed. & Marsh. 315.

**198.** An indictment alleged that the defendant "did unlawfully strike, beat, bruise, and wound, one B. with a knife, with malice aforethought, and with the intention to kill and murder him, the said B., did then and there stab, cut, and wound, him the said B., with a large knife which he then and there, held in his hand, in three places, one in the hip, one in the side, and one in the back, with the intention of committing a felony." *Held* that the indictment did not sufficiently charge the intent to commit the particular felony, but that an assault and battery was charged. State v. Miller, 27 Ind. 15.

**199.** Where an indictment charged in one count two independent felonies, one that the prisoner committed the assault with "intent to do bodily harm," and the other that he committed it "with intent to kill," each of which was in violation of a distinct statute, but omitted to charge that the assault to do bodily harm was "without justifiable or excusable cause," it was held that this omission saved the indictment from being fatally defective for duplicity, the charge of an intent to do bodily harm, without the foregoing qualification, being surplusage. Dawson v. People, 25 N. Y. 399.

**200.** An indictment against two, charging one with an assault, with the intent maliciously to kill and murder, and the other with maliciously and feloniously getting his codefendant to make an assault with the same intent, is good at common law. State v. Pile, 5 Ala. 72.

**201.** An assault with intent to commit manslaughter is sufficiently charged as an assault with intent to kill. State v. Johnson, 4 Mo. 618.

**202.** An indictment for assault and battery with intent to kill must allege that the intent was unlawful and felonious. Curtis v. People, Breese, 197; *contra*, State v. Williams, 3 Foster, 321.

**203.** An indictment for an assault, with intent to commit murder, charging that the offense was committed feloniously, unlawfully, and with malice aforethought, omitting the word "willfully," is sufficient. McCoy v. State, 3 Eng. 451.

**204. Immaterial averments.** An indictment for assault, with intent to murder, held good, although the word "assault" was not used. State v. Munco, 12 La. An. 625. And where the word "*assault*" was written in both counts "*assatt*," it was held that as the error was not such as to mislead, it was immaterial. State v. Crane, 4 Wis. 401.

**205.** An indictment for an assault with a dangerous weapon, is good, notwithstanding the omission of the words "then and there," before the words "did strike." Com. v. Bugbee, 4 Gray, 206.

**206.** Where an indictment charged an assault and battery, with an intent to murder, it was held that the indictment was not bad because the charge included a battery. Cole v. State, 5 Eng. 318.

(c) *Evidence.*

**207. Place.** The identity and description of the place where an alleged assault was committed, being material, and it being proved that the accused had undertaken to pilot the complainant through the woods, a witness who had seen the latter, both before and after the commission of the assault, the interval being three or four hours, may be asked, "if he examined a place designated by the complainant as the place where he was shot," the question being introductory of another respecting the marks of a recent struggle in the designated place; the court instructing the jury, at the time the

evidence was admitted, "that it would be no evidence that it was the place where the complainant was shot, or that he was shot at all." Magee v. State, 32 Ala. 575.

**208. Person injured.** An indictment charged a shooting with intent to kill and murder one M. It was proved that the accused shot at, and intended to kill, C., but missed him and shot M. *Held*, that the variance was fatal. Barcus v. State, 49 Miss. 17.

**209. Weapon.** Where an indictment charges an assault with a *basket knife*, with intent to kill, and the evidence shows that the instrument used was a *basket* iron, the indictment will be sustained. State v. Dame, 11 New Hamp. 271.

**210. Intent.** The intent cannot be implied, but must be proved as a fact. State v. Beaver, 5 Harring. 508; and proof of the intent must be as of the time of committing the act. People v. Kerrains, 1 N. Y. Supm. N. S. 333. It is not sufficient to prove a general felonious intent, or any other than the particular intent alleged in the indictment; and the burden of proving the alleged intent, as well as the other facts which constitute the offense, is on the prosecution. Ogletree v. State, 28 Ala. 693. But where the evidence shows that it would have been murder if death had ensued, that in itself will be sufficient ground for the jury to infer the existence of the intention to murder. Cole v. State, 5 Eng. 318.

**211.** On the trial of an indictment for an assault, with intent to murder E., the proof conduced to show that the accused fired a gun in the direction of W. and E., and of a dog near them; but there was some doubt whether the intent was to kill or wound the dog, or these men, or one of them. The following charge of the court was held erroneous: That if a loaded gun was presented within shooting range at W. or E., *or at the dog*, under circumstances not justified by law, and showing an abandoned and malignant heart, and the gun was fired off, and inflicted a dangerous wound upon E., an assault with a deadly weapon, with intent to inflict bodily injury upon E., had been proved. People v. Keefer, 18 Cal. 636.

**212.** In New York, an indictment under the Revised Statutes, charging one with an assault and battery with a deadly weapon with intent to kill, is sustained by proof of having committed the offense with intent to commit any felonious homicide. People v. Shaw, 1 Parker, 327.

**213.** Where the prisoner was charged with an assault with intent to kill, it was held that evidence of experts as to the location, character, and probable consequences of the wound, was proper as bearing upon the question of intent. People v. Kerrains, 1 N. Y. Supm. N. S. 333.

**214.** On the trial of an indictment for an assault with a deadly weapon with intent to kill, a surgeon was asked whether a wound on the chest endangered life. *Held* proper, the infliction of a dangerous wound being more indicative of an intent to kill than one of a slighter character. Rumsey v. People, 19 N. Y. 41.

**215.** On the trial of an indictment for an assault with intent to murder, it was proved that the defendant went to the house of the prosecutrix, and after threatening to kill her, seized a hatchet and started toward her with it raised in a threatening attitude; that she fled to an adjoining room, and thence to a butcher's shop, a few rods distant; and that the defendant, after waiting a few minutes, followed her to the latter place. *Held* that what occurred in the butcher's shop, between the prosecutrix and the defendant, was admissible on the question of intent. People v. Yslas, 27 Cal. 630.

**216.** On the trial of an indictment for an assault with intent to kill, the intent is a question of fact for the jury. It is, therefore, error in the court to charge that "the law presumes that every man intends the natural, necessary, and probable consequences of his acts." State v. Stewart, 29 Mo. 419. And see Crocker v. State, 47 Ga. 568. Whether an assault by lying in wait is deliberate, is not a conclusion of law, but a question of fact. Floyd v. State, 3 Heisk. 342; s. c. 1 Green's Crim. Reps. 757.

**217.** Intoxication may render a party incapable of forming or entertaining the in-

tention of committing an assault with intent to murder. Mooney v. State, 33 Ala. 419.

**218. Character of assault.** To sustain a conviction, the proof must be such that if death had ensued, it would have been murder. Elliott v. State, 46 Ga. 159; Jackson v. State, 51 Ib. 402; Meeks v. State, Ib. 429; Smith v. State, 52 Ib. 88; Read v. Com. 22 Gratt. 924; State v. Neal, 37 Maine, 468; McCoy v. State, 3 Eng. 451; Cole v. State, 5 Ib. 318.

**219.** But the court is not bound to charge the jury at the defendant's request, "that they cannot find the defendant guilty of an assault with intent to murder, unless they are satisfied from the evidence, beyond a reasonable doubt, that, if death had ensued from the assault, he would have been guilty of murder in the first degree." Ogletree v. State, 28 Ala. 693; Slatter v. People, 58 N. Y. 354.

**220.** In Minnesota, where on the trial of an indictment for an assault with intent to murder, the judge, after charging the jury as to the general common-law definition of murder, instructed them, that, in order to return a verdict of guilty, they must find that if the assault had resulted in death, the killing would have been murder under the general definition. *Held* erroneous, for the reason that such general definition comprehended both the lesser degrees of murder under the statute, and manslaughter. Bonfanti v. State, 2 Minn. 123.

**221.** It is erroneous to charge the jury, on a trial for an assault with intent to murder, that proof which would make the offense murder if death had ensued, would be sufficient evidence of the intention, since, by the common law, a killing may amount to murder, though the party committing the offense did not intend to kill. Moore v. State, 18 Ala. 532.

**222.** On a trial for assault with intent to murder, it was proved that the accused presented a loaded gun, and attempted three times to fire it, but that there was no cap on it. A charge that the absence of the cap would not avail the defendant if he supposed it was on the gun, and that the jury must be satisfied beyond a reasonable doubt that he did not know there was no cap on it, is correct. Mullen v. State, 45 Ala. 66.

**223.** On the trial of an indictment for an assault with a deadly weapon with intent to inflict bodily harm, it appeared that the prisoner threatened to shoot the prosecutor if he did not leave certain land in dispute between the parties, at the same time drawing a revolver which he held in a line with the body of the prosecutor, but with the pistol so pointed that the ball would have struck the ground before it reached the latter if it had been discharged. *Held* that a conviction was proper. People v. McMakin, 8 Cal. 547. See People v. Honshell, 10 Cal. 83.

**224. Malice.** On a trial for an assault with intent to kill, it is competent to prove that the defendant, who was in the employ of the complainant, was maliciously and revengefully disposed toward him, and that the defendant purposely did his work badly so as to injure the complainant. People v. Kerrains, 1 N. Y. Supm. N. S. 333.

**225.** On a trial for an assault with intent to murder, the State, in order to show malice, may prove the fact of a previous difficulty between the accused and the person assaulted, but not the particulars of such difficulty. Tarver v. State, 43 Ala. 354.

**226.** An indictment for an assault with intent to murder, charging that the assault was committed with malice aforethought, will be sustained by proof that the assault was made without premeditation or malice aforethought, but willfully and maliciously, with the intent charged. Sharp v. State, 19 Ohio, 379; State v. Parmelee, 9 Conn. 259.

**227.** On the trial of an indictment for assaulting an officer with intent to murder him, while engaged in arresting M., the defense proved that M. had given himself up, and that the officer immediately called in other persons, some of whom were armed, and upon M.'s taking up his knife, but not making any hostile demonstration with it, the officer struck him several times on the head with a club, and that thereupon, the defendant shot the officer. *Held* that it was for the jury to determine how far the rushing in of an armed crowd, and a violent at-

tack with a deadly weapon upon M. affected the question of malice on the part of the defendant. Jackson v. State, 51 Ga. 402.

**228. Declarations of party assaulted.** On the trial of an indictment for an assault with intent to murder, declarations of the party assaulted, made immediately after the encounter, are admissible as a part of the *res gestæ* to show the impression on his mind at the time as to the nature of the attack made on him by the accused. Monday v. State, 32 Ga. 672. But threats made by the party assaulted to a third person against the defendant, previous to the assault, are not admissible in evidence in the defendant's behalf, when it does not appear at what time they were communicated to him. State v. Jackson, 17 Mo. 544.

**229. Declarations of defendant.** On the trial of an indictment for an assault with intent to murder, the declarations of the defendant the next day after the occurrence, manifesting animosity toward the person attacked, are admissible on the question of malice. Meeks v. State, 51 Ga. 429.

**230.** On the trial of an indictment for an assault and battery with intent to murder, the prosecution were permitted to prove that the defendant said a short time before he committed the assault, that he expected to kill some one before he left town. Read v. State, 2 Carter, 438.

**231.** But on the trial of an indictment for an assault on A. with intent to murder, the defendant's threats, made several hours "previous to the fight," that he would kill B., are not admissible against him. Ogletree v. State, 28 Ala. 693.

**232.** On the trial of an indictment for an assault with intent to murder, the assault having in fact been made by a mob, and not by the defendant, if he is sought to be convicted by proof that he encouraged, aided and abetted the mob to commit the assault by words uttered by him, it must be proved that they were addressed to, or at least heard by the persons or some of them composing the mob. Cabbell v. State, 46 Ala. 195.

**233.** Where on a trial for an assault with intent to murder, the prosecution prove that the defendant seized a deadly weapon, the defendant has a right to elicit on cross-examination what was said by the defendant when he took the weapon. Taliaferro v. State, 40 Texas, 522.

**234.** On the trial of an indictment for an assault with intent to murder, the statement of the prisoner after he had been arrested and gone 150 yards toward the guard house is not admissible in his favor as a part of the *res gestæ*. Hall v. State, 48 Ga. 607.

**235. Declarations of codefendant.** When three jointly indicted for an assault with intent to murder are tried separately, a letter written by one of them to the prosecutor before the commission of the assault, which shows malice and ill will on the part of the writer towards the prosecutor, cannot be given in evidence against another, who though *particeps criminis* in the assault, is not shown to have had anything to do with the writing of the letter, nor to have participated in his ill will towards the prosecutor. Stewart v. State, 26 Ala. 44.

**236.** If, however, the defendants had entered into a conspiracy to kill the prosecutor, and the letter was written subsequently by one to advance the common design, it would be evidence against all. Ib.

**237.** On the trial of an indictment for an assault with intent to commit murder, there was some evidence tending to show that the defendant was assaulted by the party injured and several other persons. *Held* that what was said by these persons at the time of the assault, illustrative of its object and the motive which prompted it, being a part of the *res gestæ*, was admissible in evidence. People v. Roach, 17 Cal. 297. But see Maxwell v. State, 3 Heisk. 420; s. c. 1 Green's Crim. Reps. 696.

**238.** On the trial of an indictment for an assault and battery with intent to murder, there was evidence of a conspiracy between the defendant and B. to commit offenses of force and violence, and that the assault and battery was committed by B. while the defendant was present aiding and abetting him. *Held* that the previous declarations of B. as to the intentions of himself and the defendant, which resulted in the assault and

battery in question, were admissible in evidence. Williams v. State, 47 Ind. 568.

**239. Presumptions.** On the trial of an indictment for assaulting and stabbing another with a knife, evidence that the defendant was possessed of a knife, and its character and condition, is admissible as tending to show that the injury was inflicted with a knife. Com. v. Roach, 108 Mass. 289.

**240.** On the trial of an indictment for an assault with a deadly weapon with intent to murder, a witness for the prosecution may be asked on cross-examination, whether at the time of the occurrence he was not excited from anger, and whether he did not have a fight immediately previous. Hoffler v. State, 16 Ark. 534.

**241.** On a trial for an assault with intent to murder, a charge which selects a portion only of the facts disclosed by the testimony, and instructs the jury that if these facts are proved, "the law presumes that the act was malicious," and that the defendant "intended to kill," is erroneous, nor is the error cured by further instructiug them in a subsequent part of the charge that these presumptions of law only arise in the absence of evidence tending to qualify or explain the selected facts; and if, upon the whole evidence, they entertain a reasonable doubt, they should acquit the defendant. Ogletree v. State, 28 Ala. 693.

**242.** In Delaware, on the trial of an indictment for an assault with intent to kill, under the statute, the intent cannot be presumed from the act, as malice is, but must be proved. State v. Negro Bill, 3 Harring. 571.

**243. Circumstances leading to assault.** The circumstances which in fact led to the assault are a part of the *res gestæ* which the jury are entitled to have before them to show what was the real nature of the act. It is therefore competent for the defense to prove that the person assaulted, the night before, attempted the violation of the defendant's wife. Biggs v. State, 29 Ga. 723.

**244.** On the trial of an indictment for an assault on H. with intent to murder, evidence was held admissible which tended to show the commission of adultery with the prisoner's wife half an hour before the assault; that the prisoner saw them going to the woods together; that he followed them, and was told on the way by a friend that they had committed adultery the day before in the woods; that H. and the prisoner's wife were seen not long after coming from the woods, and that the prisoner pursued H. to a saloon, where the assault was committed. Maher v. People, 10 Mich. 212.

**245.** Charging the jury that they must find A., the defendant, guilty if they believe that he committed the assault with intent to take life, is error, because it takes from the jury all consideration of provocation or self-defense. State v. Williamson, 16 Mo. 394.

**246. Affront.** No affront by mere words or gestures is a sufficient provocation to excuse or extenuate such acts of violence as manifestly endanger the life of another. State v. Fuentes, 5 La. An. 427.

**247. Where defendant was the aggressor.** When on a trial for an assault with intent to murder, it is proved that the defendant was the aggressor, he cannot mitigate the offense by showing that it was committed under the influence of sudden passion caused by injuries inflicted by his adversary. Crane v. State, 41 Texas, 494; nor that his adversary had armed himself for a voluntary fight, it appearing that the defendant after arming himself sought to renew the combat. Murray v. State, 36 Ib. 42; s. c. 1 Green's Crim. Reps. 654.

**248.** If a father make a felonious assault upon another, and his son afterward aid his father in the assault, on the trial of an indictment against the son for an assault with intent to murder, the jury cannot consider his relation to his father, nor the circumstances of peril in which his father was placed. Sharp v. State, 19 Ohio, 379.

**249. Defense of property.** An assault with intent to murder cannot be excused on the ground that it was in defense of property. State v. Morgan, 3 Ired. 186.

**250.** On the trial of an indictment for an assault upon D. with a deadly weapon, with intent to inflict upon him bodily injury, it is no justification that the defendant, while he was in possession of and working his

mining claim, shot D. because he had shut off the supply of water in the gulch, to which the defendant was entitled. Terr. of Mont. v. Drennan, 1 Mont. 41; s. c. 1 Green's Crim. Reps. 552.

251. **Exercise of legal right.** The simple exercise of a legal right, no matter how offensive to another, is never in law deemed a sufficient provocation to justify or mitigate an act of violence; and for a provocation to have that effect, the act must be the immediate result of, and follow the provocation. State v. Lawry, 4 Nev. 161.

252. Upon the trial of an indictment for an assault upon one S. with a deadly weapon, with intent to kill, it was proved that it was verbally agreed between S. and the defendant, that the former should pay the latter thirteen shillings a day for his services, steady work, and give him the use of a house to live in throughout the year, or while they should agree. *Held* that the relation was that of master and servant; that S. had the right of possession of the house, and the right to remove the defendant with his effects therefrom, and to employ all the force necessary for that purpose, and that the defendant's resistance to such removal was unlawful. People v. Kerrains, 1 N. Y. Supm. N. S. 333.

253. **Antecedent grudge.** Mere threats made will not excuse a deadly assault, when the party assailed had made no attempt or demonstration of a hostile or equivocal character. People v. Wright, 45 Cal. 260.

254. On the trial of an indictment for an assault with intent to murder, evidence is admissible of threats made by the person assaulted, to drive the defendant from the place, or take his life; and whether the threats were such as to excite the fears of a reasonable man, and to induce the defendant to apprehend violence to his person, so as to justify an attack upon the party making them, is a question for the jury, and if not a justification, may, in their judgment, rebut the presumption of malice. Howell v. State, 5 Ga. 48.

255. **Previous assault.** A prior assault on the prisoner, by the person whom he is alleged to have assaulted with intent to murder, is not necessarily a defense, since the injury inflicted by the prisoner may not have been justified by the necessity of the case, nor proportioned to the injury inflicted on him. Mooney v. State, 33 Ala. 419.

256. On the trial of an indictment for an assault with intent to murder, the defendant's counsel proposed to prove a fight between the parties two years previous, and stated that he expected to connect the two fights by repeated and continuous acts of violence on the part of the complainant, down to the time of the offense charged. *Held* proper to begin with the proof at the last fight, and go back to the first. Hatcher v. State, 18 Ga. 460.

257. **Mutual combat.** On the trial of an indictment for stabbing, it was proved that the prosecutor and defendant agreed to fight; and that the prosecutor being unarmed, the defendant commenced from the first to use a knife. *Held* that this was not self-defense. McAfee v. State, 31 Ga. 411.

258. Where on the trial of an indictment against F. for stabbing W., which occurred immediately after the latter had struck the former with his fist, it did not appear that there was great superiority in physical strength on the part of W., nor that F. was in ill health, nor other circumstance which produced great inequality between them for sudden combat, it was held that F. was properly convicted. Floyd v. State, 36 Ga. 91.

259. **Wife as witness.** On the trial of the husband for assault and battery upon the wife with intent to kill her, the prosecution will not be compelled to call her as a witness. In such case, the wife is a competent witness for her husband, and may be called on his behalf. People v. Fitzpatrick, 5 Parker, 26.

### (*d*) *Verdict.*

260. **Form.** On an indictment for assault and battery with intent to kill, the verdict should be, that "the prisoner is guilty of the assault and battery with a deadly weapon with intent to kill;" or, "by such force as was likely to produce death, with intent to kill;" or, "guilty of assault and battery

with intent to kill, as charged in the indictment." People v. Davis, 4 Parker, 61; O'Leary v. People, Ib. 187.

**261.** If a person designedly fire a pistol in the direction of two, and so near that it would probably do them some great bodily harm, and with such an intent, or regardless which it might kill, he may be found guilty of the same intent as to both. Com. v. McLaughlin, 12 Cush. 615.

**262.** In Alabama, where a person is indicted for an assault with intent to kill and murder, and the jury find him guilty of an assault with intent to kill, it is equivalent to a verdict of guilty of a simple assault, or assault and battery. State v. Burns, 8 Ala. 313.

**263.** It is erroneous to charge the jury that they may find the defendant guilty of "an attempt to commit an assault with intent to commit murder;" no such offense being known to the law. White v. State, 22 Texas, 608.

**264. Variant from charge.** The indictment charged the defendant with having made an assault with a dangerous weapon upon one A. with intent to kill and murder. The jury rendered the following verdict: "The defendant D. S. is guilty of being accessory before the fact of an assault with intent to kill A." *Held* that the judgment must be arrested. State v. Scannell, 39 Maine, 68.

**265.** On a trial for an assault with intent to murder, a special verdict which finds the defendant guilty of striking with a loaded whip, calculated to produce death, without cause or provocation, does not justify the court in rendering judgment of guilty in manner and form as charged. Seitz v. State, 23 Ala. 42.

**266.** Under an indictment for an assault with intent to kill and murder, if the offense when completed would have been manslaughter, the prisoner may be convicted of an assault with intent to kill, or of an assault. State v. Butman, 42 New Hamp. 490.

**267.** In Maine, the statute makes an assault with intent to murder and an assault with intent to kill, distinct offenses. The former necessarily includes the latter, and a person charged with the greater offense may be found guilty of the lesser. State v. Waters, 39 Maine, 54. The first two counts of an indictment charged an assault with intent to murder, and the last two, an assault with intent to kill. *Held* that it was competent for the jury to find the prisoner guilty of an assault simply, or of an assault with intent to kill, or of an assault with intent to murder. State v. Phinney, 42 Maine, 384.

**268.** In Connecticut, where the indictment charged an assault with intent to murder, and the jury found a verdict of guilty of an assault with intent to kill, without malice aforethought, it was held to be a good finding. State v. Nichols, 8 Conn. 496.

**269.** Under an indictment for an assault with intent to murder, the defendant may be convicted of a simple assault, or of assault and battery. State v. Coy, 2 Aiken, 181; Gardenheir v. State, 6 Texas, 348; Clark v. State, 13 Ga. 350; State v. Kennedy, 7 Blackf. 233; State v. Bowling, 10 Humph. 52; Stewart v. State, 5 Ohio, 241; Tuberville v. State, 40 Ala. 715; Dixon v. State, 3 Iowa, 416; State v. Shepard, 10 Ib. 126; Foley v. State, 9 Ib. 363; State v. Stedman, 7 Porter, 495; Cameron v. State, 8 Eng. 712. But see Wright v. State, 5 Iowa, 527. *Contra*, in Florida and Arkansas, Ludowick v. State, 9 Fla. 404; Sweeden v. State, 19 Ark. 205.

**270.** Under an indictment for an assault with intent to murder, the jury cannot find the defendant guilty of an assault with intent to commit bodily injury. Carpenter v. People, 4 Scam. 197. But in Kentucky, under an indictment for shooting with intent to kill and murder, the defendant may be found guilty of shooting with intent to wound. Robinson v. Com. 16 B. Mon. 609.

**271. On one of two counts.** After the trial of an indictment for an assault with intent to murder which contained two counts, the judgment entry recited that the State moved that the defendant be tried on the first count, and that the second count be postponed until the first was disposed of; to which there was no dissent by the defendant. That the jury found the defendant

guilty as charged in the indictment, and the solicitor afterward entered a *nolle prosequi* to the second count. *Held* 1. That the postponing of the second count until the first was disposed of was error. 2. That the defendant was not precluded from taking advantage of the error by the recital in the judgment entry that he did not object. 3. That if the defendant had consented to go to trial on one count only, yet the verdict being general, it would have been erroneous. Flanagan v. State, 19 Ala. 546.

272. **Amendment.** On a trial for an assault with intent to murder, the jury found the defendant guilty of assault and battery without the felonious intent. *Held* that the verdict might be amended during the sitting of the court, by striking out the words "and battery." Com. v. Lang, 10 Gray, 11.

*See* AFFRAY. *For assault with intent to commit rape, see* RAPE.

## Attorney.

1. **Right to visit jail.** Counsel have the right, at all reasonable hours of the day, to visit a jail in order to advise with their clients; and if denied admission, they are not obliged to resort to an action of trespass. but may obtain redress by summary process, Matter of Sheriff and Jailer of N. Y. 1 Wheeler's Crim. Cas. 303.

2. **Designation by court.** The power to appoint a counselor of the court to assist a prosecuting officer in the trial, is an incidental power of the court, and the fact that such person expects compensation will not deprive the court of its power to appoint him. State v. Bartlett, 55 Maine, 200.

3. On the trial of an indictment for rape, the defendant objected to F., an attorney assisting in the prosecution, and filed his affidavit stating in substance, that he had employed F. to defend him, executed to F. his notes for $250, and disclosed to him the facts in the case, and the evidence for his defense. *Held* that the permitting F. to take part in the prosecution, was error. Wilson v. State, 16 Ind. 392.

4. The fact that the trial was conducted without the aid of any prosecuting attorney, or by one who, with the assent of the court, acted as such without competent authority, is not ground for a new trial. Tesh v. Com. 4 Dana, 522.

5. **Buying claim.** The purchasing of debts by attorneys, with intent to bring suits upon them in justices' courts, is not prohibited by the statute of New York (3 R. S. 5th ed. § 58), which provides that no attorney, counselor, or solicitor, shall buy any bond, bill, promissory note, bill of exchange, &c., for the purpose of bringing any suit thereon. Goodell v. People, 5 Parker, 206.

6. **Removal.** The official misconduct of an attorney at law, may be inquired into in a summary manner by the court, and if guilty, his name may be stricken from the roll of attorneys. Rice v. Com. 18 B. Mon. 472; Turner v. Com. 2 Metc. Ky. 619; Walker v. Com. 8 Bush, 676. Or the proceeding may be by information. Baker v. Com. 10 Ib. 592.

7. The fact that the counsel of a prisoner has projected his escape, is ground for the removal of the counsel as a member of the bar. Matter of Sheriff and Jailer of N. Y. 1 Wheeler's Cr. Cas. 303.

8. The power to disbar an attorney is possessed by all courts which have authority to admit attorneys to practice. It can only be exercised when there has been such misconduct on the part of the attorney as shows him to be an unfit member of the profession. Before a judgment disbarring an attorney is rendered, he should have notice of the grounds of complaint against him, and opportunity of explanation and defense. Mandamus is the proper remedy to restore an attorney disbarred, where the court below has exceeded its jurisdiction. *Ex parte* Robinson, 19 Wallace, 505, per Field, J.; s. c. 2 Green's Crim. Reps. 135.

*As to privileged communications between attorney and client, see* EVIDENCE.

## Autrefois Acquit, and Autrefois Convict.

*See* FORMER ACQUITTAL OR CONVICTION.

# Bail and Recognizance.

1. Authority to admit to bail, or to compel a recognizance.
2. Bail when in general refused or allowed.
3. Proof required to admit to bail.
4. Form and requisites of recognizance.
5. Construction and validity of recognizance.
6. Return of recognizance.
7. Discharge of bail.
8. Forfeiture of recognizance.

## 1. Authority to admit to bail, or to compel a recognizance.

**1. In general.** The power to take bail is incident to the power to hear and determine the offense charged. People v. Van Horne, 8 Barb. 158; Young v. Shaw, 1 Chip. 224. And the court may admit the prisoner to bail on a second application after having previously refused to do so. *Ex parte* Campbell, 20 Ala. 89.

**2. Courts of record.** The Supreme Court of New York, or a justice thereof, as well as courts of Oyer and Terminer, have authority to bail in all cases. People v. Van Horne, 8 Barb. 158; *Ex parte* Taylor, 5 Cow. 39. But though the offense appear but man slaughter, it is not of course to admit to bail. Ib.

**3.** In New York, where a person is arrested under a warrant indorsed pursuant to the statute (2 R. S. 707, § 5), for an offense punishable by imprisonment in the State prison, he cannot be admitted to bail in the county where the arrest is made, but must be taken back to the county in which the warrant was issued. Clarke v. Cleveland, 6 Hill, 344.

**4.** In Georgia, the court has the discretionary power to bail in all cases. State v. Abbot, R. M. Charlt. 244. In Ohio, where a person accused of crime has been committed for trial by a justice of the peace, the Court of Common Pleas may recognize him to appear from day to day without investigating the circumstances. State v. Dawson, 6 Ohio, 251.

**5. Justices of the peace.** In Illinois, justices of the peace are authorized to take recognizances in all bailable cases. McFarlan v. People, 13 Ill. 9. In Kentucky, they may take bail. Hostetter v. Com. 12 B. Mon. 1.

**6.** In South Carolina, two justices of the peace have power to admit to bail a prisoner brought before them on a charge of felony, but not after he has been committed. Barton v. Keith, 2 Hill, S. C. 537.

**7.** In Massachusetts, a justice of the peace has no authority to admit to bail for an offense which may be proceeded against as well by action or information *qui tam* as by indictment. Com. v. Cheney, 6 Mass. 347; nor after a prisoner has been committed by another justice. Com. v. Canada, 13 Pick. 86. Neither can he let to bail one convicted of felony who escapes before sentence into another State and is afterwards brought back. Com. v. Otis, 16 Mass. 198.

**8.** In Vermont, a justice of the peace, upon the complaint of a private person, for a felony or misdemeanor, may arrest, bind over or commit for trial. But unless the party complaining has a pecuniary interest in the conviction, the bond must be taken to the State. State Treasurer v. Rice, 11 Vt. 339.

**9.** In Virginia, after the prisoner has been sent to a court of record for trial, a justice of the peace has no authority to admit him to bail. Hamlett v. Com. 3 Gratt. 82. But the justice can take bail after the examining court has decided that the prisoner is bailable and fixed the amount of bail. Ib.

**10.** In New York, where a justice of the peace was authorized to hear a complaint and take a recognizance only in the absence of the police justice residing in the same town, it was held that the presumption, in the absence of proof, was that the justice of the peace did not exceed his jurisdiction. People v. Mack, 1 Parker, 567. The commitment of the accused, after the record of conviction has been signed, ousts the magistrate of jurisdiction to take a recognizance. People v. Duffy, 5 Barb. 205; People v. Brown, 23 Wend. 47. Whether two justices of the peace have authority, under the statute

relative to disorderly persons, to take the recognizance after the filing of the record and previous to commitment—*query*. People v. Brown, 23 Wend. 47.

11. In Connecticut, a justice of the peace may admit a prisoner to bail at an adjourned examination. Potter v. Kingsbery, 4 Day, 98. In the same State, a justice of the peace has authority to require sureties of the peace and good behavior of a person charged with keeping a bawdy-house, and on his failing to comply with such order, may commit him to prison for a term not exceeding thirty days. Darling v. Hubbell, 9 Conn. 350.

12. A magistrate who is authorized to take the recognizance of persons accused of crime cannot delegate the power to another. Butler v. Foster, 14 Ala. 323; nor after he has bound over the accused, cancel the recognizance and discharge him. Benjamin v. Garee, Wright, 450.

13. **U. S. commissioner.** A United States commissioner, as respects the taking of bail, has the same power as State magistrates. U. S. v. Horton's Sureties, 2 Dillon, 94; s. c. 1 Green's Crim. Reps. 431.

14. **Sureties for good behavior.** At common law, courts of record may require sureties for good behavior from a person who has been convicted of a gross misdemeanor. Estes v. State, 2 Humph. 496. In Pennsylvania, where a person is tried for burglary and acquitted, the court may compel him to find sureties for the peace and good behavior. Bamber v. Com. 10 Barr, 339.

15. When a married woman is disqualified by law from taking the oath necessary to obtain a peace warrant, her husband may demand surety of the peace in her behalf against any one from whom danger to her life or person may be justly apprehended; and the same is true as to the other domestic relations. State v. Tooley, 1 Head, 9.

16. A complaint on oath praying for surety of the peace, which states that the "affiant verily believes and actually fears, and has just cause to fear and apprehend that the said J. S. will kill him, said affiant, or do him great bodily injury, or procure others to do so," is bad for being in the alternative. Steele v. State, 4 Ind. 561.

### 2. Bail when in general refused or allowed.

17. **In treason.** There must be strong circumstances which will induce the court to admit a person to bail who is charged with high treason. U. S. v. Stewart, 2 Dallas, 343. But see U. S. v. Hamilton, 3 Ib. 17.

18. **In murder.** An indictment for a capital offense furnishes of itself, a presumption of guilt too great to entitle the defendant to bail as a matter of right. It creates a presumption of guilt for all purposes, except the trial before a petit jury. People v. Tinder, 19 Cal. 539.

19. In Alabama, the court has power, where "the proof is not evident, or the presumption great," to admit to bail a prisoner accused of murder. *Ex parte* Simonton, 9 Porter, 390. And in that State, under the constitution (art. 1, § 17) and laws (Code §§ 3669–70), a person indicted for murder is entitled to bail, unless the court to which the application is made is of opinion, on the evidence adduced, that he is guilty of murder in the first degree, and if the application for bail is made to a circuit judge, and is by him refused, the evidence in the case may be set out on exceptions (Code § 3673), and application made thereon to the Supreme Court. *Ex parte* Banks, 28 Ala. 89. On such an application, the prisoner is presumed to be guilty. *Ex parte* Vaughan, 44 Ala. 17.

20. In Alabama, where the trial of a capital offense is continued at one term, on account of the disability of the presiding judge, and at the succeeding term by the State, without the defendant's fault or consent, he has a right to be admitted to bail, notwithstanding the case had been previously continued on his motion. *Ex parte* Stiff, 18 Ala. 464.

21. In Arkansas, an indictment in a capital case raises such a presumption of guilt as to deprive the prisoner of the privilege of being admitted to bail as a matter of right; and to entitle him to it, he must rebut the pre-

sumption raised against him by the indictment. *Ex parte* White, 4 Eng. 222.

22. In Indiana, where a prisoner is indicted for murder in the first degree, he may sue out a writ of habeas corpus to be admitted to bail, and upon proof that he is guilty of a bailable homicide, he should be allowed bail. Lumm v. State, 3 Ind. 293.

23. In Illinois and Missouri, every offense is bailable, except capital offenses where the proof is evident or the presumption great. Shore v. State, 6 Mo. 640; Foley v. People, 1 Breese, 32. In Pennsylvania and Kentucky, in capital cases, where the proof is evident, or the presumption great, the prisoner will not be admitted to bail. Com v. Keeper of Prison, 2 Ashm. 227; Villery v. Com. 8 B. Mon. 3. In New Jersey, the power of the court to admit to bail in capital cases, will be seldom exercised, and with great caution. State v. Blackafellow, 1 Halst. 332.

24. In South Carolina, after indictment for a capital offense, the prisoner may be admitted to bail, at the discretion of the court; and the court may entertain affirmative affidavits, showing that the prosecution was instituted from malice or mistake. State v. Hill, 3 Brev. 89. But where two justices under the habeas corpus act had admitted a prisoner to bail who was charged in the warrant with murder, it was held that they were liable to indictment. State v. Arthur, 1 McMullan, 456.

25. **Circumstances of homicide to be inquired into.** The mere fact that a grand jury has found an indictment for murder, does not preclude an inquiry into the facts of the case to ascertain whether the offense may not be of such grade as to entitle the prisoner to bail. Lynch v. People, 38 Ill. 494. The consideration that the jury in a capital case disagreed, will not in itself, entitle the prisoner to bail. State v. Summons, 19 Ohio, 139. But in deciding an application to bail a prisoner indicted for murder, the result of a previous trial is proper to be considered in determining the probability of a future conviction, and of the prisoner's guilt. Where the jury on a former trial were equally divided, six being in favor of acquittal, and six for conviction, and it appeared that a second trial would soon take place, and that the prisoner's health was not being seriously impaired by his confinement, bail was refused. People v. Cole, 6 Parker, 695.

26. **Illness of prisoner.** Where a prisoner under indictment for murder was in such ill health that his confinement endangered his life, it was held to be good cause for admitting him to bail. Semme's Case, 11 Leigh, 605. Where a person was detained on a charge of piracy, it was held that if in the opinion of a skillful physician, the nature of the prisoner's illness was such that confinement must be injurious, and might be fatal, he ought to be bailed. U. S. v. Janes, 3 Wash. C. C. 224. In Virginia, where the accused was in prison under four indictments for felony, and it was proved that continued confinement would endanger his life, he was admitted to bail. Archer's Case, 6 Gratt. 705.

27. **In cases not capital.** In cases of felony the prisoner cannot demand as of right to be released from imprisonment and let to bail. He should not be so released, unless the court can, upon all the facts, see that letting to bail will probably insure his forthcoming to abide his trial. People v. Dixon, 4 Parker, 651.

28. The statute of New York, which provides that if a person brought up on *habeas corpus*, appear to be guilty of an offense, the judge shall hold the person to bail, although his commitment be irregular, if it be a bailable offense, contemplates a clear case of guilt, and does not apply to a case where two coroner's inquests have been held, one of which found that the death resulted from suicide, and the other, that there was cause to suspect the defendant of the homicide. People v. Budge, 4 Parker, 519.

29. Where two grand juries had found that the crime committed was manslaughter, and one that it was murder, it was held that the prisoner was entitled to the benefit of the presumption that his offense was no more than manslaughter, and he was admitted to bail. People v. Van Horne, 8 Barb. 158.

30. In Virginia, where the defendant is

acquitted on the trial of one of several indictments found on substantially one and the same offense, he will be entitled to bail. Green's Case, 11 Leigh, 677. But acquittal on the trial of one of two indictments for passing counterfeit money will not entitle the prisoner to be let to bail in the other. Summerfield's Case, 2 Rob. 767.

31. In Georgia, in crimes of a high grade, where the proof is positive, and there are no extrinsic circumstances in favor of the prisoner, bail will be refused. State v. Howell, R. M. Charlt. 120. But where there are mitigating circumstances in favor of the prisoner, and a presumption that he has only been guilty of a minor offense, the court will admit to bail. State v. Wicks, Ib. 139.

32. Upon indictment for mayhem, if the offense is flagrant without mitigating circumstances, bail will not be taken. State v. Mairs, Coxe, 335.

33. When a person brought before a magistrate for a violation of the act of New York of April 9, 1855, "for the prevention of intemperance, pauperism, and crime," demands that his examination shall be taken, and offers bail for his appearance at the next Court of Sessions, the refusal of his request by the magistrate will be error. People v. Berberrich, 20 Barb. 224.

34. **Omission to prosecute.** A person accused of felony may make the omission to prosecute a good claim for bail, if the omission is oppressive; as when the prosecuting officer, or committing magistrate, permits a term of a court in which the prisoner could have been tried, to pass without commencing the trial. State v. Abbott, R. M. Charlt. 214. In South Carolina, a prisoner accused of forgery will be admitted to bail at the second court, if no indictment has been found against him. State v. Buych, 2 Bay, 563. In Massachusetts, where, upon indictment for burglary, the prosecuting attorney did not deem it safe to go to trial upon the evidence he had, the prisoner was bound in his own recognizance to appear for trial at the next term. Com. v. Phillips, 16 Mass. 423.

35. **After conviction.** The prisoner might be admitted to bail after conviction at common law. Davis v. State, 6 How. Miss. 399; State v. Hill, 3 Brev. 89.

36. Bail is founded on the doubt which may exist as to the prisoner's guilt. If his guilt is beyond doubt, he ought not to be bailed. But the prisoner may be admitted to bail, even after conviction and sentence, when it appears that he was improperly convicted, or there are serious doubts as to his guilt. People v. Lohman, 2 Barb. 450. Under section 19 of the statute of New York, relative to *habeas corpus*, a person, after conviction for a misdemeanor, is entitled to be heard on an application to be let to bail, even after the execution of judgment has commenced, where a writ of error has been allowed in his case, with a direction that it shall operate as a stay of the execution of the judgment; and it is discretionary with the judge to let him to bail pending the decision of the court on the writ of error. People v. Folmsbee, 60 Barb. 480.

37. In North Carolina, after conviction for passing counterfeit money, it was held that the prisoner was not entitled to be admitted to bail, as a matter of right; but that it was in the discretion of the court before which the appeal was taken. State v. Rutherford, 12 Hawks, 453.

38. In Mississippi, where the punishment is only fine and imprisonment, the court will admit the prisoner to bail after conviction when the circumstances of the case justify it. But the power will be exercised with great caution, and only in minor offenses. Davis v. State, 6 How. Miss. 339.

39. In South Carolina, although in minor offenses, it is usual to admit to bail, after conviction, where motions for new trial or in arrest of judgment are made, yet it will not be done after conviction of an infamous crime. State v. Connor, 2 Bay, 34.

40. **Upon allowance of writ of error.** Whether a prisoner in confinement in pursuance of a final judgment and sentence can be admitted to bail after an allowance of a writ of error, when there is no direction therein that the same shall operate as a stay of proceedings—*query*. Dempsey v. People, 5 Parker, 85.

41. **Appeal from decision.** Though the

decision of a committing magistrate or court in relation to admitting to bail, is final as to other magistrates or courts of co-ordinate or concurrent jurisdiction, yet it may be reviewed on appeal. People v. Cunningham, 3 Parker, 531. Where a police justice by whom the prisoner was committed, and also the court of General Sessions before whom the prisoner was triable, refused bail, and afterward a judge of the Supreme Court sitting at chambers, admitted to bail, the latter decision was reversed by the general term of the Supreme Court, on the ground that the question was *res adjudicata* when brought before the single judge. Ib. But when bail is refused on the ground that it is not sufficient, a new application may be made for a discharge on offering other bail. Ib.

3. Proof required to admit to bail.

**42. In general.** The maxim of law that every one is presumed innocent until he is proved guilty, does not apply to the question of admitting a person accused of crime to bail. People v. Goodwin, 1 Wheeler's Crim. Cas. 434.

**43.** In Ohio, if the evidence produced on the hearing of the application to admit to bail be such that it would not sustain a verdict of guilty, on a motion for a new trial the court will admit to bail. State v. Summons, 19 Ohio, 139.

**44.** A person indicted for murder, cannot be admitted to bail on *ex parte* testimony. State v. Dew, 1 Taylor, 142.

**45. Testimony at inquest.** On a question of bail before indictment, on a charge of murder, the court on *habeas corpus* may look into the examination had by the coroner by whom the prisoner was committed, to ascertain whether a crime has been perpetrated, and if so the strength of the proofs that support it. People v. Beigler, 3 Parker, 316. But when the indictment has been found, the inquest of the coroner, and the depositions before the magistrate, cannot be regarded on an application to admit to bail. People v. Dixon, 4 Ib. 654.

**46. Affidavits or oral testimony.** Upon an application to be let to bail the prisoner is not restricted to the record, but extraneous facts may be introduced in evidence. People v. Cole, 6 Parker, 695. The affidavits of jurors are admissible to prove the disagreement of the jury on a former trial. Ib.

**47.** On an application to be admitted to bail after indictment for a capital offense, affidavits or oral testimony to repel the presumption of guilt arising from the indictment can only be received under special and extraordinary circumstances, such as:—the existence at the time the indictment was found of great popular excitement with reference to the prisoner; proof that the person charged to have been murdered is still alive; the admission of the public prosecutor that the evidence will not warrant a conviction; where there has been a trial and the jury have disagreed, or where after verdict, a new trial has been granted for insufficiency of the evidence; and where the trial of the prisoner has been unreasonably delayed. People v. Tinder, 19 Cal. 539.

4. Form and requisites of recognizance.

**48. At common law.** A recognizance at common law was an obligation entered into before some court of record or magistrate, to do a certain thing, as to keep the peace, or to appear and answer to a criminal charge. It was not signed by the party. The cognizer acknowledged that he was indebted to the cognizee, in a certain sum, to be levied of his goods and chattels, lands and tenements, if he should make default in performing the condition. In other respects it was in form like a penal bond. It was deemed of more solemnity and of greater legal affect than another bond. It was allowed a priority in point of payment, and the lands of the cognizer were bound from the time it was recorded. Shattuck v. People, 4 Scam. 477, per Treat, J.

**49. How taken.** All recognizances in cases of crime, should be taken to the State. Com. v. Porter, 1 A. K. Marsh. 44.

**50. Date.** The recognizance may bear date of the day on which the prisoner is recognized to appear. State v. Bradley, 1 Blackf. 83.

51. **Commencement.** A recognizance is sufficient which commences as follows: "Be it remembered that on, &c., came A. B., &c., before me, J. P., a justice of the peace in and for the county, &c., who acknowledged themselves, &c." Howie v. State, 1 Ala. 113.

52. **General requisites.** No particular form is required to render a recognizance valid, provided it contain the essential requisites of such an instrument. Dean v. State, 2 Sm. & Marsh. 200. But oral evidence is not admissible to give effect to a defective recognizance. Nicholson v. State, 2 Kelly, 363. And when a statute in relation to appeal requires that the accused shall recognize to the State for his personal appearance at the appellate court, the prisoner's remaining in custody is not equivalent to such recognizance. Com. v. Brigham, 16 Pick. 10.

53. The recognizance should state the ground on which it is taken, in order to show that the magistrate taking it had jurisdiction. State v. Smith, 2 Greenlf. 62; Com. v. Downey, 9 Mass. 520; Com. v. Daggett, 16 Mass. 447; Goodwin v. Governor, 1 Stew. & Port. 465; Nicholson v. State, 2 Kelly, 363. But see People v. Kane, 4 Denio, 530; State v. Hamer, 2 Carter, 371; State v. Weaver, 18 Ala. 293. The recognizance need not state that the charge was made on oath. McCarty v. State, 1 Blackf. 338.

54. A recognizance will be insufficient which only states that the prisoner was charged with the offense, without stating in some way that there was probable cause for believing him guilty. People v. Koeber, 7 Hill, 39.

55. Form of a recognizance for the appearance of a person accused of crime, who has removed the cause by certiorari, for error in his conviction. People v. Vermilyea, 7 Cow. 108.

56. **Description of offense.** It has been held that a recognizance need not recite the offense charged, or show the court in which it was taken. State v. Rye, 9 Yerg. 386; Fowler v. Com. 4 Monr. 128, or specify in the terms of the indictment the particular act which the accused conspired to do. Hall v. State, 15 Ala. 431. But when the recognizance is taken before a court of limited jurisdiction, it should so far describe the crime charged, as to show the case to be one, in which the court, had power to take bail. People v. Koeber, 7 Hill, 39. Where the recognizance required the accused to appear in the Circuit Court, to answer "*the charge herein*," without other description of the offense, it was held bad. Simpson v. Com. 1 Dana, 523.

57. The recognizance will be good, notwithstanding the offense be not described in the words of the statute. Hall v. State, 9 Ala. 827. A recognizance to answer a charge of felony, is sufficiently certain. Cotton v. State, 7 Texas, 547. But a recognizance to appear and answer a charge of "gaming," without describing the game so as to show that it is indictable, is bad. Com. v. West. 1 Dana, 165. A recognizance to appear and answer to a charge of "playing at a game of cards" is bad, simply "playing at a game of cards" not being an indictable offense. Cotton v. State, 7 Texas, 547; Towsey v. State, 8 Ib. 173.

58. **Name.** The name of the connusor if signed to the recognizance, need not be stated in the body of it. Cunningham v. State, 14 Mo. 402. And the omission of a party's name, from the body of a recognizance, will not render it null as to him if he has acknowledged it. Hall v. State, 9 Ala. 827.

59. **Condition.** A penalty and condition are essential to a recognizance. Caldwell v. Brindell, 1 Jones, 293. The essential parts of the obligation and condition should be stated in the body of the recognizance; and as close an analogy between the recognizance to appear before the examining magistrate, and the one to appear at the court to which it is returned, should be observed, as possible. Dillingham v. U. S. 2 Wash. C. C. 422.

60. Words superadded to the condition of a recognizance, beyond what are authorized by the statute, do not invalidate the recognizance, but it has the same effect as if they had been omitted. Williford v. State, 17 Texas, 653; Howie v. State, 1 Ala. 113.

61. Where the statute provided that the

recognizance should be made returnable to the term of the next court; a recognizance conditioned for the appearance of the accused at a time when no court sat, was held void. Butler v. State, 12 Sm. & Marsh. 470; Com. v. Bolton, 1 Serg. & Rawle, 328; State v. Sullivant, 3 Yerg. 281. But where the accused was recognized to appear at the next term of the court, to be held on the first Monday in March, it was held that the legal effect of the recognizance was not avoided by the change in the time of holding the court. Walker v. State, 6 Ala. 350.

62. In New York, when a recognizance is taken by a justice of the peace, for the appearance of the accused to answer, it must require him to appear at the next criminal court having cognizance of the offense; and if it do not do so, the recognizance will be void. People v. Mack, 1 Parker, 567. Such a recognizance is good, notwithstanding the words, "as well to the grand as to the petit jury, and not depart the said court without leave." People v. Willis, 5 Barb. 511. In Missouri, where, under the statute (Wagner, p. 1075, § 88) authorizing a magistrate to adjourn the examination of a prisoner, not exceeding ten days at one time, the magistrate, at the request of the defendant, adjourned the examination nineteen days, and ordered him to find bail to appear at that time, it was held that as the consent of the defendant could not confer jurisdiction or power to make the order, the recognizance was void. U. S. v. Horton's Sureties, 2 Dillon, 94; s. c. 1 Green's Crim. Reps. 431.

63. The condition of a recognizance which does not go beyond enforcing the appearance of the party accused at the proper term of the court, and his submission to the process and judgment of the law, is lawful, when there is nothing in the statute that shows that less was intended. The words, "and not depart from said court without license therefor," mean not to depart from the term of the court at which the defendant was recognized to appear. State v. Baker, 50 Maine, 45.

64. Where the indictment is quashed because it was found by a grand jury summoned by the sheriff without process, the prisoner must be held to bail to appear before the next court of Oyer and Terminer. Nichols ads. State, 2 South. 539.

65. A condition in a recognizance to answer to a charge for "resisting process," sufficiently indicates the offense, although the statute makes it consist in knowingly and willfully resisting or opposing any officer in the State in serving or attempting to serve or execute any legal writ or process. Browder v. State, 9 Ala. 58.

66. The recognizance may bind the accused either to appear and answer the offense charged, or to appear and answer what shall be objected against him. People v. Koeber, 7 Hill, 39; Gildersleeve v. People, 10 Barb. 35. In Tennessee, where the defendant was required to find sureties that he would not gamble for twelve months, it was held not valid, but that it ought to have been a recognizance with sureties for good behavior generally. Estes v. State, 2 Humph. 496.

67. Where a person being indicted for an assault with an attempt to commit a rape was released upon a bond in which he and his sureties bound themselves that he should appear and answer to the charge of rape, it was held that such a condition rendered the bond void. State v. Forno, 14 La. An. 450.

68. **Amount.** The fact that the defendant is a man of fortune, may be considered in fixing the amount of his bail. *Ex parte* Banks, 28 Ala. 89.

69. Bail to the amount of two thousand dollars on a charge of perjury, and on a charge of stealing, in the sum of five hundred dollars, is not excessive. Evans v. Foster, 1 New Hamp. 374. Where a person was charged with embezzling between seventy and eighty thousand dollars, bail in the sum of twenty-five thousand dollars was held not to be excessive. *Ex parte* Snow, 1 R. I. 360.

70. The sufficiency of an affidavit to be admitted to bail, and the amount of bail on mesne process in the District of Columbia, are by the act of Congress of 1842, ch. 108, to be determined by the District Court. *Ex parte* Taylor, 14 How. U. S. 3.

71. **Number of sureties.** Where the prisoner was directed to give bail to the

amount of four hundred dollars, with two sureties for two hundred dollars each, and he gave bail to the amount of four hundred dollars, with ten sureties in the sum of forty dollars each, it was held insufficient, and that the sureties were not bound. State v. Buffum, 2 Fost. 267.

72. A recognizance taken by a magistrate with a single surety is valid, notwithstanding the statute requires two or more sureties. State v. Baker, 50 Maine, 45.

73. **How executed.** In general, a recognizance need not be under seal. State v. Foot, 2 Mills, 123. Whether where a recognizance which is required to be under seal is signed by several, and seals set opposite the names of some of them, the seals upon the paper may not be referred to all who sign it—*query*. Hall v. State, 9 Ala. 827.

74. When the recognizance is acknowledged, it need not be signed. Madison v. Com. 2 A. K. Marsh. 131. In Kentucky, the principal and sureties need not sign a recognizance to answer a charge of felony. Com. v. Mason, 3 A. K. Marsh. 456.

75. Where an indictment for adultery or fornication names the defendant *Caroline T.*, and the recognizance is signed *Lucinda Katharine T.*, and is conditioned for her appearance at the next term of the court "to answer to an indictment pending in said court against her for adultery and fornication;" and the recitals of the judgment *nisi* state that it appeared to the satisfaction of the court that the said *Caroline T.* "signed her bond by the name of *Lucinda Katharine T.*," it is not a variance which is available to the recognizors. Tolison v. State, 39 Ala. 103.

76. An infant prisoner should not join with his sureties in the recognizance. Semme's Case, 11 Leigh, 665.

77. A recognizance executed by the sureties alone, conditioned for the appearance of the accused to answer to a charge of larceny, is valid. Minor v. State, 1 Blackf. 236. But a recognizance executed by a surety in behalf of a person indicted, who has not been served with process, and who does not appear, is not binding. People v. Slayton, 1 Breese, 257.

78. Where a recognizance was signed and sealed by principal and sureties, and attested by justices, and by them delivered to the clerk with the warrant upon which it was founded, it was held that it was certain to a common intent that the recognizance was taken before these justices. State v. Cherry, Meigs, 232.

79. Where a recognizance taken before the requisite authority has been signed and sealed by the accused and his surety, its validity is not impaired by the failure to insert the name of the surety in a blank left for that purpose in the body of it. Badger v. State, 5 Ala. 21.

80. Where a recognizance taken by a sheriff does not show by his attestation the county of which he is sheriff, it is void. State v. Austin, 4 Humph. 213.

81. **Approval.** Where two persons approved of the recognizance by affixing to their respective signatures the letters J. P., it was held that it sufficiently appeared that the recognizance was entered into before and approved by two justices. Shattuck v. People, 4 Scam. 477.

82. **Amendment.** A recognizance with sureties, entered into before a police magistrate by a person charged with assault with intent to kill, may be amended even after an action is brought on it. State v. Young, 56 Maine, 219. A recognizance to appear and answer at a certain term of the court, may be extended at any subsequent term if an indictment be found at that term. Ellison v. State, 8 Ala. 273.

### 5. Construction and validity.

83. **Rule of construction.** The rule of construction of a recognizance in a criminal case is, if possible, to make it answer the purpose for which it was intended, and that where it contains words that are absurd and repugnant they are to be rejected. McCarty v. State, 1 Blackf. 338; State v. Wellman, 3 Ohio, 14.

84. A recognizance taken in the course of proceedings may be valid notwithstanding the proceedings are erroneous. Com. v. Huffey, 6 Barr, 348. When the recognizance is filed of record, the presumption is

that the charge was regularly preferred and investigated, and the proper decision made, before it was entered into and acknowledged. McCarty v. State, *supra;* People v. Blankman, 17 Wend. 252. The fact that persons offered as sureties received conveyances of property from friends of the defendant to enable them to qualify as bail, is not an objection to them. People v. Ingersoll, 14 Abb. Pr. N. S. 23; s. c. 1 Green's Crim. Reps. 635.

**85. Sufficiency of complaint.** A recognizance taken upon a complaint before a magistrate, is not bad because the complaint contains two counts with a different offense set forth in each. State v. Fowler, 28 New Hamp. 184.

**86. Taken by unauthorized person.** An instrument purporting to be a recognizance taken by a person not authorized by law to admit to bail in criminal cases, is a contract between the sureties and the State. Dennard v. State, 2 Kelly, 137.

**87. Sufficiency of recital.** It was argued that the magistrate had no authority to require the prisoner to enter into a recognizance, because it did not appear that he found that "there was probable cause to charge the accused," as required by the statute. The recital in the recognizance was, that he found that "there was good reason and probable cause to believe said L. is guilty." *Held* sufficient. State v. Baker, 50 Maine, 45.

**88. Entered into by several.** Where the parties acknowledge themselves bound in a given sum, to be levied severally and individually on their respective goods, it is a joint and several recognizance, and not the several recognizances of each. Ellison v. State, 8 Ala. 273.

89. Where several of the same name bind themselves by a recognizance, it will not be void for ambiguity if from the whole instrument they can be sufficiently identified. State v. Cherry, Meigs, 232.

90. A person may be admitted to bail on Sunday. State v. Wyatt, 6 La. An. 701. But a recognizance entered into on Sunday, to prosecute an appeal in a criminal case, is void. State v. Suhur, 33 Maine, 539.

91. A recognizance taken after the issuing of a mittimus for the commitment of the prisoner, and giving him in charge of an officer who is taking him to jail, is void. State v. Young, 56 Maine, 219.

**92. Place to appear.** Although a recognizance does not specify the court house of the county as the place at which the prisoner is to appear for examination, yet that place is to be intended, when the statute points out that as the only place where the examination shall be had. Tyler v. Greenlaw, 5 Rand. 711.

93. A recognizance requiring the accused to appear at the next Court of Sessions to be held at the court house, in the city of H., to be tried by a jury on two indictments for forgery, means the next Court of Sessions to be held in the city of H., and not the next Court of Sessions to be there held at which a jury is summoned. People v. Derby, 1 Parker, 392.

**94. Force and effect.** A recognizance to appear and answer binds the accused not only to appear at the time to which it is returnable, but to continue to appear until acquitted or discharged; or if tried and found guilty, until the sentence of the court is passed upon him, unless allowed to depart sooner. Dennard v. State, 2 Kelly, 137; People v. McCoy, 39 Barb. 73. And the accused is not to depart until discharged, although no indictment be found against him, or although he be tried and found not guilty. State v. Stout, 6 Halst. 124.

95. The binding force of a recognizance does not depend upon the fact that the court before which the accused is required to appear has jurisdiction of the offense charged, but upon the duty and power of the magistrate to examine and admit the accused to bail. State v. Edney, 4 Dev. & Batt. 378.

96. The prisoner has a right to an examination before he can be compelled to enter into a recognizance; but if he waive an examination, a recognizance entered into without it is valid. Champlain v. People, 2 Comst. 82.

97. Where upon a complaint to a magistrate who has concurrent jurisdiction to

try it with the Court of Common Pleas, the magistrate decides that the accused shall recognize for his appearance at that court, it is not a bar to an indictment for the same offense. Com. v. Harris, 8 Gray, 470.

### 6. Return of recognizance.

**98. How to be made.** Recognizances in criminal cases must be made returnable before the court, and not before a judge at chambers. Corlies v. Waddell, 1 Barb. 355. Where a recognizance is returnable at the next court of Oyer and Terminer, the fair interpretation is, that the court of Oyer and Terminer of the county where the indictment was found was intended. People v. McCoy, 39 Barb. 73.

**99. What to be returned.** In Illinois, the recognizance of the accused and of the witnesses on the part of the prosecution, are all the proceedings before the magistrate that need be transmitted to the court. Shattuck v. People, 4 Scam. 477.

**100. To be filed.** Under the statute of New York, which requires that whenever a prisoner shall be let to bail by an officer out of court, the officer shall immediately cause the recognizance taken by him to be filed with the clerk of the county in which the party bailed was imprisoned, the court can take no action upon the recognizance until it is filed. In a suit upon a recognizance, it must appear that the recognizance was filed in or made a record of the court in which it is returnable; and it is a good defense that the recognizance was taken on an illegal arrest. People v. Shaver, 4 Parker, 45.

**101. Right of sureties.** A recognizance cannot be respited from one court to another in opposition to the remonstrance and express dissent of the sureties, if they have the accused in court when the motion is made. People v. Clary, 17 Wend. 374.

### 7. Discharge of bail.

**102. In general.** Bail may be discharged by the death of the principal, or by the conviction and imprisonment of the principal. Canby v. Griffin, 3 Harring. 333; People v. Partlett, 3 Hill, 570. And when the defendant is acquitted, his recognizance is *ipso facto* discharged without any further entry. Mills v. McCoy, 4 Cow. 406.

**103. Failure to prosecute.** A person accused of crime, and under recognizance, is not entitled as of course to a discharge, although no indictment be found. Fitch v. State, 2 Nott & McCord, 558; Champlain v. People, 2 Comst. 82. And the entry of a *nolle prosequi* does not entitle the accused to discharge from custody, nor his bail to discharge. State v. Haskett, 3 Hill, S. C. 95. But where a person has been bound over to keep the peace, and no indictment is found or continuance had, such failure operates as a discharge. Goodwin v. Governor, 1 Stew. & Port. 465. And where a prisoner entered into a recognizance to appear at the next term, and not at the succeeding session, it was held that he was entitled to be discharged at the end of the term. Keefhaver v. Com. 2 Penn. 240.

**104.** A prisoner who is recognized to appear on the first day of the next court, must appear at the first court actually held, and a failure to hold the court at the usual time, will not discharge him. Com. v. Cayton, 2 Dana, 138.

**105.** Where upon an accusation of bastardy, the defendant appeared by attorney, and prevailed upon the court erroneously to quash the recognizance, it was held that it did not do away with the recognizance; but the defendant was allowed a reasonable time to appear in discharge of it. Com. v. Thompson, 3 Litt. 284.

**106. By appearance of defendant.** Where the recognizance requires the personal appearance of the defendant in court on the first day of the term to answer a charge of felony, it is not enough that he barely appear before the court on the first day, nor will anything avail to discharge the recognizance but the surrender of himself into custody to answer the felony charged. Starr v. Com. 7 Dana, 243.

**107.** In New Jersey where a prisoner who had entered into a recognizance to appear at the Oyer and Terminer made default, but appeared at a subsequent court of Quarter Sessions, and was tried and acquitted, his

bail was discharged on payment of costs. State v. Saunders, 3 Halst. 177.

**108.** When the recognizance is forfeited by the failure of the accused to appear, and he appears at the succeeding term, the court, for good cause shown by the defendant for his absence, may discharge the recognizance. U. S. v. Feely, 1 Brock. 255.

**109. Unlawful arrest.** After the prisoner has given bail for his appearance at court, the magistrate has no authority, on the ground that his bail is insufficient, to cause him to be re-arrested for the same offense. Such irregular re-arrest will not therefore discharge his bail. Ingram v. State, 27 Ala. 17.

**110.** The arrest by a private individual of one under recognizance to appear and answer, without authority in writing, being unlawful, does not discharge the recognizance. People v. Moore, 2 Douglas, 1.

**111. Arrest on other charge.** The subsequent arrest of the accused on a different charge, or his delivery (after escaping from his bail) by the authorities of another State on the requisition of the governor, when the demand does not seem to be founded on the same charge, does not discharge his bail; their remedy in such case being by application for *habeas corpus*. Ingram v. State, 27 Ala. 17.

**112. Surrender of defendant.** The surrender on demand, of the accused by the governor of the State to which he has escaped, to the authorities of the State where the crime was committed, and in which he was admitted to bail, discharges his bail. State v. Allen, 2 Humph. 258.

**113.** Although the Circuit Court of the United States cannot issue a *habeas corpus* in order to surrender a principal in discharge of his bail, yet when the principal is in confinement under the process of a State court, it will, in its discretion, respite the recognizance. U. S. v. French, 1 Gall. 1.

**114.** Special bail may arrest his principal anywhere and at any time, to surrender him in discharge of the bail. The bail may make the arrest himself, or may delegate the power to another or others, in writing. Either the bail or his deputy may call others to his aid in making the arrest, but such aid must be rendered in presence of the person authorized to make the arrest. State v. Mahon, 3 Harring. 568, per Booth, C. J.

**115.** Where the accused has neglected to comply with his recognizance, and it has been forfeited of record, the surety cannot, as a matter of right, discharge himself from liability by surrendering the principal, though the court may receive a surrender and remit the penalty in whole or in part. Com. v. Johnson, 3 Cush. 454.

**116.** When the sureties surrender their principal, it releases them from liability on the recognizance, but does not discharge the principal. Lorance v. State, 1 Carter, 359.

**117.** After the default of the principal has been recorded, his sureties may be discharged upon showing to the satisfaction of the court, by affidavits, that the prisoner was not able to appear at the proper court by reason of illness. Com. v. Craig, 6 Rand. 731.

### 8. Forfeiture of recognizance.

**118. When to be.** The recognizance must be forfeited before motion to quash. State v. Holloway, 5 Ark. 433.

**119. Calling defendant.** Before the default of the accused is entered, it must be clearly proved that he was called and warned, and neglected to appear. Dillingham v. U. S. 2 Wash. C. C. 422; Park v. State, 4 Ga. 329; State v. Grigsby, 3 Yerg. 280; White v. State, 5 Ib. 183. He may be called on any day during the court, and it is not necessary to authorize a call on a subsequent day that notice should be given to him or his sureties. People v. Blankman, 17 Wend. 252. But notwithstanding the recognizance is continued by statute from term to term, a forfeiture cannot be taken at a subsequent term, except on notice. Moss v. State, 6 How. Miss. 298.

**120.** In Kentucky, where a person enters into a recognizance to the State, it is not necessary to the taking of his default that he be called. But it is his duty to appear and have his appearance recorded as a discharge of the recognizance; and the State is

not bound to prove that he did not appear. Leeper v. Com. Litt. Sel. Cas. 102.

**121. Time to appear.** Where the condition of a recognizance is not for the appearance of the accused on any particular day, he has the whole term to enter his appearance. Griffin v. Com. Litt. Sel. Cas. 31.

**122.** Where the accused is recognized to appear on the first day of the term, his appearance on a subsequent day of the term will not save his recognizance. Shore v. State, 6 Mo. 640. But if he appear during the term, his sureties may be discharged. Adair v. State, 1 Blackf. 202.

**123.** A recognizance for the appearance of the accused on a certain day, is not forfeited by his neglect to appear at a subsequent day, to which the court was changed by a law passed after the taking of the recognizance, the law not providing that recognizances should be returned and parties appear on that day. State v. Melton, Busbee, N. C. 426.

**124.** A prisoner was recognized to appear at the "April criminal term." The next succeeding term of the criminal court was in May, and not April. In June there was a common law court, when he was called and failed to answer. *Held*, that there was no forfeiture of the recognizance. Thurston *et al.* v. Com. 3 Dana, 224.

**125.** Where a recognizance was entered into in January, and at a Court of Sessions held in June following the accused was defaulted, and his recognizance declared forfeited and ordered to be prosecuted, and it appeared that a regular term of the Court of Sessions had been held in March of the same year, though no jury trial had then been had, it was held that there had been no breach of the recognizance. People v. Derby, 1 Parker, 392.

**126. Neglecting to appear.** The fact that the defendant is imprisoned on another charge in a neighboring State will not excuse his non-appearance in obedience to his recognizance. Tailor v. Taintor, 16 Wallace, 366; s. c. 2 Green's Crim. Reps. 143. And the same is true as to the defendant's illness; but it will excuse the sureties from a surrender of him at the subsequent term. State v. Edwards, 4 Humph. 226.

**127.** A person indicted for perjury neglected to appear for trial because he could not obtain certain testimony. On motion to forfeit his recognizance it was ordered that the motion be granted, unless within thirty days he gave a new recognizance to appear at the next court. People agt. Winchell, 7 Cow. 160.

**128.** Where the accused, who has entered into a recognizance to appear to answer to an indictment, appears and is discharged by judgment of court, and the judgment is afterward reversed, and the prosecution resumed, his neglecting to appear will not forfeit the recognizance. State v. Murphey, 10 Gill & Johns. 365.

**129.** Where, upon an accusation of assault with intent to commit a rape, the prisoner was bound over for trial before the Superior Court in a bond, the condition of which was that "the prisoner should appear before said court and abide final judgment on said complaint," it was held that the neglect of the accused to appear and answer to an information filed against him for the offense charged in the complaint was not a forfeiture of the bond. Kingsbury agt. Clark, 1 Conn. 406.

**130.** Where an undertaking of bail stipulates that the principal shall appear at the then next term of the Circuit Court, and from term to term thereafter, until discharged by law, "to answer an indictment pending in said court against him," but does not describe or identify the indictment, the prosecution may (Code of Alabama, § 3679) show "the particular case to which the undertaking is applicable," on the failure of the principal to appear. Vasser v. State, 32 Ala. 586.

**131. Failure to comply with judgment.** Where the recognizance requires the accused not only to appear, but not to depart without leave of the court, and to abide the order and judgment thereof, if he fail to comply with the judgment against him, the recognizance will be forfeited. State v. Whitson, 8 Blackf. 178.

**132. Neglecting to keep the peace.**

Where a person recognized to keep the peace is guilty of acts of violence out of the State, it is no breach of his recognizance. Key v. Com. 3 Bibb, 495.

**133. Entry.** Where the clerk neglected to record the forfeiture of a recognizance, it may be entered *nunc pro tunc*. Rhodes v. Com. 3 Harris, 272. And see McFarlan v. People, 13 Ill. 9.

**134.** A recognizance required the appearance of W. H. G., and the indictment was found against H. G., and a forfeiture of the recognizance entered for his non-appearance. *Held*, that this did not show any breach of the obligation. Hopkins v. Walter, 11 Ill. 542.

**135.** When two forfeitures of a recognizance are entered at different terms of the same court, the second entry may be regarded as surplusage. State v. Pepper, 8 Mo. 249.

**136. Effect.** A judgment on a recognizance for a failure to appear is not a bar to another prosecution for the same offense. Com. v. Thompson, 3 Litt. 284.

**137. Remission.** In Pennsylvania, a recognizance, after it is forfeited, may be remitted by the governor. Com. v. Denniston, 9 Watts, 142.

*See* BASTARDY, 6.

## Barratry.

**1. Meaning of.** Barratry consists in the willful misconduct of the master or mariners, done for some unlawful or fraudulent purpose, contrary to their duty to the owners of the vessel—as the criminal delay of the voyage for an unlawful purpose. Roscow v. Corson, 8 Taunt. 684; or the willful deviation by the master in fraud of the owners. Vallejo v. Wheeler, Cowp. 143; or the stealing from the cargo by the seamen. Stone v. National Ins. Co. 19 Pick. 34; or dropping anchor and going ashore for private emolument. Ross v. Hunter, 4 Term R. 33. And where the master or mariners of a neutral vessel resist the search of a belligerent, it is barratry. Brown v. Union Ins. Co. 5 Day, 1.

**2. Negligence and intoxication.** Barratry cannot be committed by negligence, unless the negligence be so gross, as to amount to evidence of fraud. Patapsco Ins. Co. v. Coulter, 3 Pet. 222, 234; Wigin v. Amory, 14 Mass. 1; Cronsillat v. Ball, 4 Dall. 294. But the offense cannot be excused or palliated by intoxication. Lawton v. Sun Mut. Ins. Co. 2 Cush. 500.

## Barretry.

**1. What is.** A barretor is a common mover, exciter or maintainer of suits or quarrels, either in courts of justice or the country. Com. v. Davis, 11 Pick. 432. Whether three acts are sufficient to constitute the perpetrator of them a common barretor—*query*. Com. v. McCullock, 15 Mass. 227. They could only be such upon proof of a malicious design to harass and oppress. Ib.

**2. Justice of the peace.** An indictment for barretry may be sustained against a justice of the peace for promoting litigation in order to obtain fees, although the prosecution excited by him may not have been groundless. And in order to show guilty motive, evidence may be given to prove that the justice exacted illegal fees as a condition of compounding prosecutions. State v. Chitty, 1 Bail. 379.

**3. Indictment.** The indictment must contain the words "common barretor." It may charge the defendant generally as "a common barretor." Com. v. Davis, 11 Pick. 432. The acts of misconduct need not be set forth in the indictment; but the prosecutor must, before the trial, give the defendant a note of the particular acts which he intends to prove; and if he omits to do so, the court will not suffer him to proceed in the trial. Ib.

**4. Bill of particulars.** In a prosecution for barretry, the bill of particulars concerns the proof and mode of trial only, and not the indictment. It is no part of the record, and it is not subject to demurrer, or a matter of technical nicety; but is simply to give notice and guard against surprise on the

trial. Com. v. Davis, 11 Pick. 432; State v. Chitty, 1 Bail. 379.

5. **Punishment.** The punishment for barretry, is by fine and imprisonment; and where the accused is an attorney, his name will be stricken from the rolls. State v. Chitty, *supra*.

# Bastardy.

1. The complaint.
2. Warrant.
3. Examination.
4. Indictment.
5. Evidence.
6. Security.
7. Settlement of prosecution.
8. Concealing death of bastard child.

## 1. The complaint.

**1. By whom made.** In Kentucky, under the statute of 1795, the sole power of commencing the proceedings belongs to the mother. Burghen v. Straughen, 7 J. J. Marsh. 583. The statute of that State in relation to bastardy, applies to single women only. Sword v. Nestor, 3 Dana, 453. A free woman of color may institute a complaint and obtain a warrant against the father of her bastard child. Williams v. Blincoe, 5 Litt. 171. The courts have jurisdiction although the child was born out of the State. Taner v. Allen, Litt. Sel. Cas. 25.

2. In New Hampshire, the complaint may be made by a married woman, and the husband need not be joined. Parker v. Way, 15 New Hamp. 45. In North Carolina, a man may be charged with the maintenance of a bastard child begotten upon a married, as well as upon a single woman. State v. Pettaway, 3 Hawks, 623; State v. Allison, Phil. N. C. 346.

3. In Alabama, the complaint can only be made by an unmarried woman. Judge v. Kerr, 17 Ala. 328.

4. In Indiana, any unmarried female residing in the State may complain before a justice of the peace against the father of her bastard child, without reference to the place where the child was born. Cooper v. State, 4 Blackf. 316. The prosecution must be brought in the name of the State. State v. Bradley, 1 Blackf. 83; Woodburk v. Williams, Ib. 110; Dickinson v. Gray, 2 Ib. 239.

5. In Maine and Massachusetts, when the female marries after the child is born, the husband must unite with her in the prosecution. Kenniston v. Rowe, 16 Maine, 38; Wilbur v. Crane, 13 Pick. 284.

**6. Nature of the proceedings.** In Massachusetts and Maryland, the proceedings, properly speaking, are criminal. Wilbur v. Crane, 13 Pick. 284; Cummings v. Hogdon, 13 Metc. 246; Hyde v. Chapin, 2 Cush. 77; Oldham v. State, 5 Gill, 90; Root v. State, 10 Gill & Johns. 374. In Maine, the proceedings are not local. Dennett v. Kneeland, 6 Maine, 460; and they may be commenced after the birth of the child. Kenniston v. Rowe, 16 Maine, 38. The fact that the accused is an infant, is no defense. McCall v. Parker, 13 Metc. 372.

**7. Requisites.** In Ohio, the complaint must show on its face that the mother of the child is a single woman. Devinney v. State, Wright, 564.

8. In New Hampshire, where the complaint was not under oath, but on the 13th of January, the woman swore that on the 15th of the previous May, the child was begotten, it was held that the time was charged with sufficient certainty. Marston v. Jenness, 12 New Hamp. 137.

9. In Indiana, the affidavit of the complainant need not show that she is a resident of the county, or that the child was born there, or that it is alive. State v. Allen, 4 Blackf. 269; Beeman v. State, 5 Ib. 165. And under a recent statute, the woman is not required to be a resident of the State. State v. Gray, 8 Blackf. 274.

10. In Massachusetts, the complaint need not be in writing. Smith v. Hayden, 6 Cush. 111. In Vermont, the complaint must be in writing, and be signed and sworn to. Graves v. Adams, 8 Vt. 130. But the complainant need not swear that she is a single woman. Robie v. McNiece, 7 Ib. 419. Although the neglect of the complainant to

sign the complaint, if objected to at the proper time, may be ground for quashing the proceedings, yet it will be cured by verdict. Ramo v. Wilson, 24 Ib. 517. The complaint will be good, notwithstanding it alleges that the proceedings are under a statute which has been repealed. Blood v. Merrill, 17 Ib. 598.

**11.** In North Carolina, the complaint of the woman need not be signed by her. State v. Thompson, 4 Ired. 484. Where her examination was not signed by justices, but the warrant issued by them was on the same paper, it was held that this was a sufficient authentication of the complaint, though it would have been more proper if the complaint had been signed by the woman and attested by the justices. Ib. When one of the justices omits to sign the examination, the court to which the proceedings are returned, may permit the justice then to sign it. State v. Thomas, 5 Ired. 366. The examination of the woman being made by statute *prima facie* evidence, the defendant can only introduce evidence to show his innocence. If he wishes to object to the woman as a witness, he must do so by a motion to quash the order of filiation as being founded on incompetent evidence. State v. Patton, 5 Ired. 180. The examination of the complainant before the justices, must have been had within three years from the birth of the child. State v. Ledbetter, 4 Ired. 242.

### 2. Warrant.

**12. How issued.** In New York, the warrant issues upon the complaint of the overseers of the poor, or either of them. Walworth v. McCullough, 10 Johns. 93.

**13. Averment in.** The warrant must state truly the time of the child's birth. But if the time of the birth be stated incorrectly, an acquittal will not bar a subsequent proceeding. Burnett v. Com. 4 Monr. 106.

**14. How far evidence.** The warrant is evidence of the arrest of the accused, and that he was regularly taken before the magistrate. Walker v. State, 5 Ga. 491.

**15. Objection to.** After the defendant has been brought before the magistrate, and bound by a recognizance to appear at court and answer the charge, it is too late to object to the warrant. Walker v. Com. 3 A. K. Marsh. 355; Schooler v. Com. Litt. Sel. Cas. 88.

### 3. Examination.

**16. By whom had.** In Massachusetts, the magistrate to whom the complaint is made and who issues the warrant, can alone take the examination of the defendant, and the warrant cannot be returned before another magistrate. Fisher v. Shattuck, 17 Pick. 252.

**17.** In Connecticut, one justice may entertain the complaint and issue the warrant, and another hear the case and bind over the accused. Hopkins v. Plainfield, 7 Conn. 286.

**18.** In Vermont, where the parties are non-residents, and the child was begotten and born out of the State, the proceedings will be dismissed. Graham v. Monsergh, 22 Vt. 543.

**19. Defendant need not be arraigned.** It is not a good objection to the proceedings that the defendant was not arraigned and asked whether he was guilty or not guilty. Smith v. Hayden, 6 Cush. 111.

**20. When barred.** A decision in favor of the defendant, is a bar to a subsequent proceeding against him for the same matter. Thayer v. Overseers of the Poor, 5 Hill, 443; Davis v. State, 6 Blackf. 494.

### 4. Indictment.

**21. Necessary averments.** In Georgia, an indictment for bastardy is sufficient which charges that the defendant is the father of the child and refuses to give security for its maintenance and education. Walker v. State, 5 Ga. 491. Locke v. State, 3 Kelly, 534; without alleging that the mother is a single woman. Smith v. State, 28 Ga. 19. In Pennsylvania, the indictment must state the sex of the child. Com. v. Pintard, 1 Browne, 59; and in Maryland, the residence of the mother and child. Root v. State, 10 Gill & Johns. 374.

**22.** In South Carolina, in an indictment under the statute of 1795, it need not be al-

leged that the defendant refused to give the security required. State v. Adams, 1 Brev. 279. The indictment must aver that the mother of the child is a white woman. State v. Clements, 1 Speer, 48. Where it only charged that the child was the issue of a single woman, the judgment was arrested. State v. Clarke, 2 Brev. 386. Under the statute of 1839, two indictments will lie against the putative father of two bastard children born at one birth; but the indictments and recognizances must describe each child by name, complexion, hair and sex, or in some other way identify them. State v. Derrick, 1 McMullan, 338. The indictment need not charge that the child is likely to become a public burden, and that the accused refuses to give security for its support. State v. McDonald, 2 McCord, 299.

5. Evidence.

**23. Testimony of prosecutrix.** In Maine and Massachusetts, the woman may be a witness if she has complied with the statute and been constant in her accusation. The fact that she had before charged another person with being the father, under oath, and in the same form in which she does the defendant, will not exclude her, but only go to her credibility. Burgess v. Bosworth, 23 Maine, 735; Bradford v. Paul, 18 Ib. 30; Maxwell v. Hardy, 8 Pick. 560. She will not be permitted to testify to any fact which is equally within the knowledge of other disinterested persons. Drowne v. Stimpson, 2 Mass. 441. It must be proved by other testimony than that of the woman, that she charged the defendant in the time of her travail, and remained constant in her accusation. Drowne v. Stimpson, 2 Mass. 441; Com. v. Cole, 5 Ib. 517; Dennett v. Kneeland, 6 Maine, 460.

24. In Maine, the complainant, to be a competent witness, is not required to make her complaint to a justice previous to the birth of the child. Sweet v. Stubbs, 33 Maine, 481. The burden of showing the inconstancy of the woman in her accusation is on the defendant. Murphy v. Glidden, 34 Ib. 196.

25. In Connecticut, the complainant must have charged the defendant with being the father of her child during her travail. Warner v. Willey, 2 Root, 490; Hitchcock v. Grant, 1 Ib. 107. But where the town prosecutes the father, this is unnecessary. Davis v. Salisbury, 1 Day, 278. If a witness introduced by the defendant testifies that the complainant in conversation with him stated that the defendant was not the father of the child, she is a competent witness to contradict this testimony. Judson v. Blanchard, 4 Conn. 557. If the woman die, her deposition taken *ex parte* before the prosecution was commenced cannot be given in evidence. McDonald v. Hobby, 1 Root, 154.

26. In Ohio, the woman must be present and testify on the trial, unless there is a confession in open court. Baxter v. Columbia Township, 16 Ohio, 56.

27. In New Hampshire, the woman can only be a witness to prove the criminal connection, non-access being shown by other evidence. Parker v. Way, 15 New Hamp. 45. It is not a good objection to a witness, that he is the father of the woman. Marston v. Jenness, 12 Ib. 137.

28. In New York, justices of the peace may commit the mother of an illegitimate child to jail for refusing to discover the father. Scott v. Ely, 4 Wend. 555.

29. The cross-examination of the prosecutrix as to the circumstances under which the defendant had connection with her must be limited to a period of time in which it is probable the child in question was begotten. Barnett v. State, 16 Ark. 530. Where it is proved that the woman made contradictory statements, she may introduce evidence to sustain her general character for veracity. Sweet v. Sherman, 21 Vt. 23.

**30. Birth of child.** In Alabama, the record need not show that the child was born alive and is still living. Kawich v. Davis, 4 Ala. 328. In Tennessee the record must show that the child was born in the county in which the proceedings are had. Edmonds v. State, 5 Humph. 94.

**31. Non-access.** When the female is a married woman, non-access or impotence of the husband must be proved. Com. v. Shepherd, 6 Binn. 283.

32. A child born in wedlock a day after marriage, is presumed to be the child of the husband. State v. Herman, 13 Ired. 502. Evidence to show the resemblance of the child to the reputed father or the absence of it, is not admissible. Keuniston v. Rowe, 16 Maine, 38.

33. **Admissions.** The admissions of the defendant that he was the father of the child, and his promise to marry the mother, are competent evidence to corroborate the complainant. Woodward v. Shaw, 18 Maine, 304.

34. **Impeachment of prosecutrix.** The complainant may be impeached, by disproving what she swore to on the preliminary examination. Holmes v. State, 1 Iowa, 150.

35. **Intercourse of prosecutrix with other men.** The defendant may prove that about nine months before the birth of the child, the woman had criminal intercourse with other men; but not, if the defendant admit that he also had criminal intercourse with her about the same time. Fall agst. Overseers of the Poor, 3 Munf. 495. And the woman may be questioned as to her intimacy with other men about the time she charges the defendant. Ginn v. Com. 5 Litt. 301; Short v. State, 4 Harring. 568; Sword v. Nestor, 3 Dana, 453; State v. Coatney, 8 Yerg. 210; *contra*, Com. v. Moore, 3 Pick. 194; Low v. Mitchell, 18 Maine, 372. See State v. Pettaway, 3 Hawks, 623.

36. **Efforts to produce an abortion.** Evidence that the mother of the child tried to procure an abortion is not admissible; nor that another man, who had not been made a witness, endeavored to do so. Sweet v. Sherman, 23 Vt. 23.

37. **Character of defendant.** In New Jersey, on the hearing of an appeal to the sessions, the defendant may show his former good character. Dally v. Overseers of Woodbridge, 1 Zabr. 491.

38. **What proof sufficient to convict.** In Illinois, a prosecution for bastardy being in the nature of a civil proceeding, a preponderance of proof is sufficient to sustain a conviction. Where it is proved that the woman gave birth to a child at a certain time, it will be presumed that the child was born alive, and is still living. Mann v. People, 35 Ill. 467; Maloney v. People, 38 Ib. 62; Allison v. People, 45 Ib. 37; People v. Christman, 66 Ib. 162. But in Alabama, it was held erroneous to charge the jury that if the prosecution produced a preponderance of evidence, they might find the defendant guilty. Satterwhite v. State, 28 Ala. 65.

### 6. Security.

39. **Nature and effect.** In Massachusetts, under the statute of 1785, ch. 66, the security must be a bond, and not a recognizance. Merrill v. Prince, 7 Mass. 396; Johnson v. Randall, Ib. 340. In Maine, there must be a bond with sureties to appear and abide by the order of the court, and to give a new bond for the performance of such order. Mariner v. Dyer, 2 Greenlf. 165; Taylor v. Hughes, 3 Ib. 433.

40. The bond required by the statute of New York, in a case of bastardy, is intended to secure the appearance and presence of the person charged not only at the adjourned day, but his continued appearance and attendance until the examination and subsequent proceedings are finally closed. Where the accused, after appearing at the place of examination, absents himself therefrom, it amounts to a breach of the bond, which is not cured by his return the next morning and offer to submit himself to imprisonment upon notice of an order of filiation. People v. Jayne, 27 Barb. 58.

41. When the condition of the bond is that the defendant shall appear and not depart until discharged by the court, the sureties are bound to take care that he remains during the term to answer any charge other than the one on which the prosecution is founded. But if the defendant appear and answer, a default at the next term will not be a breach. People v. Green, 5 Hill, 647.

42. A recognizance requiring the putative father of a bastard child to appear at the sessions and abide such order as shall be made for the relief of the town in which the child was born, remains in force, although after the time of entering into the recognizance the distinction between the town and

county poor is abolished, and the child thereupon becomes a county charge. People v. Haddock, 12 Wend. 475.

43. In Georgia, it is the duty of the magistrate to require the defendant to give security for the maintenance and education of the child; and if he refuses or fails to do so, to recognize him to appear at the next Superior Court to answer the charge. Walker v. State, 5 Ga. 491.

44. In Kentucky, under the statute giving to the magistrate authority to bind the defendant in a recognizance to appear at the next county court, it will be error to bind him to abide by and perform the order of the county court. Young v. Com. 2 A. K. Marsh. 63.

45. A bond is bad which, in addition to the provisions required by law, contains others imposing further conditions on the obligor. People v. Meighan, 1 Hill, 298.

46. **Date.** The recognizance may be dated as of the day on which the defendant is recognized to appear. State v. Bradley, 1 Blackf. 83. *See* BAIL AND RECOGNIZANCE.

7. SETTLEMENT OF PROSECUTION.

47. **When allowed.** As bastardy is only a misdemeanor, it may be settled by the parties. Coleman v. Frum, 3 Scam. 378.

48. In New Hampshire, although the form of the proceedings is criminal, the parties may, if they choose, settle the prosecution. But the town may come in and prosecute. Parker v. Way, 15 New Hamp. 45.

49. In Vermont, the mother of the child may compromise with the defendant three months after the arrest, and before the overseers of the town take the control and management of the prosecution. Hurd v. Seeker, 12 Vt. 364.

50. **When not allowed.** In Kentucky, though the mother of a bastard child is not obliged to commence proceedings against the putative father, yet, whenever at her instance, they have been commenced, she cannot, by any agreement between her and the defendant, stop the proceedings. Com. v. Turner, 4 Dana, 511.

51. **Payment of fees and expenses.** Although the defendant offers to pay what the woman deems satisfactory, he will not be entitled to his discharge until the fees and expenses of the officer are paid. Pearl v. Rawlin, 5 Day, 244. In New York, if the defendant refuse to pay the amount certified for the costs, the justices may issue a warrant for his commitment, though he has executed a bond. People v. Stowell, 2 Denio, 127. In Massachusetts, if the defendant does not comply with the order requiring him to support the child, he may be committed to jail until he does so. Woodcock v. Walker, 14 Mass. 386.

52. **Marriage of prosecutrix.** The marriage of the mother of the child, subsequent to complaint, will not abate the prosecution. Austin v. Pickett, 9 Ala. 102.

53. **Defendant taking poor debtor's oath.** In Maine, the discharge of the accused on taking the poor debtor's oath, will not prevent his body from being taken on execution issued upon a judgment recovered on the bond. McLaughlin v. Whitten, 32 Maine, 21.

54. **Pardon.** If after conviction, the accused is pardoned, the court may, notwithstanding, make an order for the maintenance of the child. Com. v. Duncan, 4 Serg. & Rawle, 449.

8. CONCEALING DEATH OF BASTARD CHILD.

55. **Child must have been born alive.** The offense consists in concealing the death of a being upon whom the crime of murder could have been committed. Therefore, if the child be born dead, its concealment is not a crime. State v. Joiner, 4 Hawks, 550. In South Carolina, when it was proved that the mother concealed her illegitimate child after its death, but there was also some evidence that the child was still-born, she was acquitted. State v. Love, 1 Bay, 167.

56. In Maine, on the trial of an indictment under the statute (R. S. ch. 124, § 7), which provides that "if any woman is willingly delivered in secret of the issue of her body, which would be a bastard if born alive, and conceals the death thereof, so that it is not known whether it was born dead

or alive, and was murdered, she shall be punished," &c., it was proved that the prisoner was delivered in secret of such issue, still-born, and concealed the same by throwing it into a vault, where it was discovered the same day and examined by inquest, when it appeared that the child had been dead several days before the birth. *Held* that the prisoner was entitled to an acquittal. State v. Kirby, 57 Maine, 30.

**57. Indictment.** The indictment must allege the death of the child. Douglass v. Com. 8 Watts, 538. It need not state the manner in which the defendant endeavored to conceal the death of the child. The following averment was held sufficient, that "the child having died on the day and year, &c., the mother did endeavor privately to conceal the death of said child." Boyles v. Com. 2 Serg. & Rawle, 40.

**58. Evidence.** The prosecution must prove the birth, death, and concealment of the death. Com. v. Clark, 2 Ashm. 105. And that the defendant willfully and maliciously destroyed the child. Pennsylvania v. McKee, Addis. 1.

## Bawdy-House.

*See* Nuisance.

## Bigamy.

1. Who may commit.
2. When committed.
3. Indictment.
4. Evidence.

### 1. Who may commit.

**1. Nephew.** In South Carolina, it was held that a nephew might lawfully marry his aunt, so that if he married again while she was alive, it was bigamy. State v. Barefoot, 2 Rich. 209.

**2. Emancipated slave.** If parties were married according to the usages and customs of slaves, and after their emancipation continued to live together as husband and wife, it was a legal assent to and ratification of the marriage, and the marrying another while the first marriage existed would be bigamy. McReynolds v. State, 5 Cold. Tenn. 18.

**3. Infant.** In Ohio, the marriage of a male under the age of eighteen, with a female under fourteen, does not make the parties liable for bigamy by contracting subsequent marriage while the first husband or wife is living, unless the first marriage was followed by cohabitation after arriving at those ages respectively. Shafher v. State, 20 Ohio, 1.

**4.** In Michigan, under the statute, when a person of full age marries another under the age of legal consent, and they separate before the minor reaches lawful age, and do not cohabit afterward, or when the minor refuses consent on attaining lawful age, such marriage is void, and the parties may marry again without being amenable to the charge of bigamy. People v. Slack, 15 Mich. 193.

### 2. When committed.

**5. In case of divorce.** In Massachusetts, after a husband has been divorced from his wife on account of adultery, if he marry again he is not liable for adultery. In such case he should be indicted under the statute for polygamy, and the second marriage, together with all the facts constituting the offense, should be set forth in the indictment. Com. v. Putnam, 1 Pick. 136. But if the second marriage take place in another State, and it is lawfully contracted there, he is not liable, though he cohabit with his second wife in Massachusetts. Putnam v. Putnam, 8 Pick. 433.

**6.** Where a man having been lawfully married to his first wife in Massachusetts and divorced from her for his adultery, afterward while still a resident of Massachusetts marries again in another State, and cohabits with her in Massachusetts, the first wife being still alive, he is not guilty of polygamy under the statute (Gen. Stats. of Mass. ch. 165, § 4) unless the second wife was a resident of Massachusetts, and the parties went into the other State to evade the law. Com. v. Lane, 113 Mass. 458.

**7.** In New York, it is not a defense to an

indictment for bigamy, that after the second marriage the first was dissolved by the decree of a competent court, for some cause other than the adultery of the defendant. But otherwise if the decree was obtained before the second marriage. Baker v. People, 2 Hill, 325.

8. A decree of divorce obtained in Arkansas, by a citizen of Alabama, would be void, and would constitute no defense to a prosecution in Alabama for polygamy if the decree was procured by fraud, or if the defendant went to Arkansas merely for the purpose of obtaining a divorce, and with the intention of remaining no longer than was necessary to accomplish that purpose. Thompson v. State, 28 Ala. 12.

9. In Indiana, it was held that the court ought, if requested, on a trial for bigamy, to charge the jury that if they believed from the evidence that the defendant had been informed that his wife had been divorced, and that he had used due care and made due inquiry to ascertain the truth, and had, considering all the circumstances, reason to believe, and did believe at the time of his second marriage, that his former wife had been divorced from him, they should find him not guilty. Squire v. State, 46 Ind. 459; s. c. 2 Green's Crim. Reps. 725.

**10. In case of absence.** In Massachusetts, the statute (R. S. ch. 130) does not make the legality of a second marriage whilst the former husband or wife is in fact living, depend upon ignorance of such absent party's being alive, or upon an honest belief of such person's death. Accordingly, where a husband suddenly left his wife saying that he would return immediately, and was absent three or four years, and she married again, it was held that she was guilty of bigamy, notwithstanding she had made inquiry after her husband, and did not know that he was alive, but honestly supposed that he was dead. Com. v. Mash, 7 Metc. 472.

11. In North Carolina, bigamy does not apply to any person whose husband or wife shall continually remain beyond sea for seven years together, nor to any person whose husband or wife shall absent him or herself in any other manner for seven years together, such person not knowing his or her husband or wife to be alive within the time. State v. Patterson, 2 Ired. 346.

**12. Place of marriage.** In New York, bigamy cannot be punished as an offense unless the second marriage was within the State. People v. Mosher, 2 Parker, 195.

3. Indictment.

**13. Immaterial averments.** An indictment for bigamy need not state the place where the first marriage took place. State v. Bray, 13 Ired. 289; by whom it was solemnized, or the maiden name of the first wife. Hutchins v. State, 28 Ind. 34; or contain the words "with force and arms." State v. Kean, 10 New Hamp. 347.

14. An indictment for bigamy which charges that the wife was alive at the second marriage, need not allege that the first marriage then subsisted. State v. Norman, 2 Dev. 232.

15. An indictment for bigamy is sufficient, although it does not negative the exceptions referred to in the statute defining the offense. The averment and the proof to justify a second marriage in such case are to come from the defendant. Fleming v. People, 27 N. Y. 329.

**16. Where tried.** An indictment for polygamy was found, and the offense alleged to have been committed in the county of K. The defendant pleaded in abatement to the jurisdiction of the court, that at the finding of the indictment he resided in B., in the county of Y., and was apprehended in said town. *Held* that the plea was bad, the statute (R. S. of Maine, ch. 424, § 4) providing that "the indictment for such offense *may* be found and tried in the county where the offender resides, or where he is apprehended," being permissive and not mandatory. State v. Sweetsir, 53 Maine, 438.

17. In New York, a person was indicted, tried and convicted of bigamy in O. county. It appearing that the offense was not committed in O. county nor the prisoner apprehended there, but that the second marriage took place in Y. county, and that the

prisoner was apprehended in that county, the conviction was reversed and the prisoner discharged. Collins v. People, 4 N. Y. Supm. N. S. 77; 8 Ib. 610.

4. Evidence.

**18. Must be proof of marriage.** If parties competent to contract, in the presence of witnesses, agree to be husband and wife, and afterward cohabit and recognize each other as such, it is a sufficient marriage to sustain an indictment for bigamy in the event of one of the parties having before that time married another who is still living. Hayes v. People, 25 N. Y. 390.

**19.** Marriage may be entered into in any manner which clearly evinces the intention of the parties. It was proved that the prisoner introduced to the complainant a person whom he represented to be a minister, and who conducted a marriage ceremony between them as a minister. There was no proof, however, that he was in fact a clergyman, or authorized by law to certify a marriage. The ceremony was followed by cohabitation. *Held* that the proof of marriage was sufficient. Hayes v. People, 5 Parker, 325; s. c. 25 N. Y. 390.

**20.** In Ohio, on a trial for bigamy, the consent of parties to become husband and wife, followed by cohabitation as such, is sufficient proof of the second marriage to authorize a conviction. Carmichael v. State, 12 Ohio, N. S. 553.

**21.** Marriage to avoid imprisonment is not void when the inducement to the marriage was not the fear of imprisonment, but arose from the arrest and prosecution of the party for bastardy. Williams v. State, 44 Ala. 42.

**22.** Where on a prosecution for bigamy the first marriage is charged to have been celebrated in another State, a marriage in fact must be proved according to the law of that State, and it will not be presumed that such law is like our own. People v. Lambert, 5 Mich. 349.

**23.** On the trial of an indictment for polygamy, evidence of the former marriage of the defendant in England may be proved by the general repute there, in connection with other evidence. Com. v. Johnson, 10 Allen, 196. In such case, the fact that the defendant's wife "has been continually remaining beyond sea for the last year, at her usual place of abode (he having deserted her and come to this country), is no defense. Ib.

**24.** Oral proof of the official character of the person before whom the marriage was solemnized is *prima facie* evidence of his authority. Case of Damon, 6 Maine, 148. But where a marriage to be valid must be entered into as a civil contract before a magistrate, it was held erroneous for the court to charge the jury that if they were satisfied of the performance of the religious ceremony, and that the priest who officiated was liable to severe penalties for performing it unless the civil marriage had taken place, they would be authorized to infer that the latter had been previously performed according to law. Weinberg v. State, 25 Wis. 370.

**25.** Where an information for bigamy charges that the first marriage took place in Brooklyn, and it is proved that it occurred in the city of New York, the variance is not material unless the defendant was thereby misled. People v. Calder, 30 Mich. 85.

**26. License and certificate.** In Illinois, the marriage may be proved by the license and certificate, or by such other evidence as is competent to prove a marriage in other cases. Jackson v. People, 2 Scam. 231. In Virginia, parol proof of a license of marriage may be given, although it be in the power of the prosecution to produce the license; and the certificate of marriage is competent evidence against the prisoner, although it does not show on its face that the person whose name is subscribed to it was a person authorized to perform the marriage ceremony. Moore's Case, 9 Leigh, 639. And see Squire v. State, 46 Ind. 439; s. c. 2 Green's Crim. Reps. 725.

**27.** Where, on a prosecution for bigamy, a paper puporting to be the certificate of the first marriage bore no date, and neither declared where the marriage took place nor showed where the clergyman resided, and it appeared to have been made after the prisoner was arrested, it was held not ad-

missible for any purpose. People v. Lambert, 5 Mich. 349.

28. To make a marriage certificate signed by a justice of the peace in another State evidence of the marriage on a trial for bigamy, such person must be proved to have been a justice, and to have been authorized to solemnize marriages, and that his signature is genuine. The testimony of a witness that he wrote a letter on the subject of said marriage to the address of the person whose name was signed to the certificate, and received a reply thereto, which is in the handwriting of the certificate and signature, is not legal evidence that the certificate was signed by the person which it purports. State v. Horn, 43 Vt. 20.

29. The transcript of a record or registry of the marriage of a person in a foreign country, in the absence of any proof that the transcript and its authentications were made by the authority of, or in conformity with the laws of such country, is not *prima facie* evidence of the fact and legality of the marriage. Stanglein v. State, 17 Ohio, N. S. 453.

30. On a trial for bigamy, in order to prove the first marriage, a document was produced purporting to be a copy of an entry in the marriage register in the office of the superintendent registrar of the district of Mohill, Ireland, and was signed by W., in his official capacity of such registrar. But it did not appear that the laws of Ireland required the registration of marriages, or that W. was the superintendent registrar at the time the certificate was given, if there was such record, or that his signature was genuine if he was such an officer. *Held*, that its admission in evidence was error. State v. Dooris, 40 Conn. 145; s. c. 2 Green's Crim. Reps. 492.

31. **Testimony of persons present at ceremony.** The marriage may be proved by a person who was present at the ceremony. Warner v. Com. 2 Va. Cas. 95; State v. Kean, 10 New Hamp. 347; State v. Williams, 20 Iowa, 98. Proof that the parties went together to a church; that the officiating minister, in the presence of spectators, performed the marriage ceremony, and that the parties appeared to consider themselves married, is presumptive evidence that the ceremony was regular and legal. People v. Calder, 30 Mich. 85.

32. **Wife as witness.** In a prosecution for bigamy, the lawful wife is not a competent witness against her husband. Williams v. State, 44 Ala. 42. But it is otherwise as to the woman with whom he committed the offense. State v. McDavid, 15 La. An. 403; State v. Patterson, 2 Ired. 346.

33. The prosecution may inquire of the prosecutrix as to the place and manner of her living immediately after her alleged marriage to the prisoner, in corroboration of her testimony as to the actual marriage. Hayes v. People, 25 N. Y. 390.

34. **Confession of defendant.** On a trial for bigamy the first marriage may be proved by cohabitation and the confessions of the prisoner without the production of the record or the testimony of a witness who was present at the ceremony. Langtry v. State, 30 Ala. 536; State v. Abbey, 29 Vt. 60; Finney v. State, 3 Head, 544; Wolverton v. State, 16 Ohio, 173; Com. v. Murtagh, 1 Ashm. 272; Warner v. Com. 2 Va. Cas. 95; O'Neale v. Com. 17 Gratt. 582; State v. Seals, 16 Ind. 352; Squire v. State, 46 Ib. 459; s. c. 2 Green's Crim. Reps. 725; State v. Britton, 4 McCord, 256; State v. Hilton, 3 Rich. 434; Stanglein v. State, 17 Ohio, N. S. 453.

35. Where, on a trial for bigamy, the accused claimed that the marriage ceremony was a mock one, it was held that a letter written by him to the woman, in which he represented the contrary, was admissible against him. State v. Horn, 43 Vt. 20.

36. In New York, the confessions of the defendant, though corroborated by proof of cohabitation and reputation, are not sufficient to show the first marriage, proof of actual marriage, either by the record or by the evidence of an eye-witness, being necessary. Goghagan v. People, 1 Parker, 378. And the same seems to be the case in Michigan and Minnesota. People v. Lambert, 5 Mich. 349; State v. Armstrong, 4 Minn. 335; State v. Johnson, 12 Ib. 476.

37. **Proof that first wife was living.**

The fact that the first wife was living at the time of the second marriage, may be proved by circumstantial evidence. Gorman v. State, 23 Texas, 646. On a trial for bigamy there was no direct evidence that the first wife of the defendant was alive at the time of the second marriage, though it was established by the admissions of the defendant that she was living two years previous thereto. *Held*, that the presumption of the continuance of life was neutralized by the presumption of the innocence of the defendant. Squire v. State, 46 Ind. 459; s. c. 2 Green's Crim. Reps. 725.

**38. Testimony for defense.** If on the trial of an indictment for polygamy the defense is a previous divorce, the defendant must prove it. Com. v. Boyer, 7 Allen, 306.

**39.** The prosecution need not show that the first wife was not absent for five successive years without being known to the defendant within that time to be living, nor prove that at the time of the second marriage the defendant did not come within any of the other exceptions mentioned in the statute. Fleming v. People, 27 N. Y. 329.

## Bill of Exceptions.

1. Nature and office.
2. What it should contain.
3. Settlement.
4. Effect.

### 1. Nature and office.

**1. Meaning.** An exception is a formal protest against the ruling of the court upon a question of law, and a bill of exceptions is a written statement, settled and signed by the judge of what the ruling was, the facts in view of which it was made, and the protest of counsel. People v. Torres, 38 Cal. 141. An alleged error in the charge to the jury will not be noticed unless the party objecting excepts, and by a bill of exceptions places the objectionable charge on the record. Wash v. State, 14 Sm. & Marsh. 120; Com. v. Kneeland, 20 Pick. 206.

**2. In New York.** Bills of exceptions in criminal cases were unknown to the common law. Their office is to bring up for review questions of law made and decided on the trial. The statute of New York which gives the right limits it to exceptions taken on the trial of the main issue, and does not extend to such as are taken on the trial of preliminary or collateral questions. Wynhamer v. People, 20 Barb. 567; People v. Gardiner, 6 Parker, 143.

**3.** In New York, before exceptions were given by statute, it was the practice of the inferior courts to suspend sentence after conviction to ask the advice of the Supreme Court in respect to difficult or important questions of law which had arisen on the trial. Applications of this kind are still sometimes made and entertained. People v. Bruno, 6 Parker, 657. But since the Revised Statutes, the defendant is allowed to make a bill of exceptions, as in civil cases, and to have the exceptions examined upon a writ of error, and the former practice to suspend judgment until the advice of the Supreme Court could be obtained, has for the most part fallen into disuse. People v. Cummings, 3 Parker, 343.

**4. When it will lie.** Where, upon a challenge for favor, the court errs in admitting or rejecting evidence, or in instructing the triers upon questions of law, a bill of exceptions will lie. People v. Bodine, 1 Denio, 281.

**5.** An exception will lie to the admission or exclusion of evidence; to the granting or refusing a nonsuit; to charging, or refusing to charge the jury on a specific proposition; or in deciding any question on the trial going to the merits. But that which has reference to the manner of conducting the trial; to the forms of the questions asked, and to the range allowed counsel in their arguments, are matters of discretion, and not subject to exception. People v. Finnegan, 1 Parker, 147; People v. Stockham, Ib. 424; Safford v. People, Ib. 474.

**6.** Although the judge neglects to give the instruction which counsel, in addressing the jury, claimed, it is not a ground for exceptions, unless the judge was requested to give such instructions. State v. Straw, 38 Maine, 554.

7. It is not cause for exception that the court charged the jury that if any of them differed in their views of the evidence, from the majority of their fellows, they ought to distrust the correctness of their own judgments, and be led to examine the facts of the case for the purpose of correcting their opinions. Com. v. Tuey, 8 Cush. 1.

8. When the judge, in his charge to the jury, expresses an opinion as to the effect of the evidence, leaving the jury to decide the question, it is not good ground of exception; otherwise, if the language which is the subject of exception, amounts to an instruction as to the law applicable to the evidence in the case. People v. Quin, 1 Parker, 340.

9. **Waiver.** When three being indicted, ask for separate trials, whether by so doing they do not waive the right of exception to the indictment, on the ground that it was not legally found—*query*. Com. v. Chauncey, 2 Ashm. 90.

10. Where no bill of exceptions is sent up with the record of a case, the judgment below is affirmed, as of course, there appearing no error in the record. State v. Orrell, Busbee, N. C. 217.

### 2. What it should contain.

11. **Must set out the evidence.** The party excepting to the refusal of the court to admit evidence, should, in order to avail himself of the error, state what he expected or believed the witness would testify, and let the bill of exceptions show it, in order that the appellate court may see that the evidence was material. Tipper v. Com. 1 Metc. Ky. 6.

12. Assignments of error that the court permitted improper questions to be answered, will not be considered, unless the record shows the answers given, or that they prejudiced the defendant. Jhons v. People, 25 Mich. 499.

13. Where the defendant was tried for a libel, and the bill of exceptions did not recite the evidence, it was held that the court must presume that the evidence sustained the verdict, and that there was no variance. Melton v. State, 3 Humph. 389.

14. A bill of exceptions, after setting out the evidence, stated that "here the evidence closed." *Held*, that this was a sufficient allegation that the bill of exceptions contained all the testimony heard at the trial. Yates v. State, 10 Yerg. 549.

15. **Exceptions to charge of court.** When instructions are excepted to as erroneous, no part of the testimony need be stated to authorize the appellate court to revise the case upon the bill of exceptions. Sharp v. State. 15 Ala. 749.

16. A mere general exception to the charge of the court, without specifying any grounds of error, or asking for a particular charge, is not well taken. People v. Smith, 57 Barb. 46. A bill of exceptions, instead of containing the testimony or objections made, rulings of the court, or any exceptions, stated that all these things appeared by the depositions, documentary evidence, and other papers on file, which were to be annexed and form part of the bill. *Held*, that the judge was not bound to examine the files in search of documents, or to sign a bill in such a shape. State v. Noggle, 16 Wis. 333.

17. Where a bill of exceptions shows that evidence was excluded in the court below on objection, but does not state the ground, either of the objection or decision, any objection which might have been available during the trial, may be raised on the argument. Ward v. People, 3 Hill, 395.

18. **When to be disregarded.** Exceptions at the trial, and exceptions to the rulings upon a motion in arrest, are incompatible. Both must be dismissed, or one be withdrawn or waived. If either of the exceptions are deemed to have been withdrawn, it is reasonable to consider that those taken first in order of time, are the ones withdrawn. State v. Wing. 32 Maine, 581.

19. Where an exception is so obscure that the court cannot readily perceive the exact point of the objection, it will be disregarded. Carnal v. People, 1 Parker, 272.

### 3. Settlement.

20. **By whom made.** In New York, the judges who preside at the trial must settle the bill of exceptions, and no other judges or officers can do so. Wood v. People, 3

N. Y. Supm. N. S. 506. And it must be settled by the court that tries the indictment, as a court, and not merely by the presiding judge. Where the bill was settled after the adjournment of the court by the circuit judge alone, in the absence of the justices of sessions, and was afterward presented to and signed by them, the Supreme Court, on motion of the district attorney, ordered it to be struck from the record. Birge v. People, 5 Parker, 9.

4. Effect.

**21. What brought up.** Where a bill of exceptions is allowed, the facts embraced in it become a part of the record; and a writ of error brings up the entire record, and error may be assigned on any part of it. State v. Jones, 5 Ala. 666.

**22. What entertained.** When exceptions are alone taken, special findings of the jury cannot be considered, but only the questions presented by the exceptions. State v. Hinckley, 38 Maine, 21.

**23.** When a general objection is made to evidence, it must be understood to be taken to its competency, and not to the form of the question, or other incidental matter which, if stated at the trial, might have been obviated. State v. Flanders, 38 New Hamp. 324.

**24. Presumption in favor of court below.** It will be presumed that the court below decided correctly, unless the contrary appears from the facts and proceedings preserved in the bill of exceptions. Ingram v. State, 7 Mo. 293.

**25.** When an exception represents a matter differently from the statement made up by the judge, it will be disregarded, and the statement taken to be true. State v. Langford, Busbee, N. C. 436.

**26.** Where the bill of exceptions does not disclose what the evidence was in relation to which the charge was given to which exception is taken, the exception will be overruled, if the instruction could have been correct in any supposable state of the evidence. State v. Hopkins, 5 R. I. 53.

**27. When there is no proof of venue.** When the bill of exceptions purports to set out all the evidence, and does not show that the venue was proved, and an exception was reserved to the conviction and sentence, though no instruction was given or asked in reference to the proof of venue, the judgment will be reversed. Frank v. State, 40 Ala. 9.

For decisions having some relation to the same subject, *see* Appeal; Indictment; Trial; Writ of error.

## Bill of Particulars.

**In discretion of court.** Whether a bill of particulars or specification of facts will be ordered, is a question in the discretion of the court in which the cause is pending. Com. v. Giles, 1 Gray, 466; Com. v. Wood, 4 Ib. 11.

## Blasphemy.

**1. What constitutes.** Blasphemy at common law, is profanation of the general principles of religion and morality. It may be committed by such utterances in a scoffing and railing manner, out of a reproachful disposition in the speaker, and as it were, with passion against the Almighty, rather than with any purpose of propagating the irreverent opinion. Com. v. Kneeland, Thatch. Crim. Cas. 346; People v. Ruggles, 8 Johns. 290; State v. Chandler, 2 Harring. 553.

**2.** To constitute the offense in Massachusetts, under the statute, there must be a willful denial of God, and of his creation and government, with an intent to impair and destroy the reverence due to him. Com. v. Kneeland, 20 Pick. 206. In Pennsylvania, it is an indictable offense to maliciously vilify the christian religion. Updegraph v. Com. 11 Serg. & Rawle, 394.

**3.** In Delaware, where the jury found that the defendant had proclaimed publicly and maliciously, with intent to vilify the christian religion, and to blaspheme God, that "the Virgin Mary was a whore, and Jesus Christ was a bastard," it was held that the offense was blasphemy, and the court refused to arrest the judgment. State v. Chandler, *supra*.

4. **Indictment.** In Pennsylvania, an indictment for blasphemy, under the statute, must charge that the words were spoken profanely; and the words must be set out. Updegraph v. Com. *supra*.

5. **Evidence.** A person cannot be convicted of blasphemy on his own confession, made out of court. It must be proved that the offensive words were actually uttered. People v. Porter, 2 Parker, 14.

## Boarding Vessel.

1. **Act constitutional.** The 62d section of the act of Congress of June 7th, 1872 (17 U. S. Stat. at Large, 276), making it an indictable offense, punishable by a penalty and imprisonment, to go on board a vessel about to arrive at the place of her destination, before her actual arrival, and before she is completely moored, without permission of the master, is valid. U. S. v. Anderson, 10 Blatchf. 226; s. c. 1 Green's Crim. Reps. 423.

2. **Foreign vessels.** The act was designed to protect foreign vessels as well as vessels of the United States. Ib.

3. **What constitutes the offense.** A person by climbing from a boat upon the rail of the ship, in the act of entering the ship, without permission, renders himself liable to punishment. Ib.

4. The offense is committed, by boarding, in the bay of New York, without permission, an inward bound vessel, laden with cargo, to be landed at a pier in the city of New York, before the arrival of the vessel at such pier, although the vessel when boarded, was temporarily at anchor in the bay. Ib.

5. **Evidence for prosecution.** The prosecution need not prove that the prisoner was not in the United States service, or was not duly authorized by law to go on board of the vessel. Ib.

6. Proof that the master of the ship was not on board of the vessel, and that the mate then in command, gave no permission to the defendant to board the vessel, and caused his arrest on the spot, is sufficient to support a conviction, in the absence of any evidence showing a permission by the master. Ib.

7. **Defense.** Proof that the prisoner was a runner employed by a person licensed to keep a sailor's boarding house under the statute of New York, is not a defense. Ib.

## Breach of the Peace.

1. **By improper language.** If a person in his own dwelling-house, is in the habit of using loud and violent language, consisting of opprobrious epithets, and exclamations, in such a manner as to attract crowds of persons passing and living in the neighborhood he may be convicted of being a common railer and brawler and a disturber of the peace, although he was betrayed into these violent expressions in the heat of altercations suddenly arising. Com. v. Foley, 99 Mass. 497.

2. **By assaulting another.** In Connecticut, to constitute a violation of the statute providing the punishment of any person who shall disturb, or break the peace by tumultuous and offensive carriage, threatening, traducing, quarreling with, challenging, assaulting and beating any other person, there need not have been such conduct on the part of the defendant as amounted to an assault and battery at common law. State v. Farrall, 29 Conn. 72.

3. **By rapid driving.** It is an indictable offense, and a breach of the peace at common law, to drive a carriage through a crowded street of a city, at such a high rate of speed as to endanger the safety of people passing; and where the driver of such carriage is carrying the U. S. mail, he may be arrested, notwithstanding the act of Congress prohibiting the stoppage of the mail. U. S. v. Hart, 3 Wheeler's Crim. Cas. 304.

4. **By forcible entry.** If a person having a possessory title to land, enters by force, and throws out a person who has a naked possession only, he may be indicted for a breach of the peace, but is not liable in trespass to the ousted person; and on the trial of the indictment, the title to the land does not come in question. Higgins v. State, 7 Ind. 549.

*As to sureties of the peace, see* BAIL AND RECOGNIZANCE.

# Bribery.

**1. Power of Congress to punish.** Bribery is included in the 8th section of the 1st article of the Constitution of the United States, giving Congress power to create, define, and punish crimes and offenses. U. S. v. Worrall, 2 Dallas, 384.

**2. Venue.** Writing and mailing a letter offering a bribe in one State, directed to a person in another State, is an offense completed in the State where the post office is situated. U. S. v. Worrall, *supra.*

**3. Bribery at election.** To constitute bribery at an election, it must appear that the offense was actually carried into execution by an election held, and the corrupt vote then given; and this cannot be intended, but must be distinctly charged. Newell v. Com. 2 Wash. 88.

**4.** In Pennsylvania, the bribing of a voter by a person running for the office of sheriff, is not an infamous crime, within the meaning of the State constitution disqualifying him on conviction, from holding office. Com. v. Shaver, 3 Watts & Serg. 338.

**5.** An agreement between A. and B. that A. will vote for C. as commissioner of the revenue, in consideration that B. will vote for D. as clerk, and the voting of A. and B. pursuant thereto, is not an offense within the statute of Virginia against buying and selling offices. Com. v. Callaghan, 2 Va. Cas. 460.

**6. Bribing officer.** In Alabama, to constitute the offense of bribing a legislative or judicial officer, it must appear that the cause or proceeding was pending before the officer at the time; or that it was afterward instituted before the officer, or so instituted that in the ordinary course of proceeding it would come before him. Barefield v. State, 14 Ala. 603.

**7.** It is not a defense to an indictment for bribing a United States officer, that the prisoner was brought within the jurisdiction of the court under an extradition treaty on another charge, and that the offense of bribery is not within the treaty. U. S. v. Caldwell, 8 Blatch. 131.

**8. Offering bribe.** A person may be indicted for offering to bribe, though the bribe be not taken. State v. Ellis, 4 Vroom, 102.

**9. Indictment.** An indictment for bribery at an election need not allege that the persons voted for were candidates. Com. v. Stephenson, 3 Metc. Ky. 226.

**10.** An indictment alleged that the defendant knowingly offered to give O. a bribe to vote, the said O. being then and there under twenty-one years of age. *Held* sufficient, as including in the charge, that the defendant knew that O. was under age when he offered him the bribe. U. S. v. O'Neill, 2 Sawyer, 481.

**11.** A person was indicted for attempting to bribe a deputy sheriff, with money to induce him to summon such persons on the jury, as the defendant should name. *Held*, an offense at common law, and that it was not necessary to allege in the indictment, that the defendant offered any specific sum of money, or other thing, to the deputy sheriff. Com. v. Chapman, 1 Va. Cas. 138.

# Burglary.

1. WHAT CONSTITUTES.
2. INDICTMENT.
3. EVIDENCE.
4. VERDICT.

## 1. WHAT CONSTITUTES.

**1. Meaning.** Burglary is the breaking and entering of a dwelling-house, in the night with intent to commit a felony. State v. Wilson, Coxe, 441; Com. v. Newell, 7 Mass. 247.

**2. The breaking.** To constitute burglary, there must be a breaking, removing, or putting aside of some part of the dwelling-house which is relied on as a security against intrusion. A door or window left open is no such security. But if the door or window be shut, it need not be locked, bolted, or

nailed; a latch to the door, or the weight of the window being sufficient. State v. Boon, 13 Ired. 244; State v. Reid, 20 Iowa, 413; Lyons v. People, 68 Ill. 271; Com. v. Strupney, 105 Mass. 588. But see People v. Bush, 3 Parker, 552.

3. The outer door being open, entering and unlatching, or unlocking a chamber door is burglary. State v. Wilson, Coxe, 439. Otherwise, if all the doors are open, and a thief enter, though he afterward break open a chest or cupboard. Ib. A person who entered a railroad depot through an open outer door, and then broke and entered an inner door, was held guilty of breaking and entering the depot. State v. Scripture, 42 New Hamp. 485.

4. The raising of a window sash which was down and closed, and which was the only fastening to the window, and the entry of the party through the same into the house, is such a breaking as constitutes burglary. Frank v. State, 39 Miss. 705.

5. Where an entry into a building is effected through a hanging window over a shop door, designed for light and ventilation, kept down by its own weight so firmly as to be opened only by the use of force, and so situated that a ladder, or something of the kind, is necessary to reach it, it is a sufficient breaking to constitute burglary. Dennis v. People, 27 Mich. 151; s. c. 2 Green's Crim. Reps. 565.

6. An area or excavation, in front of a cellar window, covered and protected by an iron grating is to be deemed a part of the cellar, and the raising of the grating is a breaking and entering within the statute of Michigan (Comp. L. § 5766) against burglary. People v. Nolan, 22 Mich. 229.

7. Where it was proved that the prisoner entered a dwelling-house by an open window in the day time, passed through the house, unlocked the front door and went out about noon, it was held that his offense was not burglary in the second degree under the statute of New York (2 R. S. 5th ed. p. 947, § 13). People v. Arnold, 6 Parker, 638.

8. In Massachusetts, the removal of a plank which is loose, and not attached to the freehold, in a partition wall of a building, is is not a breaking in within the statute. Com. v. Trimmer, 1 Mass. 476.

9. Entering by getting down a chimney, is a breaking. It makes no difference whether the door is barred and bolted, or the window secured or not, provided the house is secured in the ordinary way, so that by the carelessness of the owner, in leaving the door or window open, the trespasser be not tempted to enter. Com. v. Stephenson, 8 Pick. 354; State v. Willis, 7 Jones, 190.

10. Where on a trial for burglary it was proved that the defendant about four o'clock in the morning had raised the window of a dwelling-house, and stood outside holding it up with his hand, the fingers of which were inside the house, and his elbows resting on the window sill, when being discovered, he dropped the window and fled, it was held sufficient to sustain a conviction. France v. State, 42 Texas, 276.

11. Forcing open shutters and thrusting the hand within them, there being no entry of the house, will not constitute burglary. State v. McCall, 4 Ala. 643. Where on a trial for burglary, the evidence did not show whether certain blinds were so closed as to require a breaking to enter, it was held insufficient to sustain a conviction. Williams v. State, 52 Ga. 580.

12. When it was proved that the prisoner had proposed to a servant a plan for robbing his employer's office by night, that the servant told his employer, and that the latter acting under the instructions of the police, gave the servant the keys of his office, that the servant and the prisoner went together to the office, when the servant opened the door with the key, and they both entered through the door, and were arrested in the house, it was held that there could not be a conviction of burglary. Allen v. State, 40 Ala. 334.

13. On a trial for burglary, the evidence showed that the proprietor of the building was apprised of the intended crime, that armed men were placed in the building, and that the proprietor was close at hand watching when the entrance was effected. *Held* that the liability of the defendants was not

thereby changed. Thompson v. State, 18 Ind. 386.

**14. Constructive breaking.** The prisoner, by artifice and fraud, procured the door of a dwelling to be opened, and immediately entered and robbed the house. *Held* burglary. State v. Johnson, Phil. N. C. 186.

**15.** Where three persons, between ten and eleven o'clock at night, obtained an entrance into a store by arousing the owner from sleep, and requesting to be let in, and after they had entered called for meat, and as the owner of the store was in the act of getting it, knocked him down and robbed the store, it was held a sufficient breaking to constitute burglary. State v. Mordecai, 68 N. C. 207.

**16.** To amount to a constructive breaking, so as to constitute burglary, by enticing the owner out of his house by fraud and circumvention, and thus inducing him to open his door, the entry of the trespasser must be immediate, or so soon that the owner, or his family, cannot refasten the door. State v. Henry, 9 Ired. 463.

**17.** Where the owner was decoyed to a distance from his house, leaving it unfastened, and his family did not fasten it after he went out, and the trespasser, at the expiration of about fifteen minutes, entered the house through the unfastened door, with intent to commit a felony, it was held not burglary. Ib. Ruffin, C. J., *dissenting*.

**18.** Where two combine to commit a burglary, and one breaks into the house and obtains the property while the other waits outside, both are guilty of breaking and entering. People v. Boujet, 2 Parker, 11.

**19.** Where an essential part of the plan of a burglary was that one of the parties should entice the owner a mile away from the building, and keep him there while the burglary was effected, it was held that the one so doing, was constructively present at the burglary, and might be indicted as a principal. Breese v. State, 12 Ohio, N. S. 146.

**20. Time of breaking.** In Georgia, burglary may be committed in the day as well as night. State v. Thompson, R. M. Charlt. 80. And in Maine, the offense may be committed irrespective of light or darkness. State v. Newbergin, 25 Maine, 500.

**21.** On the trial of an indictment against an accessory before the fact, to the breaking and entering a bank building in the night, and stealing from the vault of the bank, it is immaterial that part of the work was done in the day time, or that the forcing open of the vault and stealing its contents was postponed until daylight; nor is it necessary to prove that the defendant knew or supposed that the offense was to be committed in the night. Com. v. Glover, 111 Mass. 395.

**22. Must be a felonious intent.** The intent to commit a felony is a material part of the crime of burglary, and must be alleged in the indictment. Wood v. State, 46 Ga. 322. The jury were instructed that if they believed that the defendant entered a certain warehouse in the night time and took therefrom sundry goods and chattels, he was guilty of burglary. *Held* error, no allusion being made in the instruction to the felonious intent of the entry and the character of it. People v. Jenkins, 16 Cal. 431.

**23.** When on the trial of an indictment for breaking and entering a dwelling in the night with intent to commit larceny, it is proved that the defendant was at the time in such a state of intoxication that he entered without any intent to commit the crime, he cannot be convicted. State v. Bell, 29 Iowa, 316.

**24.** A person who is lawfully *in* a house, or has the right to enter, as the guest of an inn, cannot be convicted of entering in the night time with intent to steal. State v. Moore, 12 New Hamp. 42.

**25.** A joint tenant cannot be guilty of burglary in unlocking the door of the joint tenement and taking therefrom the goods of his roommate. Clarke v. Com. 25 Gratt. 908.

**26.** Under an indictment for breaking and entering a smokehouse and stealing meat, the character of the intent will not be changed by the fact that the prisoner previously went into the smokehouse on the business of the mistress of the house, and while there, dropped the meat between the

ceiling, so that it could be taken out by prying up one of the weather boards; nor will it change the character of the breaking and entering so as to make the offense a mere larceny instead of burglary. Fisher v. State, 43 Ala. 17.

**27. Intent when not an ingredient of offense.** In Ohio, under the statute punishing the breaking and entering a mansion house in the night season, *in which any person shall reside or dwell*, and committing, or attempting to commit, any personal *violence* or *abuse*, the *intent* with which the party enters forms no ingredient of the offense. The sole question is, did the defendant commit, or attempt to commit, any personal abuse or violence. Forsythe v. State, 6 Ham. 20.

**28.** To break and enter a dwelling-house with intent to commit adultery, is not burglary in Vermont. State v. Cooper, 16 Vt. 551. In Massachusetts, it is not a felony to break and enter a dwelling-house with intent to cut off an ear of a person. Com. v. Newell, 7 Mass. 245.

**29. The building.** Every dwelling-house is a habitation in which burglary may be committed, and also all out-houses attached to the dwelling, and intended for the comfort and convenience of the family. Armour v. State, 3 Humph. 379; but not a store, in which no member of the family slept, though within thirty feet of it, and within a common inclosure. Ib.

**30.** It is not burglary to break the door of a store within three feet of the dwelling-house, and inclosed in the same yard, when the store is not essential to the house as a dwelling. State v. Langford, 1 Dev. 253. And breaking open, in the night, a store twenty feet from a dwelling-house, but not connected with it by any fence or inclosure, is not burglary. People v. Parker, 4 Johns. 424.

**31.** A storehouse in which the owner occasionally slept, two hundred yards from his dwelling-house, in which he generally slept, with his family, is not a dwelling-house, the breaking and entering of which constitutes burglary. State v. Jenkins, 5 Jones, 430. Approved, State v. Outlaw, 72 N. C. 598. But burglary may be committed by breaking and entering a storehouse twenty-four yards from the dwelling-house and separated therefrom by a fence, if the owner or his servants occasionally sleep there. State v. Wilson, 1 Hayw. 242. Where a clerk had for four years occupied a storehouse as his regular sleeping apartment, for the sole purpose of protecting it, it was held a dwelling-house in which burglary might be committed. State v. Outlaw, 72 N. C. 598.

**32.** Where a person was charged with breaking and entering, in the night, "a certain house, not then occupied as a dwelling-house," and stealing therein goods and chattels, it was held to be only larceny. Wilde v. Com. 2 Metc. 408. But it has been held burglary to break and enter a house in a city where the prosecutor intended to live when he came back from the country, to which he had moved his furniture on going to the country, although his family had never slept in it; but it had only been used by them occasionally as a stopping place. Com. v. Brown, 3 Rawle, 207.

**33.** A two-story house of which the front on the first floor was used by the owner as a storehouse, and the back room (containing a few boxes of goods, and communicating with the front by a door in the partition) as a sleeping room, while his clerks took their meals at a hotel, but slept in the rooms on the second floor. *Held*, a dwelling-house, both within the common-law definition of burglary, and under sections 3308-9 of the Code of Alabama. *Ex parte* Vincent, 26 Ala. 145. And see State v. Mordecai, 68 N. C. 207.

**34.** Burglary may be committed by breaking and entering rooms in a tenement house which is occupied separately by several families, each having distinct apartments opening into a common hall and thus communicating with the street. Mason v. People, 26 N. Y. 200. But apartments leased and occupied separately from other tenements in the same building, with a separate outside entrance, the lessee having his residence in another part of the city, are not "adjoining to or occupied with a dwelling-

house" within the statute of Michigan against burglary (Comp. L. § 5766). People v. Nolan, 22 Mich. 229.

**35.** In North Carolina, a smokehouse which opened into the yard of a dwelling-house was deemed a part of the dwelling, the breaking and entering of which constituted burglary. State v. Whit, 4 Jones, 349. And in Alabama, under an indictment for burglary, a smokehouse, the front part and door of which were in the yard of the dwelling-house, although the rear was not, was held to be within the curtilage, and that the breaking and entering the rear of such a building constituted the offense, if the breach enabled the prisoner to take out meat with his hands. Fisher v. State, 43 Ala. 17.

**36.** In Connecticut, the cabin of a vessel is a "shop," and a barn not connected with the mansion-house, is an "out-house," within the statute punishing burglary. State v. Carrier, 5 Day, 131; State v. Brooks, 4 Conn. 446. See also, Rex v. Humphrey, 1 Root, 63. But otherwise as to a district school-house. State v. Bailey, 10 Conn. 144.

### 2. Indictment.

**37. Manner of breaking.** In Missouri, an indictment for house breaking under the statute, must allege the manner of the breaking, in order to show the exact offense intended to be charged. Connor v. State, 14 Mo. 561. In New Hampshire, it was held that the offense of entering a house in the night, without breaking, was included in an indictment for breaking and entering. State v. Moore, 12 New Hamp. 42.

**38. Description of premises.** It is sufficient to describe the house in the indictment by the word "mansion." Com. agst. Pennock, 3 Serg. & Rawle, 199.

**39.** An indictment for burglary charged that the crime was committed in the dwelling-house of W. He occupied two apartments in the house, and there were several rooms tenanted by other persons. The outer or hall door was common to all the occupants. *Held* that the rooms occupied by W. were properly described in the indictment as his dwelling-house. People v. Bush, 3 Parker, 552.

**40.** An indictment for burglary charged the prisoner with having broken and entered "the storehouse building of the Gulf Brewery, in which said storehouse building, goods, chattels, personal property, beer, ale, and other valuable things were kept for use, sale and deposit, with intent," &c. Upon the trial, the "Gulf Brewery" was proved to be a corporation, and the premises broken into, consisted of one or more rooms in the basement of a court-house, which for several years had been occupied by the "Gulf Brewery" for storing beer, and which was separated from the other rooms in the basement by partition walls with doors which were kept locked, the keys remaining in the possession of the agents of the corporation. The alleged burglary consisted in breaking the door leading into these apartments, the prisoner having gained access to the basement through an open window into a hall occupied for public purposes. *Held* that the apartments of the Gulf Brewery were properly described to convict the defendant of burglary in the third degree. People v. McCloskey, 5 Parker, 57.

**41.** An indictment charged that the defendants broke and entered "a certain building called a bank, being the bank of the New Hampshire Savings Bank, in Concord." The building was owned by the Merrimack County Bank. There were two entrances to the building in which the Savings Bank was kept, one leading to the rooms occupied by the Merrimack County Bank, the other to the rooms of the Savings Bank and other parts of the building. All the rooms except those occupied by the Merrimack County Bank as their banking rooms, were leased and occupied by tenants. The part occupied by the Merrimack County Bank was separated from the rest of the building by a partition, and had no connection with the other parts. The Savings Bank had exclusive possession of their rooms for their bank. *Held* that the place of the alleged offense was properly described in the indictment. State v. Rand, 33 New Hamp. 216.

42. Where there were two statutes, one punishing the offense of breaking in the night into an office adjoining a dwelling-house, and another, that of breaking in the night into an office not adjoining a dwelling-house, the punishment of both being similar, it was held not necessary to allege whether the office was adjoining, or not, to the dwelling house. Larned v. Com. 12 Metc. 240.

43. An indictment for burglary which described the premises as "the warehouse of W. M., at Scioto county," was held sufficient. Spencer v. State, 11 Ohio, 401.

44. **Ownership of building.** In Massachusetts, an indictment for breaking and entering the building of another, which did not allege the ownership of the building, was held fatally defective. Com. v. Perris, 108 Mass. 1. In Iowa, an indictment under the statute (Revision, § 4235), for breaking and entering a building in which valuable things are kept for use, must set out the owner of the building, if known, or if not known, it must be so stated. State v. Morrisey, 22 Iowa, 158.

45. An indictment for burglary may lay the ownership of the house in a married woman who lives apart from her husband, and has the occupancy and control of it. Dutcher v. State, 18 Ohio, 708. Describing the building entered as "the property of the estate of Mrs. L.," is sufficient, though it should appear that Mrs. L. was dead before the alleged time of the commission of the offense. Anderson v. State, 48 Ala. 665; s. c. 2 Green's Crim. Reps. 620.

46. In an indictment for entering a room with intent to commit larceny, the ownership of the room may be alleged to be in a person who hires the room from the lessee of the building. People v. St. Clair, 38 Cal. 137. Where the building alleged to have been entered, was described as the shop of William S. Amigh, it was held no variance that the shop was occupied in the business of one Winters, that Amigh was his agent, hired and paid for the shop and had it under his charge. People v. Smith, 1 Parker, 329.

47. In Massachusetts, where a shop is occupied by tenants in common, an indictment under the statute (R. S. ch. 133, § 11), for breaking and entering it in the night time and stealing therein, may describe it as the property of either. Com. v. Thompson, 9 Gray, 108.

48. Where two railroad companies jointly had the exclusive possession and control of a depot under a lease from the owner, it was held that an indictment for breaking and entering the depot, properly described it as belonging to such companies. State v. Scripture, 42 New Hamp. 485.

49. Where the house is occupied by a servant, clerk or employee, who has no estate therein as lessee or tenant at will or at suffrance, an indictment for burglary should charge it to be the house of the owner. State v. Outlaw, 72 N. C. 598.

50. Where an indictment for burglary charges that the defendants broke and entered "the City Hall of the city of Charlestown," it was held that this was a sufficient averment of ownership in the city. Com. v. Williams, 2 Cush. 582.

51. An indictment for burglary need not allege that any one was in the house at the time of the alleged breaking. The State v. Reid, 20 Iowa, 413.

52. **Time of breaking.** It is sufficient to allege, generally, that the burglary was committed in the night; and if a particular hour is named, it need not be proved. People v. Burgess, 35 Cal. 115; State v. Robinson, 6 Vroom (35 N. J.) 71.

53. An indictment for burglary is sufficient which charges that the offense was committed on a specified day, "about the hour of twelve, in the night of the same day." State v. Seymour, 36 Maine, 225.

54. In Massachusetts, the averment that the breaking and entering were in the night is deemed equivalent to an allegation that the offense was committed between one hour after sun-setting on one day, and one hour before sun-rising on the next day. Com. v. Williams, 2 Cush. 582.

55. In New York, an indictment for burglary in the third degree need not charge that the offense was committed in the day-time. Butler v. People, 4 Denio, 68.

**56.** In Connecticut, an information for burglary which charged that the prisoner "feloniously and burglariously" broke and entered, without stating that the acts were done in the night, or at what hour they were done, after a verdict of guilty and judgment was held fatally defective. Lewis v. State, 16 Conn. 32. And see Mark's Case, 4 Leigh, 658.

**57. Must aver intent.** An indictment for burglary must charge a felonious intent. State v. Eaton, 3 Harring. 554; Bell v. State, 48 Ala. 684; otherwise, as to an indictment for breaking and entering a house in the day time. Davis v. State, 3 Cold. Tenn. 77.

**58.** It is not enough in an indictment for burglary to allege an intention to commit a felony, but the particular offense must be stated, and the facts set forth. Wilburn v. State, 41 Texas, 237; State v. Lockhart, 24 Ga. 420. It is otherwise in New York under the Revised Statutes. Mason v. People, 26 N. Y. 200, Emott, J., *contra.*

**59.** An indictment for breaking and entering a dwelling-house in the night, and stealing, need not charge an intent to steal. Jones v. State, 11 New Hamp. 269; Com. v. Brown, 3 Rawle, 207.

**60.** An indictment which alleges that A. and B. had "in their possession" on a certain day burglars' tools sufficiently charges a joint possession; and an indictment which alleges an intent to use such tools need not describe the buildings intended to be entered; or the property intended to be taken, or mention the name of the owner. Com. v. Tivnon, 8 Gray, 375.

**61.** An indictment for breaking and entering a dwelling-house with intent to commit a rape need not allege an intent "*then and there*," nor need the crime of rape be fully and technically set forth. Com. v. Doherty, 10 Cush. 52.

**62. Averment of larceny.** The charge of larceny is not essential to constitute burglary, the mere intent to commit larceny being sufficient. If therefore, the allegation of larceny is wholly defective, there will still remain sufficient to sustain a conviction. Larned v. Com. 12 Metc. 240; State v. Ayer, 3 Fost. 301.

**63.** Burglary and larceny committed in the night may be included in the same indictment. State v. Colter, 6 R. I. 195; Breese v. State, 12 Ohio, N. S. 146; Shepherd v. State, 42 Texas, 501; Davis v. State, 3 Cold. Tenn. 77; State v. Ah Sam, 7 Nev. 127. And the prisoner may be acquitted of burglary, and convicted of the larceny; but a general verdict of guilty, will cover both offenses. State v. Brady, 14 Vt. 353.

**64.** An indictment charging that the defendant broke and entered the dwelling-house of one person with intent to steal his goods, and having so entered, stealing and carrying away the goods of another person, is not bad for duplicity. State v. Brady, *supra.*

**65.** Judgment will not be arrested after a general verdict of guilty under an indictment for breaking and entering a building and stealing therein, if the indictment properly allege the larceny of a single article. State v. Bartlett, 55 Maine, 200.

**66.** An indictment for burglary with intent to steal goods and chattels, need not describe the goods. Spencer v. State, 13 Ohio, 401; Josslyn v. Com. 6 Metc. 236; or state the value of the things intended to be stolen. Hunter v. State, 29 Ind. 89; Wicks v. State, 44 Ala. 398. *Contra*, as to the averment of value, People v. Murray, 8 Cal. 519.

**67.** An indictment for entering a dwelling-house with intent to steal, may charge in different counts the ownership of the goods to be in different persons. People v. Thompson, 28 Cal. 214.

**68.** An indictment for breaking and entering a shop, and stealing therein certain property of A. and B., need not allege that A. and B. were partners; and proof that they were in fact partners, and that the property stolen belonged to the firm, will not constitute a variance. Com. v. O'Brien, 12 Allen, 183.

**69. Place of trial.** In New York, burglaries may be tried out of their proper counties in certain special cases, that is where the goods burglariously taken are carried into another county by the offenders; but

this is by positive law, and not because the burglary was actually committed in the county where the indictment is found, or in judgment of law is considered to have been committed there. The fact must therefore be set out which brings the case within the statute. But in the case of an indictment for a simple larceny found in a county into which the thief has carried the property stolen in another county, the law adjudges that the offense was in truth committed there, and hence there is no occasion for a statement in the pleading of what occurred in the other county. Haskins v. People, 16 N. Y. 344.

### 3. Evidence.

**70. The breaking.** To authorize a conviction for burglary, it must be proved that the doors were shut. State v. Wilson, Coxe, 439. Evidence of merely such an entrance as would enable the party injured to maintain trespass will not be sufficient, nor proof of an entrance obtained by stratagem, without an actual breaking or its equivalent. State v. Newbergin, 25 Maine, 500. In Ohio, proof of the constructive breaking of a jail is sufficient to sustain a conviction for a forcible breaking and entering. Dutcher v. State, 18 Ohio, 308. Proof of breaking out of a house will not sustain an indictment for breaking, entering and stealing. State v. McPherson, 70 N. C. 239; s. c. 2 Green's Crim. Reps. 737.

**71. Time and place.** On the trial of an indictment for burglary, the prosecution was permitted to prove, against the objection of the defendant, that the offense was committed at a time and place admitted to be other than, and distinct from, those mentioned or intended to be charged in the indictment. *Held* error. People v. Barnes, 48 Cal. 551. It is not material to prove whether or not there was sufficient light to distinguish a man's face. Thomas v. State, 5 How. Miss. 20.

72. Under a statute making it a crime to break and enter a shop with a felonious intent, a person may be convicted for breaking and entering a store. State v. Smith, 5 La. An. 340.

73. An indictment for burglary and larceny "in a certain building, to wit, the shop of J. D.," is supported by proof that the building in which the complainant had his shop contained also several other rooms occupied by tenants. Com. v. Bowden, 14 Gray, 103.

74. An indictment for burglary charged the breaking into and entering a store in which goods were kept for use, sale and deposit. The proof showed a breaking and entering into an inner room of a building, which room was not a store but a mere business office of the board of underwriters. *Held* that the variance was fatal. People v. Marks, 4 Parker, 153.

**75. The intent.** Under an indictment for burglary, it need not be proved that goods were actually stolen. It is sufficient if the offense was committed with that intention. Olive v. Com. 5 Bush, 376. The larceny, if proved, is sufficient evidence of the intent. State v. Moore, 12 New Hamp. 42.

76. The offense of burglary is complete by the breaking and entering with intent to steal. The actual larceny, although when it can be proved the most conclusive evidence that the breaking and entering was to steal, need not be charged in the indictment, and when charged the proof of it is not necessarily the only proof of the intent. But there must be proof of some fact or circumstance, act or declaration of the prisoner, in addition to the proof of the mere breaking and entering, from which the jury can find the intent. People v. Marks, 4 Parker, 153. In New Hampshire, where an actual stealing was charged in an indictment for burglary, it was held that proof of an intent to steal was not sufficient. Jones v. State, 11 New Hamp. 269.

77. The intent with which the defendant entered may be proved by circumstances tending to show that a felony was committed in a store adjoining. Osborne v. People, 2 Parker, 583.

78. On the trial of an indictment for breaking and entering a dwelling-house with intent to commit a rape, the effects of the alleged violence upon the person of the

female may be proved. Com. v. Doherty, 10 Cush. 52.

**79. The premises.** To sustain an indictment for burglary in a dwelling-house, it must be proved that some one lived in the house. Fuller v. State, 48 Ala. 273.

**80.** In burglary, the tenure by which the occupier holds the premises is immaterial. An indictment alleged the ownership of a storehouse broken into to be in A. and B. It was proved to have been the property of A., but that he and B. carried on mercantile business in it, and owned the goods kept therein for sale. The court charged that if A. and B. were doing business in the house at the time it would be a sufficient ownership. *Held* correct. White v. State, 49 Ala. 344.

**81.** On the trial of an indictment for breaking and entering in the night time the building of J. F., "the said building being then and there occupied by said J. F. as a dwelling-house," it was proved that J. F. left the house and deserted his family two weeks before the alleged burglary. *Held* no variance. Com. v. Dailey, 110 Mass. 503.

**82.** On the trial of an indictment for burglary in breaking and entering a storehouse, parol evidence of possession under a written lease is sufficient without the production of the lease. Houston v. State, 38 Ga. 165.

**83. Presumptions.** Where it was proved that the door had been forced open, it was held that the jury might infer that it had been previously shut. Com. v. Merrill, Thach. Crim. Cas. 1. On a trial for burglary alleged to have been committed in the apartments of one of several tenants who occupied the same building, the wife of the complainant testified that she had latched the door when she left the room, about fifteen minutes before she returned and discovered the accused; that the hall door was also latched when she saw it about ten minutes previous, and that both doors were generally kept closed. *Held*, that this evidence was properly admitted. People v. Bush, 3 Parker, 552.

**84.** It is not a presumption of law that a felonious breaking into a dwelling-house was committed in the night rather than the day. State v. Whit, 4 Jones, 349. On the trial of an information for burglary, the judge charged the jury as a matter of law, that, "when a building is left secure at night, and found early in the morning broken open, the presumption is that it was broken open in the night, and that this presumption obtains, though not so strongly, if the hour of discovery be so late as half past seven o'clock in the morning of the 15th of April." *Held* error, the question as to the time of the breaking and entering being one of fact for the jury. State v. Leaden, 35 Conn. 515.

**85.** Identification by voice alone of a person charged with burglary, whose voice had been previously heard by the witnesses but once, may be sufficient. Com. v. Williams, 105 Mass. 62.

**86.** On the trial of an indictment for burglary, evidence that the defendant was seen in the neighborhood on the day preceding the night of the robbery; that he made inquires about purchasing tobacco in a manner which showed that they were mere pretexts; that he apparently had some connection with two other strangers, is competent, in connection with the testimony of the owner of the house entered, that the defendant was there the same day, and that there were two engaged in committing the offense, although the defendant admitted that he was at the house that afternoon. Com. v. Williams, *supra*.

**87.** Under an indictment charging that the defendant broke and entered a shop and stole certain articles therefrom, at the same time jointly with his brother, it is proper to show that the two brothers occupied rooms at their father's house at the same time; that some of the stolen articles were found in the house, part of them in the room occupied by the brother, and part mingled with the defendant's property, and that some of the property was found in the defendant's room at another place. Com. v. Parmenter, 101 Mass. 211.

**88.** Evidence upon the question of guilty or not guilty of a burglary charged, is com-

petent to prove the attempt to commit it. People v. Lawton, 56 Barb. 126.

89. **Possession of burglars' tools.** On the trial of an indictment for burglary, burglarious tools found in the possession of the defendant soon after the commission of the offense, may be given in evidence when they constitute a link in the chain of circumstances which tend to connect the defendant with the particular burglary charged. People v. Winters, 29 Cal. 658. Evidence that such tools were found in a trunk belonging to the defendant eight days after the crime was committed, *held* proper. State v. Dubois, 49 Mo. 573.

90. Proof that burglarious implements found at the place of the burglary were made for T., held competent to show the guilt of the prisoner, the prosecution having given other evidence connecting the prisoner with T. in the commission of the crime. Clark v. People, 5 N. Y. Supm. N. S. 33.

91. The following was held sufficient evidence of an attempt to commit a burglary: The prisoner, having reconnoitered the premises, agreed with the witness that about one o'clock that night they would commit a burglary by entering a certain store; in pursuance of such design and agreement, at about the hour of one they went to the store through the alley in its rear; the prisoner carried, or caused to be carried there, a set of burglar's tools to aid them in committing the burglary; when they arrived, the prisoner suggested that none of the tools were strong enough to enable them to force an entrance; they then concluded to enter a blacksmith's shop close by, in order to get a crowbar, or some other tool with which to break into the store, and before they entered the shop an alarm was given and they were intercepted and prevented from executing their intended purpose. People v. Lawton, 56 Barb. 126.

92. **Possession of stolen property.** On the trial of an indictment for burglary and larceny, it is not erroneous for the court to charge the jury that the finding of the stolen property shortly after it was taken, is presumptive evidence of the guilt of the person in whose possession it was found, it being competent, under the indictment, to convict the prisoner either of simple larceny or of burglary and larceny. It is not erroneous for the court in such case to refuse to charge that the finding of the property in the possession of the defendant unaccompanied by any suspicious circumstances, was no evidence that she committed the burglary; it being some evidence of that fact even if not *prima facie* of her guilt of the burglary. Jones v. People, 6 Parker, 126; Davis v. People, 1 Ib. 447.

93. **Other offense.** On a trial for burglary, it is not competent to prove that the defendant committed a burglary in the same house on a former occasion. Lightfoot v. People, 16 Mich. 507, Graves, J., *dissenting*.

94. On the trial of an indictment for breaking and entering the City Hall of Charlestown, the prosecution offered evidence to prove that the ward of a certain key found in the prisoner's possession was made and fitted by him to open the door of the Lancaster Bank building. *Held*, that such evidence was improper. Com. v. Wilson, 2 Cush. 590.

95. On a trial for burglary in breaking open a barn and stealing goods therefrom, the evidence showed that the goods were discovered five days subsequent to the burglary on the prisoner's boat. *Held*, error to allow the prosecution to prove that other goods were found on the prisoner's boat which had been stolen from another person two or three weeks previous to the transaction in question. Hall v. People, 6 Parker, 671.

96. On a trial for burglary, other criminal acts than those charged may be proved to show guilty knowledge, establish identity, make out the *res gestæ*, or complete the chain of circumstantial evidence. Mason v. State, 42 Ala. 532. But evidence of other distinct burglaries committed by the defendant is *prima facie* irrelevant, and when the record does not show any ground for the admission of such evidence, the court will not examine the record of another case between the same parties to show that no error was committed. Mason v. State, 42 Ala. 532.

4. VERDICT.

97. **Form.** On a trial for burglary, the following verdict, "We, the jury, find the accused guilty of burglary, and find that the offense was committed since the first day of June, 1866, by agreement of counsel," is sufficient. Mountain v. State, 40 Ala. 344. Byrd, J., *dissenting*.

98. The prisoner may be found guilty of an attempt to commit the burglary charged in the indictment. People v. Lawton, 56 Barb. 126.

99. **In case of larceny.** Under an indictment charging a breaking, entering, and stealing, the defendant may be acquitted of the burglary and found guilty of the larceny. Clarke v. Com. 25 Gratt. 908; State v. Crocker, 3 Harring. 559; People v. Snyder, 2 Parker, 23; State v. Brandon, 7 Kansas, 106; State v. Warner, 14 Ind. 572.

100. In Maine, the prosecuting attorney may enter a *nolle prosequi* as to the breaking and entering, and leave the defendant to be punished for the larceny only. Anon. 31 Maine, 592.

101. In Alabama, under the statute (Rev. Code, § 3695), under an indictment charging that the defendant broke and entered a building with intent to steal, and feloniously took and carried away personal property, there may be a conviction of either burglary or larceny, or of both. But in the latter case the defendant can be sentenced to only one punishment. Bell v. State, 48 Ala. 684.

102. Where the breaking and entering and stealing are charged in distinct counts as separate offenses, committed at different times, the defendant may be convicted on both, and a judgment rendered on both. Joslyn v. Com. 6 Metc. 236. An indictment contained two counts, the first of which alleged that the defendant broke and entered a house with intent to steal, and stole therefrom certain goods. The second count charged a simple larceny of the same goods. *Held*, that the first count was for housebreaking, and not larceny, and that the jury might find the defendant guilty on each count, and fix a several punishment for each offense. Speers v. Com. 17 Gratt. 570. See Vaughan v. Com. Ib. 576.

# Carrying Concealed Weapons.

*See* CONCEALED WEAPONS.

# Cemetery.

1. **Desecration of.** On the trial of an indictment for wrongfully desecrating and disfiguring a public burying ground, it is competent to prove that a particular tract of land is such, by showing its use and occupation for that purpose by others than the owners of the soil, and if it has once acquired that character it does not cease to have it by mere disuse. Com. v. Wellington, 7 Allen, 299.

2. Under an indictment for wrongfully desecrating and disfiguring a public burying ground particularly described by metes and bounds, the whole description must be proved exactly as set forth. It is, therefore erroneous to charge the jury that the defendant may be convicted if it is shown that a part of the land described in the indictment as a burying ground has been so used, and that the acts were done by him in that part. Com. v. Wellington, *supra*.

3. **Removal of dead bodies.** A statute which empowers boards of health "to make all regulations which they judge necessary concerning burial grounds and interments within their respective limits" is not restricted in its operation to acts done within burial grounds, but includes the removal of dead bodies. Com. v. Goodrich, 13 Allen, 546.

*See* DISINTERRING THE DEAD.

# Certiorari.

1. WHEN IT WILL LIE.
2. FORM.
3. SERVICE.
4. RETURN.
5. JUDGMENT.

1. WHEN IT WILL LIE.

1. **Basis of application.** An application

for a writ of certiorari is based upon the irregularity of the proceedings in the cause apparent upon the record and documents properly before the court upon a return of the same to the magistrate. Stratton v. Com. 10 Metc. 217.

2. **When proper.** A certiorari is the proper writ, where a statute creating an inferior criminal court has provided no means to review its judgment. John v. State, 1 Ala. 95. It will lie to all inferior jurisdictions, the proceedings of which cannot be corrected by writ of error, to remove their proceedings into the Superior Court. Bob v. State, 2 Yerg. 176. When a removal of the case is essential to the due administration of justice, an allowance of the writ will be granted to the defendant as of course. Com. v. McGinnis, 2 Whart. 117; Com. v. Profit, 4 Binn. 428; Com. v. Lyon, 4 Dall. 302; People v. Runkel, 6 Johns. 334.

3. **When demandable.** Where a person entitled to an appeal is denied such right, or deprived of it by fraud, or accident, or inability to comply with the requirements of the law, he is entitled to have the whole case brought up by certiorari. State v. Bill, 13 Ired. 373.

4. **Under the statute of New York.** The office of a writ of certiorari after trial and before judgment, under the New York Revised Statutes, is to bring up the indictment, the proceedings on the trial, and any bill of exceptions that may have been taken; and it presents for review only the questions arising on the indictment and bill of exceptions. People v. Reagle, 60 Barb. 527; *Ex parte* Vermilyea, 6 Cow. 555. A certiorari to remove an indictment from the Oyer and Terminer to the Supreme Court, may issue at the instance of the counsel for the prosecution. People v. Baker, 3 Parker, 181.

5. Where there has been a conviction in the Oyer and Terminer, and sentence is stayed, the proceedings may be removed to the Supreme Court by *certiorari*. But when there is a conviction and judgment, the proceedings can only be so removed by writ of error; and when the irregularity is of such a nature that it cannot be properly embraced in the return to the writ of error, but the same has become part of the proceedings, a *certiorari* may also issue to bring up such proceedings. Where the irregularity complained of has not been introduced into the record or proceedings, so as to constitute it a proper subject to be returned to the writ of error or *certiorari*, affidavits may be read upon the argument after the writ of error has been returned, but not before, to correct an error arising out of an irregularity prejudicial to the rights of the prisoner, when he has no other legal mode of redress. Willis v. People, 5 Parker, 621.

6. In New York, where after the prisoners had been sentenced in the Court of Special Sessions, counsel desired the court to note an appeal to the Court of General Sessions for a rehearing, and it was objected that after such appeal, the court erred in committing the prisoners to the penitentiary, it was held that the action of the court could not be reviewed by *certiorari*. The remedy in such case, would be to offer the Special Sessions bail for trial at the General Sessions, and if this were refused, to procure the release of the prisoner pending the new trial, upon *habeas corpus* issued for the purpose of fixing and taking such bail. Gill v. People, 5 N. Y. Supm. N. S. 308.

2. Form.

7. **In general.** A certiorari for the removal of an indictment against four, will not remove an indictment which charges only three. Com. v. Franklin, 4 Dallas, 316.

8. It is proper to insert a special clause in a certiorari, directing it to operate as a supersedeas, and also to direct a special writ of supersedeas to the sheriff to delay execution until the case is heard and determined. John v. State, 1 Ala. 95.

9. A common-law certiorari to remove a summary conviction had before a magistrate, is not confined to questions touching the jurisdiction of the subordinate tribunal and the regularity of its proceedings, but also brings up the question whether there was any evidence to warrant the conviction. Mullins v. People, 24 N. Y. 399.

10. **In special cases.** For the form of a certiorari to bring up the proceedings from

a Court of Special Sessions, and for a form of the return thereto, see People v. Benjamin, 2 Parker, 201. For the form of such a writ to remove a decision on *habeas corpus* and the return to the same, see People v. Cavanagh, Ib. 650.

3. Service.

**11. Upon whom made.** The certiorari may be served by delivering it to the clerk of the court below, during vacation, who may return it immediately, notwithstanding it be directed to the court. Lambert v. People, 7 Cow. 103. It should be directed to the court, and not to the clerk. The appellate court will not grant a rule upon the clerk of the court below, to return. Such rule should be directed to the court below, who should order their clerk to return, if he refuse. Ib.

4. Return.

**12. Order for.** An order that "the trial of the prosecution shall be removed," &c., is sufficient, without directing that "a copy of the record of the said cause be removed," &c. State v. Shepherd, 8 Ired. 195.

**13. Contents of.** When the certiorari is to bring up a record to be given in evidence, or for other collateral purpose, the tenor only of the record is to be called for and certified; but it is otherwise where the court above is to take further proceedings. The indictment presented by the grand jury does not come up with the certiorari, but the record only which contains the whole proceedings. State v. Gibbons, 1 South. 40.

**14.** In sending up a transcript of record in obedience to a certiorari, the transcript need not be affixed to the writ of certiorari, if enough appears to show the court that it is in fact the proper transcript. State v. Carroll, 5 Ired. 139.

**15.** In New York, where judgment is stayed by a certificate, the statute requires the district attorney to remove the indictment and bill of exceptions by *certiorari* from the Oyer and Terminer into the Supreme Court, and the clerk is required to return thereto a transcript of the indictment, bill of exceptions, and the certificate staying judgment. Hill agst. People, 10 N. Y. 463.

**16.** Where the trial is before a magistrate without a jury, a certiorari may require the return of the evidence for the consideration of the superior tribunal, though it is otherwise where there has been a trial by jury. Barringer agst. People, 14 N. Y. 593.

**17.** In New York, the magistrate to whom a certiorari is issued to remove proceedings had before him, under the statute respecting disorderly persons, must set out in his return all the proceedings before him. Bennac v. People, 4 Barb. 164.

**18. Correction of.** The statute of New York, prescribing the contents of the return to be made by the clerk in criminal cases, and declaring that the court shall proceed upon that return, and render judgment upon the record before them, does not limit the general power of the court to correct and redress all errors, and for that purpose, to bring before it such proceedings in a cause not fully presented in the record made up in the court below, as may be important to enable it to do so. That portion of the return which is additional to the formal record of judgment and bill of exceptions, if it describes facts which might be assigned for error, is entitled to like consideration, and to have the same effect as if returned by certiorari. Cancemi v. People, 18 N. Y. 128.

**19.** In New Jersey, when an indictment has been removed, the court will allow a rule to return the record to the court below for the purpose of amending the caption. State v. Jones, 4 Halst. 2. The record is not sent with the writ, but the tenor only. Nicholls v. State, 2 South. 542. Form of record to be returned. Ib. 746.

**20. Cannot be refused.** The court to which the certiorari is directed has no power to refuse to return the indictment. State v. Hunt, Coxe, 287.

5. Judgment.

**21. By what court rendered.** In New York, where an indictment is taken into the Supreme Court by certiorari, and tried at

the circuit, it is competent and proper for the Supreme Court at general term, to pronounce judgment. Cancemi v. People, 16 N. Y. 501.

22. **Ground of.** In New York, upon a certiorari to a court of Special Sessions, the Supreme Court cannot reverse the conviction on the ground that the verdict is against the weight of evidence. But it may look into any other errors in the proceedings and judgment which appear on the face of the return. Pulling v. People, 8 Barb. 384.

## Challenge.

*See* DUELING; TRIAL.

## Cheat.

*See* FALSE PRETENSES.

## Commitment.

1. **Jurisdiction of court.** Where delay in issuing a warrant of commitment was occasioned by the bond and other proceedings on the part of the relator to appeal from the judgment, and the cause was not removed by him from the Special Sessions, it was held that the latter did not lose jurisdiction to issue the warrant, by lapse of time. People v. Rawson, 61 Barb. 619; s. p. People v. Yates Gen. Sess. 5 Wend. 110.

2. In New York, a justice of the peace, on an examination upon a complaint made before him in a criminal case, has not power to commit a person to jail for refusing to be sworn as a witness. People v. Webster, 3 Parker, 503.

3. Where a magistrate after an examination has decided that the person complained against shall give security to keep the peace, it is his duty to commit the accused if he refuses to do so; and he may issue his warrant of commitment on the following day, although he has in the mean time allowed the accused to go at large. Gano v. Hall, 5 Parker, 651; 42 N. Y. 67.

4. **Form and requisites of the warrant.** The warrant of commitment should run in the name of the State, and specify the offense with which the defendant is charged, or of which he has been convicted. *Ex parte* Rohe, 5 Ark. 104. But when a bench warrant and warrant of commitment are issued after indictment, it is only necessary for them to recite the presentment, and the crime generally. Brady v. Davis, 9 Ga. 73.

5. When a court in session orders a commitment, the minute is sufficient authority to the officer. No writ is necessary. State v. Heathman, Wright, 690.

6 Where a mittimus was irregular so far as it required the prisoner to pay a specified sum as costs, but was regular in other respects, it was held that the clause relating to costs might be rejected as surplusage. State v. James, 37 Conn. 355; approving matter of Sweatman, 1 Cow. 144.

7. Where two justices of the peace signed a mittimus and added the initials J. P., it was held that the process was sufficient to authorize an officer to hold the defendant. State v. Manly, 1 Overt. 428.

8. In New York, no seal is necessary to a warrant of commitment; the statute only providing that it shall be under the hand of the magistrate. People v. Rawson, 61 Barb. 619; Gano v. People, 5 Parker, 651; 42 N. Y. 67.

9. A commitment is irregular in not showing on its face that the justice had determined that there was probable cause to believe the prisoner guilty of the offense with which he stood charged. People v. Rhoner, 4 Parker, 166.

10. Where on a charge of larceny the magistrate temporarily commits the accused for further examination, the commitment need not state whether it is grand or petit larceny, or what articles are alleged to have been stolen. People v. Nash, 5 Parker, 473.

11. A commitment issued upon a conviction before a New York court of Special Sessions was objected to on the ground that it did not set forth that the defendants when brought before the magistrate requested to be tried before a court of Special Sessions, or that having been required by the mag-

istrate to give bail, they omitted for twenty-four hours to do so, or whether they demanded a jury. *Held* that such statements in the commitment were unnecessary. People v. Moore, 3 Parker, 465.

**12.** A warrant of commitment for petit larceny directing the officer to convey and deliver the prisoner to the keeper of the prison, and directing the keeper to safely keep the prisoner until the expiration of six months, and until he should pay the fine, is in proper form. People v. Rawson, 61 Barb. 619.

**13.** A commitment which directs the jailer to keep the prisoner "until discharged by due order of law," is too general. The commitment should be more specific, so as to leave nothing to the jailer's judgment or discretion as to when or under what circumstances the prisoner is entitled to his discharge. But such a defect is not a ground for a writ of *certiorari*. Kenney v. State, 5 R. I. 385.

## Common Drunkard.

**1. Who is.** An habitual drunkard is one who is in the habit of getting drunk, or who is commonly or frequently so, although he may not be constantly in that condition. Where it was proved that A. used liquor to excess on certain occasions, and a witness said he had seen him the worse for liquor several times, and another witness testified that A. was a dissipated man, it was held that the evidence tended to show that A. was an habitual drunkard. State v. Pratt, 34 Vt. 323.

**2. Complaint.** A complaint for being a common drunkard which alleges that the defendant at B., "on divers days and times, not less than three times, within six months last past, was drunk by the voluntary use of intoxicating liquor, and so, on the day of making the complaint, was a common drunkard," is argumentative and insufficient. Com. v. Whitney, 5 Gray, 85. But it need not be shown that the defendant was drunk in such a way as to disturb the public peace. Com. v. Conley, 1 Allen, 6.

**3. Evidence.** A person may be convicted of being a common drunkard without proof that he is constantly intoxicated, or even that his drunkenness is of daily occurrence; the word "common" in this connection importing frequency. Com. v. McNamee, 112 Mass. 285.

**4.** Where it was charged that the defendant was a common drunkard on the 1st of January, "having been at divers days and times since said 1st day of January drunk and intoxicated," it was held that the evidence must be confined to acts done on a single day. Com. v. Foley, 99 Mass. 499. *See* INTOXICATION AS A DEFENSE.

## Complaint.

**1. Venue.** When the county sufficiently appears in the body of a complaint, the want of venue in the margin, is not material. Com. v. Quin, 5 Gray, 478.

**2. Allegation of time.** A complaint for a violation of the law prohibiting the sale of intoxicating liquor, which charges that the sale was made on a certain day and month, and at divers other times, without stating the year, is insufficient; and the allegation of a former conviction without stating the time of such conviction, is also defective. State v. Kennedy, 36 Vt. 563.

**3.** A complaint to a magistrate who has authority on a trial thereof to pass sentence on the defendant, which alleges that the offense was committed on "the third day of June instant," without mentioning the year, is insufficient, although it is recited at the foot of the complaint, that it was "received and sworn to on the 4th day of June, A. D. 1855." Com. v. Hutton, 5 Gray, 89. Where the year of the commission of an offense is stated in an indictment or complaint in figures, without the letters "A. D." it will be sufficient. Com. v. McLoon, Ib. 91; Com. v. Doran, 14 Ib. 37; *contra*, Com. v. Sullivan, Ib. 97.

**4.** A complaint which alleges that the defendant on Saturday, the 2d of August, 1856, permitted certain persons to play at billiards "after the hour of six o'clock in

the afternoon on Saturday, the 2d of August, aforesaid," is sufficiently definite as to time. Com. v. Crawford, 9 Gray, 128.

5. **Necessary averments.** Every person is presumed to have a christian name until the contrary is made to appear by proper averment. Where a complaint for assault and battery only contained the initials of the defendant's christian name, and did not allege that he had no christian name or that it was unknown, it was held that the complaint was fatally defective, and that the objection could be raised by motion to quash. Gardner v. State, 4 Ind. 632. Same held as to indictment for forgery. Zellers v. State, 7 Ind. 659.

6. A complaint for disobeying an order of a health officer, should either allege specifically the acts which the defendant neglected to do, or at least that he did not comply with the order. A general allegation of disobedience is not sufficient; but it is otherwise as to the averment that the order was "substantially as follows." The allegation that the defendant "did disobey a lawful order of the health officer of said city after the same had been duly served upon him," is an *assumption* and not an *averment* of the fact of service, and therefore insufficient. And where the complaint did not allege that the city had imposed any penalty for the neglect complained of, or that it had passed any ordinance on the subject, it was held defective on that ground. State v. Soragan, 40 Vt. 450.

7. A complaint under a statute concerning willful and malicious injuries to personal property is bad which alleges the malicious destruction of cabbages, in not showing that the cabbages were personal property. Com. v. Dougherty, 6 Gray, 349.

8. When the complaint misrecites the act alleged to have been violated, it is fatally defective. Com. v. Unknown, 6 Gray, 489. But a complaint which charges an assault upon two persons, is not for that reason bad. Kenney v. State, 5 R. I. 385.

9. **Conclusion.** Where a complaint for disobeying the order of a health officer concluded "contrary to the form, force and effect of the ordinance of said city," it was held that it should have concluded against the statute and the peace and dignity of the State. State v. Soragan, 40 Vt. 450.

10. **Execution.** Under a statute (R. S. of of Mass. ch. 135, § 2), requiring the magistrate to reduce the complaint to writing "and cause the same to be subscribed by the complainant," the signature must be at the foot of the complaint. Com. v. Barhight, 9 Gray, 113.

11. Where a complaint is made before a justice of the peace by the complainant personally, and the usual oath taken by the justice to the complaint, which is signed by the complainant by affixing his mark, there need not be an attesting witness to the mark. Com. v. Sullivan, 14 Gray, 97.

12. The certificate of the clerk of a police court, that the complaint addressed to the justice was "received and sworn to," sufficiently shows, in the absence of any evidence to the contrary, that it was received and sworn to before the court when in session. Com. v. Calhane, 110 Mass. 498.

13. **Amendment.** In New Hampshire a complaint before a police court, which alleges that the defendant broke and entered a dwelling-house and committed an assault and battery upon the owner, cannot be amended by striking out the averment as to the breaking and entering, so as to leave it a complaint for simple assault and battery. State v. Runnals, 49 New Hamp. 498.

14. **Waiver of objection.** The complaint before the committing magistrate for assault and battery was against *Cahew;* but the defendant, whose name was *Cahill*, appeared and answered without objection. *Held*, that an exception taken on the trial, was properly overruled. State v. Thompson, 30 New Hamp. 250.

15. In Vermont, the objection that a memorandum of the witness is not subjoined to a grand juror's complaint, is in the nature of a dilatory plea, and must be made at the earliest possible time, otherwise it will be deemed waived. State v. Norton, 45 Vt. 258.

# Concealed Weapons.

**1. What are.** An instrument may be deadly or not deadly, according to the mode of using it, or the subject on which it is used. Whether or not it is deadly, is in general to be determined by the court. An oaken staff, nearly three feet long, an inch and a half in diameter at one end, and two inches at the other, may be a deadly weapon. State v. West, 6 Jones, 505. But when a gun or pistol is used simply as an instrument to strike with, it is for the jury to determine whether or not it is a deadly weapon. Shadle v. State, 34 Texas, 572. A pistol that has no lock, and can only be fired by the use of a match, or in some other such way, is not a pistol within the statute of Alabama prohibiting the carrying of concealed weapons. Evins v. State, 46 Ala. 88.

**2.** A person who, in the room of another in which there are several persons, has concealed in his vest pocket a pistol is guilty of a violation of the statute of Alabama against carrying concealed weapons. Owen v. State, 31 Ala. 387. But in Tennessee, a person who being armed with concealed deadly weapons, assails another in a public meeting with violent and opprobrious language, is not liable to indictment. State v. Taylor, 3 Sneed, 662.

**3. Complaint.** In Massachusetts, a complaint under the statute (Gen. Stats. ch. 164, § 10), prescribing a penalty in case a person had in his possession a dangerous weapon when arrested by an officer, must show that the defendant was lawfully arrested by the officer. Com. v. O'Connor, 7 Allen, 583; Com. v. Doherty, 103 Mass. 443.

**4. Indictment.** An indictment for unlawfully exhibiting a pistol, need not allege that the pistol was loaded. Gamblin v. State, 45 Miss. 658.

**5. Evidence.** Under an indictment alleging that the defendant carried "concealed deadly weapons, to wit, a bowie knife and also a dagger," it is sufficient to prove that he carried either. Com. v. Howard, 3 Metc. Ky. 407.

**6.** A person having in his drawer a pistol belonging to another, and being asked by a minor to lend it to him, replied: "It is not mine, but belongs to another man. I have nothing to do with it. You can take it if you choose. It was left here by Mr. C., who will come back in four or five days, and it should be here when he returns and calls for it." The minor then took the pistol. *Held* that this was a violation of the statute of Alabama (Session Acts of 1855, 1856, p. 17), making it a misdemeanor, "to sell, give, or lend" deadly weapons to a minor. Coleman v. State, 32 Ala. 581.

**7. Construction and constitutionality of statutes.** For meaning of the word "traveling," in statute of Alabama (R. C. 3555), making it lawful to carry about the person a concealed pistol, see Lockett v. State, 47 Ala. 42; s. c. 1 Green's Crim. Reps. 461. As to the constitutionality of the statute of Tennessee of June 11th, 1870, against carrying concealed weapons, see Andrews v. State, 3 Heisk. 165; s. c. 1 Green's Crim. Reps. 466.

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# Conspiracy.

1. What constitutes.
2. Indictment.
3. Trial.
4. Evidence.
5. Verdict and judgment.

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1. What constitutes.

**1. Definition.** A conspiracy is a combination of two or more persons, by concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful, by criminal or unlawful means. State v. Mayberry, 48 Maine, 218; Com. v. Hunt, 4 Metc. 111; State v. Burnham, 15 New Hamp. 396; State v. Bartlett, 30 Maine, 132; State v. Hewetts, 31 Ib. 396.

**2.** Conspiracy, at common law, is a confederacy of two or more persons wrongfully to prejudice another in his property, person, or character, or to injure public trade, or to affect public health, or to violate public policy, to obstruct public justice, or to do

any act in itself illegal. Johnson v. State, 2 Dutch. 313, per Haines, J.

3. **Gist of.** The gist of conspiracy is the fraudulent and corrupt combination. There must be either an intent that injury shall result from the combination, or the object must be to benefit the conspirators to the injury of the public, or the oppression of individuals. Com. v. Ridgeway, 2 Ashm. 247.

4. **New party.** When a new party, with a knowledge of the facts, agrees to the plans of the conspirators, and comes in and assists in carrying them out, he is from that moment a fellow conspirator, although the parties were not previously acquainted. People v. Mather, 4 Wend. 229.

5. **Need not be overt act.** The conspiring to commit an indictable offense is a crime. Com. v. Putnam, 29 Penn. St. 296; and the offense is in general complete, when the conspiracy is formed, without any overt act. State v. Rickey, 4 Halst. 293; People v. Mather, *supra;* Alderman v. People, 4 Mich. 414; State v. Ripley, 31 Maine, 386; Hazen v. Com. 23 Penn. St. 355; Isaacs v. State, 48 Miss. 234. But in New Jersey, it seems that to constitute the offense, under the statute, some act must be done in execution of the design agreed upon, to complete the offense. State v. Norton, 3 Zabr. 33.

6. **Design must be calculated to injure.** Although there may have been an intention to defraud some one of his property, yet if the means employed could not possibly have that effect, the offense of conspiracy is not complete. March v. People, 7 Barb. 391. An indictment for conspiracy cannot be maintained against several persons who combine to obtain money from a bank, by drawing their checks on a bank in which they have no funds. State v. Rickey, 4 Halst. 293.

7. Where the indictment charged the defendants with having conspired to injure the character of R. S. by obtaining a divorce on the ground of adultery, and that in order to carry out their design, they falsely represented that the divorce was sought on other and different grounds, and thereby induced her to make no defense to the action, it was held that as there was no crime involved in the accusation, the defendants were entitled to acquittal. State v. Stevens, 30 Iowa, 391.

8. In general, an indictment will not lie for conspiring to commit a civil trespass upon property. State v. Straw, 42 New Hamp. 393.

9. **At common law.** A conspiracy to seduce a female is a crime at common law. Smith v. People, 25 Ill. 17. And the same is true of a confederacy to aid a female infant to escape from her father's control, with a view to marry her against his will. Miffin v. Com. 5 Watts & Serg. 461. A conspiracy to seduce and carry off a female over sixteen years of age, is an indictable offense in Virginia, though the seduction and abduction be not so. Anderson v. Com. 5 Rand. 627.

10. A conspiracy to defraud a bank, and thereby impair the securities for the circulation held by the public, is indictable at common law. State v. Norton, 3 Zabr. 33. Where an indictment charged first, an executed conspiracy falsely, &c., by wrongful and indirect means, to cheat defraud, &c., the Bank of the United States; and secondly, a conspiracy (as before) one of the defendants being president of the office of discount of the bank, and another the cashier of the office, and another a director of the bank; it was held that it charged in each count a conspiracy at common law. State v. Buchanan, 5 Har. & J. 317.

11. A conspiracy to obtain goods by false pretenses, is indictable at common law. Johnson v. People, 22 Ill. 314. Where goods are obtained on credit by a person who is insolvent, in the usual course of his business, without disclosing his insolvency, and without any reasonable expectation of being able to pay for them, it is not necessarily such an unlawful act as to be the subject of a conspiracy; though it is otherwise in the case of a purchase made with no expectation whatever of payment. Com. v. Eastman, 1 Cush. 189.

12. It is a conspiracy at common law for journeymen bootmakers to combine to com-

'pel by force of numbers and discipline, and by fines and penalties, other journeymen to join their society, and masters to employ none but members. Com v. Hunt, Thach. Crim. Cas. 609. Where journeymen shoemakers combined, and fixed the price of making boots, and agreed that if a *journeyman* should make such boots for any less, he should pay a penalty of ten dollars, and if any *master shoemaker* employed a journeyman who had violated their rules, that they would refuse to work for him, and would quit his employment, and carried out such agreement by leaving the employment of a master workman, in whose service a journeyman had violated their rules, and thereby compelled the master shoemaker to discharge such journeyman from his employ, it was held, that the parties thus conspiring, were guilty of a misdemeanor. People v. Fisher, 14 Wend. 9.

13. In New Jersey, the common-law offense of conspiracy is not abolished by the statute defining conspiracy in certain cases. State v. Norton, 3 Zabr. 33.

14. **Acts constituting.** Many acts which, if committed by an individual, are not criminal, are indictable when committed in pursuance of a conspiracy between two or more persons; and an indictment may be sustained whenever there is a conspiracy to effect a lawful purpose, by unlawful means. State v. Rowley, 12 Conn 101. A conspiracy may be criminal, although the object be to get lawful possession of land. State v. Shooter, 8 Rich. 72.

15. A "corner," whether it be to affect the price of articles of commerce, or the price of stocks, when accomplished by confederation to raise or depress prices, and operate on the markets, is a conspiracy. Every association is criminal, the object of which is to raise or depress the price of labor beyond what it would bring if left to itself. To fix a standard of prices among men in the same employment, as a fee bill, may become criminal when the parties resort to coercion. If the means be unlawful, the combination is indictable. Morris Run Coal Co. v. Barclay Coal Co. 68 Penn. St. 173; People v. Melvin, 2 Wheeler's Crim. Cas. 262.

16. Where several combined to compel their employer to discharge certain of their fellow-workmen by threatening to quit his employment unless he did so, it was held that they were liable to indictment for conspiracy. State v. Donaldson, 3 Vroom (32 N. J.) 151.

17. Where the defendants contriving to procure the election of certain persons as directors of an insurance company, and thereby to cause themselves to be employed in the service of the company, fraudulently conspired to induce persons to appear at the annual meeting of the company and vote for directors, by issuing to such persons fraudulent policies of insurance which were to be held and treated to be nullities for every purpose but that of authorizing the holders to vote, it was held that the means were fraudulent, immoral, and illegal. State v. Burnham, 15 New Hamp. 396.

18. A combination to injure others by perverting, obstructing, or defeating the course of public justice, by suppression, or fabrication of evidence, is indictable. State v. Dewitt, 2 Hill, S. C. 282.

19. The officer, the prosecutor, and all other persons concerned, may be indicted for a conspiracy to procure criminal process for improper purposes; and if it appear that the officer who executed the process was engaged in the conspiracy, the writ will afford him no protection. Slomer v. People, 25 Ill. 70.

20. The charge of a conspiracy to cheat a municipal corporation imports an indictable offense. State v. Young, 8 Vroom (36 N. J.) 184.

21. In New Jersey, the erasure of an indorsement on a promissory note with intent to defraud, is a misdemeanor, and a conspiracy to do it, indictable under the statute. State v. Norton, 3 Zabr. 33.

22. To conspire "to injure the property" of an individual by destroying it, or lessening its value, is indictable under the statute of Maine. State v. Ripley, 31 Maine (1 Red.) 386.

23. Where A., who owned wood worth two hundred dollars, and B., who owned lumber worth one hundred dollars, conspir-

ing to cheat and defraud C. and D., agreed that B. should apply to C. and persuade him to purchase in his own name for B. A.'s wood for $1,500, and that B. should then refuse to take the wood of C. or pay him for it, that A. should in like manner apply to D. and get him to buy in his own name for A. B.'s lumber for $1,200, and that A. should then refuse to take the lumber of D., or pay him for it, and in pursuance of such conspiracy, A. and B. persuaded C. and D. to make such purchases, A. and B., pretending that they wanted to be owners of such wood and lumber, and promising to take the same of C. and D. and pay them the prices which they were to pay, and C. and D. gave to A. and B. their promissory notes for the purchase money, and A. and B. then declined to take the wood and lumber of C. and D. or to indemnify them, and by means of such combination and false pretenses, A. and B. got possession of such notes from C. and D., it was held that these acts constituted an offense within the statute of Connecticut (of 1835, Lit. 21, § 114). State v. Rowley, 12 Conn. 101.

**24. All equally liable.** Where several conspire to do an unlawful act, all are liable for the acts of each if done in the prosecution of their common purpose. State v. Wilson, 30 Conn. 500; Tompkins v. State, 17 Ga. 356; Reid v. State, 20 Ib. 681; State v. Nash, 7 Iowa, 347; State v. Shelledy, 8 Ib. 477; State v. Myers, 19 Ib. 517; Green v. State, 13 Mo. 382. Therefore, where on a trial for murder the evidence tended to show that the homicide was committed by some person with whom the prisoner acted in concert, it was held not to be erroneous for the court to refuse to charge that there was no evidence in the case that would authorize a conviction. Carrington v. People, 6 Parker, 336.

25. On the trial of an indictment for robbery, it appeared that the prisoner, being confined in jail, got out of his cell, broke the locks off of the doors of the others, who, as soon as the jailer made his appearance, set upon, bound, blindfolded and robbed him. *Held* that all were equally guilty, although it was not proved affirmatively that the prisoner personally took part in the robbery. Ferguson v. State, 32 Ga. 658.

**26. Act must have relation to common object.** If the act have no connection with the common object, the party committing it is alone responsible for its consequences. Where, therefore, A. and B., by prearrangement, attack C. and kill him, and D., not being privy to their common design, joins in the fight, D. is not guilty of murder. In such cases, the character of the act is to be determined by the jury, and a charge which excludes it from their consideration is erroneous. Frank v. State, 27 Ala. 37.

**27. When merged in the offense.** A conspiracy to commit a felony, when executed, is merged in the felony. Com. v. Blackburn, 1 Duvall, 4; but not a conspiracy to commit a misdemeanor. People v. Richards, 1 Mann. Mich. 216; State v. Murray, 3 Shep. 160; People v. Mather, 4 Wend. 229. But see Com. v. Kingsbury, 5 Mass. 106; Com. v. O'Brien, 12 Cush. 84; Lambert v. People, 9 Cow. 577; State v. Murphy, 4 Ala. 765.

28. When there is a conspiracy to commit a higher offense, and the offense is actually committed, the conspiracy is merged; but not when both are of the same grade, as a conspiracy to cheat, and actual cheating by false pretenses. State v. Mayberry, 48 Maine, 218.

29. Conspiracy to hinder an officer in the discharge of his duty is not merged in the offense of impeding the officer. State v. Noyes, 25 Vt. 415.

### 2. Indictment.

**30. Parties.** An indictment charging that the defendant conspired with divers persons to the jurors unknown is good, although the conspirators were known to the jury and their names might have been given. People v. Mather, 4 Wend. 229.

**31. Description of offense.** An indictment for a conspiracy to commit an offense for which there is no name at common law, must describe the offense with as much precision as though the indictment was laid for

the offense instead of the conspiracy. Hartman v. Com. 5 Barr, 60.

32. An indictment for conspiracy is sufficient which avers that the accused with another person conspired unlawfully and maliciously to procure L. to be arrested for the offense of larceny, well knowing he was not guilty of said offense. Elkin v. People, 28 N. Y. 177.

33. When it is alleged that the defendants conspired falsely to charge another with crime, it is not necessary to aver the innocence of the prosecutor, or in terms that he was falsely charged. Johnson v. State, 2 Dutch. 313; nor that the defendants procured or intended to procure an indictment or other legal process. Com. v. Tibbetts, 2 Mass. 536.

34. **Averment of means employed.** An indictment for conspiracy must allege that the defendants conspired to do an illegal act by illegal means. State v. Harris, 38 Iowa, 242. When the conspiracy was to effect a criminal or unlawful purpose, the indictment must state the purpose fully and clearly; and if the purpose be not in itself unlawful, the criminal or unlawful means to be used must be stated. Com. v. Hunt, 4 Metc. 111.

35. In an indictment for conspiracy at common law, to do an act which if committed would be a well known offense, no further description than the name of the crime is necessary, and the means by which it was to be accomplished need not be stated. People v. Mather, 4 Wend. 229; State v. Ripley, 31 Maine, 386; Com. v. Eastman, 1 Cush. 189; People v. Richards, 1 Mann. Mich. 216; Hazen v. Com. 23 Penn. St. 355; State v. Straw, 42 New Hamp. 393. But if it is charged that the defendants conspired for a purpose not necessarily criminal, and where the offense must therefore consist in the means designed to be used, the means must be distinctly set out in the indictment. State v. Roberts, 34 Maine, 320; State v. Hewitt, 31 Ib. 396; State v. Bartlett, 30 Ib. 132; State v. Burnham, 15 New Hamp. 396; State v. Noyes, 25 Vt. 415; State v. Norton, 3 Zabr. 33.

36. An indictment for conspiracy which alleges that the defendant conspired "to cheat and defraud," is not sufficient, that not being an offense at common law. It must be shown that the combination was to cheat and defraud in some of the modes made criminal by statute. Alderman v. People, 4 Mich. 414; People v. Eckford, 7 Cow. 103; Lambert v. People, 9 Ib. 577; March v. People, 7 Barb. 391; Com. v. Shedd, 7 Cush. 514; State v. Jones, 13 Iowa, 269; State v. Potter, 28 Ib. 554; State v. Stevens, 30 Ib. 391; State v. Parker, 43 New Hamp. 83.

37. Where an indictment charges a conspiracy to cheat, the conspiracy is the gist of the offense, and the cheating but aggravation. Com. v. Davis, 9 Mass. 415. But the means proposed to be used must be stated in such detail as to show a conspiracy to effect the intended purpose. Com. v. Wallace, 16 Gray, 221; *contra*, People v. Scholtz, 2 Wheeler's Crim. Cas. 617; State v. Young, 8 Vroom (36 N. J.) 184. The indictment should set out an offense complete in itself, without the aid of any averment of illegal acts done in pursuance of the agreement. An illegal combination, imperfectly and insufficiently charged, will not be aided by averments of overt acts done in pursuance of it. Where the indictment stated the object or purpose of the conspiracy to be the obtaining and acquiring, by the defendants, from certain persons named, large quantities of goods belonging to such persons, "by divers false pretenses and subtle means and devices to cheat and defraud them thereof," and "then to abscond out of the State with said property," it was held insufficient on demurrer. State v. Keach, 40 Vt. 113.

38. A conspiracy to defraud, under the statute of Michigan, need not have been by means of a token, writing or similar device; and it may be by acts without spoken words. An information was held sufficient which charged the defendant with having conspired with a person unknown, "by divers false pretenses, subtle means and devices to obtain and acquire to themselves, of and from J. W., a sum of money, to wit, the sum of ten dollars of the moneys of said

J. W., and to cheat and defraud him, the said J. W., thereof." People v. Clark, 10 Mich. 310.

39. An indictment charged that the defendants conspired to cheat and defraud P., and that to accomplish that object they made certain representations which were set out, and averred that those representations were false and fraudulent, and well known by the defendants so to be, and that they were made for the purpose of cheating and defrauding P. *Held* that it charged a conspiracy. State v. Mayberry, 48 Maine, 218.

40. An indictment is sufficient which charges a conspiracy to cheat and defraud the complainant of his money, by the fraudulent sale to him, of property, for a much larger sum than it was worth, and that the defendants, in pursuance of such conspiracy, falsely and fraudulently made to him certain representations known to them to be false, and thereby cheated and defrauded him. State v. Parker, 43 New Hamp. 83.

41. Where an indictment charged a conspiracy to defraud by means of false pretenses, and false, unlawful and unauthorized writings, in the form and similitude of bank notes, that were worthless, but which purported to be promissory notes, and to have been signed, &c., and stated that the overt act consisted in passing a note purporting to be a bank note, and to have been signed, &c., it was held sufficient. Collins v. Com. 3 Serg. & Rawle, 220.

42. An indictment charged that the defendant intending unlawfully, by indirect means, to cheat and defraud a certain incorporate company and divers other persons unknown, of their effects, fraudulently and unlawfully conspired, injuriously and unjustly, by wrongful and indirect means, to cheat and defraud the company and unknown persons, of their effects; and in pursuance thereof, did, by undue, indirect and unlawful means, unlawfully cheat and defraud the company and unknown persons of divers effects. *Held* (the court being equally divided) insufficient. Lambert v. People, 9 Cow. 578.

43. Where an indictment for conspiracy to defraud creditors charged that goods of unknown quality and quantity were removed and secreted by the prisoner, it was held that the indictment was insufficient in not stating the circumstances of removal and secretion, and in not giving the names of the persons intended to be defrauded. Hartman v. Com. 5 Barr, 60.

44. An indictment alleging a conspiracy by the defendants to procure an overinsurance on their stock in trade, does not charge a criminal offense. And where the false pretenses by which money was to be obtained from the insurance companies were not set out, it was held that the charge of a conspiracy "to obtain money by means of false pretenses of a loss thereafterward to happen," was too general. Com. v. Prius, 9 Gray, 127.

45. An indictment is good which charges a conspiracy falsely and fraudulently to seduce an unmarried female, by procuring the consent of herself and parents to her marriage with one of the conspirators, and in pursuance of such conspiracy producing a forged license, assuring them of its genuineness, falsely and fraudulently representing another of the conspirators to be authorized to perform the marriage ceremony, and who did so, in consequence of all which the daughter and her father and mother were deceived, and she cohabited with her pretended husband. State v. Murphy, 4 Ala. 765.

46. An indictment for a conspiracy to destroy a warrant and recognizance for the appearance of the defendant to answer a criminal charge, with intent thereby to impede the due administration of justice, must *aver* that the warrant issued and the recognizance was acknowledged, and also set forth the warrant and recognizance. State v. Enloe, 4 Dev. & Batt. 373.

47. An indictment for conspiracy to defeat the enforcement of the prohibitory liquor law, with money and other unlawful means, must allege in what manner the money was designed to be employed, and specify particularly the "other unlawful means." State v. Potter, 28 Iowa, 554. See State v. Stevens, Ib. 391.

48. An indictment for conspiracy, which does not set out facts sufficient to constitute the offense, cannot be made good by qualifying epithets. Where, therefore, the indictment alleged that the defendants, being journeymen bootmakers, unlawfully confederated and formed themselves into a club, and agreed together not to work for any master bootmaker or other persons who should employ any journeyman or other workman who should not be a member of said club, after notice given to such master or other person to discharge such workman, it was held defective in not charging any unlawful design or means. Com. v. Hunt, 4 Metc. 111.

49. The same is true of an indictment which alleged that the defendants, being journeymen bootmakers, unlawfully conspired, confederated and agreed together not to work for one who should employ any workman not being a member of a certain club, or who should break any of their by-laws, unless such person should pay to said club such sums as should be agreed upon as a penalty for the breach of such by-laws, and by means of said conspiracy did compel B., a master cordwainer, to dismiss from his employ D., a journeyman bootmaker, because D. would not pay the said club the penalty. Ib.

50. The same is true of an indictment which alleged that the defendants, intending unlawfully and by indirect means to impoverish A., a journeyman bootmaker, and prevent his following his trade, conspired, by wrongful and indirect means, to impoverish him, and to deprive and prevent him from following his trade, and from getting his livelihood, and in pursuance of said conspiracy did unlawfully, &c., prevent him from following his trade, and did greatly impoverish him. Ib.

51. The same was held of an indictment which alleged that the defendants, intending to injure B. and divers others, all being master bootmakers, employing journeymen, unlawfully conspired and agreed by indirect means to prejudice and impoverish B. and divers others, all of whom were master cordwainers, and employing journeymen, and to prevent them from employing any journeymen who should not, after notice, become members of a certain club, or who should break or violate any of the by-laws of said club, or refuse or neglect to pay any sum of money demanded from them by said club as a penalty for such breach of said by-laws. Ib.

52. **Matters of inducement** need not be set out with the particularity which is requisite in reference to material allegations. It is sufficient to allege in the indictment that the defendants unlawfully conspired, combined, confederated, and agreed together to cheat and defraud one P., "by then and there inducing and procuring said P. to surrender" certain notes. State v. Mayberry, 48 Maine, 218.

53. An indictment which alleges that the defendants feloniously conspired to rob and steal, is not bad for duplicity. State v. Sterling, 34 Iowa, 443; s. c. 1 Green's Crim. Reps. 569.

### 3. Trial.

54. **Place.** The conspiracy may be tried in the county where the overt act was committed. Com. v. Gillespie, 7 Serg. & Rawle, 478. If the agreement be made in one county and the conspirators go into *another* county to carry out their plans, and there commit an overt act, they may be punished in the latter county, without any proof of an express renewal of the agreement. People v. Mather, 4 Wend. 229.

55. **Mode.** A conspiracy being a joint offense, the court cannot grant a separate trial. Com. v. Mason, 2 Ashm. 31; *contra*, State v. Buchanan, 5 Har. & J. 500. Where three were indicted for conspiracy, and one of them died before trial, and another was acquitted, it was held that the survivor might be tried and convicted. People v. Olcott, 2 Johns. Cas. 301. But where two only were charged with a conspiracy, the acquittal of one was held to be an acquittal of both. State v. Tom, 2 Dev. 569.

### 4. Evidence.

56. **Must sustain charge.** A variance in the name of the county in an indictment for

a conspiracy against the United States is not material when the act charged and proved is within the jurisdiction of the court. U. S. v. Smith, 2 Bond, 323.

57. To sustain an indictment against an attorney and client for entering into a conspiracy to resist an officer in the discharge of his duty, it is not necessary to prove actual violence. It is sufficient to show threats and acts in their nature calculated to terrify a prudent and reasonable officer, although he was not thereby prevented from executing his process. U. S. v. Smith, 1 Dillon, C. C. 212.

58. An indictment alleging a conspiracy to cheat and defraud citizens at large, or particular persons, out of their land entries, is not sustained by evidence that the defendants conspired "to make entries in the land office before it was opened, or before it was declared to be opened, or after it was opened, for the purpose of appropriating the lands to their own use, and excluding others." State v. Trammell, 2 Ired. 379.

59. An indictment for a conspiracy to defraud B. is not supported by evidence that the defendants conspired to defraud the public generally, or any, individually, whom they might meet and be able to defraud. Com. v. Harley, 7 Metc. 506.

60. Where an indictment alleged that A., B. and C. conspired to accuse D. of a felonious assault upon a female with intent to ravish and carnally know her, and it was proved that the defendants conspired to accuse D. of having seduced and committed adultery with such female, it was held that the variance was fatal. State v. Hadley, 54 New Hamp 224.

61. **Overt acts.** On the trial of an indictment for conspiracy, acts may be given in evidence to show the combination, but for any other purpose they need not be charged or proved. State v. Ripley, 31 Maine, 386. Evidence of an overt act by one, in pursuance of a conspiracy, is sufficient to convict all. Collins v. Com. 3 Serg. & Rawle, 220.

62. On the trial of an indictment for a conspiracy in inveigling a young girl from her mother's house and reciting the marriage ceremony between her and one of the defendants, a subsequent forcible carrying her off, and threats after she had been released on a *habeas corpus*, were held admissible in evidence. Resp. v. Hevice, 2 Yeates, 114.

63. **Consummation of design.** If conspirators carry out, or attempt to carry out the object of the conspiracy, that fact may be alleged in aggravation, and given in evidence to prove the conspiracy. State v. Mayberry, 48 Maine, 218.

64. **Proof of other acts.** Evidence is admissible of other acts on the part of the defendants, of collusion with other persons to show the *quo animo* of the defendants in relation to the offense charged. People v. Bleeker, 2 Wheeler's Crim. Cas. 256. But in an indictment for a conspiracy to prosecute an innocent person, evidence is not admissible to show that the defendants prosecuted other persons who were guilty. State v. Walker, 32 Maine, 195.

65. **Acts and declarations of confederate.** After the fact of a conspiracy has been found by the court, the acts and declarations of a party's confederates, done and said in pursuance of the common purpose, are proper for the consideration of the jury. Com. v. Brown, 14 Gray, 419; although not done or said in his presence, or afterward reported to him. Sands v. Com. 21 Gratt. 87; Johnson v. State, 29 Ala. 62; State v. Simmons, 4 Strobh. 266.

66. To make the acts and declarations of an alleged confederate competent evidence against the accused, it must be proved *prima facie*, or such evidence given as to make the question one proper for the determination of the jury, that the accused had conspired with the confederate to commit the offense. Ormsby v. People, 53 N. Y. 472. But the rule requiring *prima facie* proof of a conspiracy to be first made, before the acts and declarations of one of the conspirators are admissible in evidence against the others, is not inflexible. Such acts and declarations are sometimes admitted for the sake of convenience before sufficient proof is given of the conspiracy; but it is only allowed under particular and urgent circumstances. State v. Ross, 29 Mo. 32; State v.

Daubert, 42 Ib. 239; People v. Brotherton, 47 Cal. 388; s. c. 2 Green's Crim. Reps. 444.

67. Where several are acting with a common purpose and design, although there may have been no previous combination or confederacy to commit the particular offense, yet the acts and declarations of each, from the commencement to the consummation of the offense, are evidence against the others. Kelley v. People, 55 N. Y. 565.

68. Where several persons conspired in the city of New York, to commit a larceny in Connecticut, and to carry the stolen property back to New York, and there divide it, it was held that the acts and declarations of such of them as went to Connecticut, after they had stolen the property, and were hiding and trying to remove it out of the State, were admissible against all. State v. Grady, 34 Conn. 118.

69. Where a witness swore that the prisoner, in the presence of the witness and A., said that B. had offered the prisoner money if he would kill W., that the prisoner told B. he would give him an answer another day; that the prisoner offered the witness a part of the money if he would kill W., that A. proposed a mode of doing it, that the witness declined, and the prisoner said he was joking, and the murder was committed a few days afterward, it was held that there was sufficient proof of the conspiracy of the prisoner and A. to make the declarations of A. admissible against the prisoner. Com. v. Crowinshield, 10 Pick. 497.

70. On a trial for grand larceny, it appeared that the accused went to a store, in company with two other women, and looked at cheap woolen shawls, while the other two examined valuable India shawls; that one of the latter took a shawl, concealed it, and the two immediately left; that they were followed out of the store and stopped, and one of them—not the one who took the shawl—went hurriedly back into the store, and whispered to the accused; and that the accused was then asked if she knew the other two, and she said she did, that she came into the store with them. *Held*, that the foregoing was not *prima facie* evidence of a conspiracy between the three, and that the acts and declarations of the two women, after they left the store, were not admissible. *Held*, further, that it was error in the judge to refuse to charge, as requested, that the failure of the prisoner to introduce proof was not to be considered by the jury, it not appearing that the accused had it in her power to produce evidence controverting or explaining the testimony produced against her. Ormsby v. People, 53 N. Y. 472.

71. Where the declarations of a co-conspirator are merely a narrative of a past occurrence, they cannot be received as evidence of such occurrence. To be admissible, they must be concomitant with the principal act, and connected with it, so as to constitute a part of the *res gestæ*. Patton v. State, 6 Ohio, N. S. 476; State v. Dean, 13 Ired. 63; State v. Thibeau, 30 Vt. 100; People v. Davis, 56 N. Y. 95. And the declaration of one of the conspirators, as to what he himself intended to do, not in furtherance of the common design, is not admissible against the others. Fouts v. State, 7 Ohio, N. S. 471.

72. On a trial for conspiracy, the examination of one of the defendants taken separate and apart from the others, is not admissible in evidence to prove the charge laid in the indictment. People v. Bleeker, 2 Wheeler's Crim. Cas. 256.

73. **Circumstances.** A conspiracy may be proved by circumstantial evidence; and parties performing disconnected overt acts, all contributing to the same result, may be shown to be conspirators and confederates. Kelly v. People, 55 N. Y. 565; State v. Sterling, 34 Iowa, 443; s. c. 1 Green's Crim. Reps. 569.

74. But on a trial for conspiracy among journeymen bootmakers, evidence is not admissible as to the price of flour at the formation of the society, to show that the object of the defendants, in forming their society, was to raise the price of wages proportionally to the price of flour and other necessaries. Com. v. Hunt, Thach. Crim. Cas. 609.

### 5. Verdict and Judgment.

75. **Form.** Under an indictment against two for a conspiracy to cheat, the judgment

should be against each severally, and not against them jointly. March v. People, 7 Barb. 391.

**76. Variant from charge.** Where A. and B. were indicted for a conspiracy to defraud C., and the jury found that there was an agreement between A. and B. to obtain money from C., but with an intention to return it to him, it was held not to be a verdict upon which any judgment could be given. People v. Olcott, 2 Johns. Cas. 301.

## Contempt.

**1. Power of courts to punish.** The power to punish for contempt is inherent in all courts. The moment the courts of the United States were called into existence, and invested with jurisdiction over any subject, they became possessed of this power. But the power is limited and defined by act of Congress of March 2d, 1831 (4 Stats. at Large, 487). *Ex parte* Robinson, 19 Wall. 505; s. c. 2 Green's Crim. Reps. 135.

**2.** The 17th section of the judiciary act of 1789 declares that the courts of the United States shall have power to punish contempts of their authority in any cause or hearing before them, by fine or imprisonment, in their discretion. The enactment is a limitation upon the manner in which the power shall be exercised, and must be held to be a negation of all other modes of punishment. Ib.

**3.** Courts have power at common law to punish, as for contempt, libelous publications relative to their proceedings, tending to impair public confidence and respect in them. State v. Morrill, 16 Ark. 384.

**4. What constitutes.** The employment of abusive and impertinent language toward the court in a petition signed by the party, and filed with the clerk, is a ground for an attachment to show cause for contempt. State v. Keene, 6 La. 375; State v. Redmond, 9 Ib. 319.

**5.** Where, after the judges had vacated the bench for a recess, the defendant approached the chief justice and used toward him abusive and vituperative language, and, at the same time made a violent assault upon his person, it was held a contempt of court for which the defendant was liable to fine and imprisonment. State v. Garland, 25 La. An. 532.

**6.** Proposing to a juror to signal from the window of the jury-room how the jury stand with regard to their verdict constitutes a contempt of court. State v. Doty, 3 Vroom (32 N. J.) 403.

**7.** A defendant who participates in a rescue, and escapes from the custody of the sheriff is guilty of contempt of court, and may be indicted therefor. The sheriff's return is conclusive evidence of the escape. State v. Bergen, 1 Dutch. 209.

**8.** An attorney who writes and publishes a stricture on the opinion of the court in order to prejudice a cause which is pending in such court, is guilty of contempt, for which he may be stricken from the roll of attorneys; and he can only be restored by a revocation of the sentence. Matter of Darby, 3 Wheeler's Crim. Cas. 1.

**9.** The examination of a witness before a grand jury is a proceeding upon an indictment, within 2 N. Y. R. S. p. 534, § 1, p. 735, punishing as a contempt the refusal of a witness to answer a proper question. People v. Hackley, 24 N. Y. 74.

**10. The proceeding.** A proceeding for contempt is in the nature of a criminal prosecution. The proceeding for a constructive contempt must be commenced either by a rule to show cause, or by attachment, upon affidavit making the charge; and the accused has the right to be heard by himself or counsel. Whittem v. State, 36 Ind. 196. See McConnell v. State, 46 Ib. 298; s. c. 2 Green's Crim. Reps. 723.

**11.** Where a contempt is committed in the presence of the court, the offending party may be ordered into custody without warrant. But a record of the offense and of the arrest should immediately be made. If the contempt be committed out of the presence of the court, the offender may be brought before it by attachment. An attachment may issue in the first instance, or an order may be made for the respondent to appear and show cause why an attachment should not issue against him. In the service of the

attachment, the officer may generally take bail or a bond for the appearance of the respondent. When the attachment is issued to enforce an appearance or answer, or for not paying costs, or not obeying an order or decree, the officer must bring the respondent into court. When issued to enforce an appearance or answer, it should specify the suit, and the object of the process; but when issued for disobeying an injunction, this is unnecessary. A proceeding for contempt is a distinct and independent matter, requiring distinct notices, and is regarded as of a criminal nature. State v. Mathews, 37 New Hamp. 450.

12. The respondent may submit the matter to the court upon affidavit, or may demand of the prosecutor to file interrogatories. The usual course, when the alleged misconduct is denied, is for the court to allow the prosecutor to file interrogatories. The interrogatories may be amended, and the respondent may examine witnesses. If the accused does not appear, or if he appears and makes no denial, the court will at once make a decision and award punishment. Ib.

13. Where the relator and the grand jury being present in open court, it is stated on the part of the latter, that the relator has declined to answer a question before them, and he thereupon does not deny but justifies his refusal, and reiterates the same, the contempt is in the immediate view and presence of the court, and an affidavit is not necessary to a commitment. People v. Hackley, 24 N. Y. 74.

14. **Review of judgment.** The judgment of a magistrate punishing for contempt can only be reviewed on *habeas corpus* so far as to see whether he had jurisdiction. State v. Towle, 42 New Hamp. 540.

## Continuance.

1. In behalf of prosecution.
2. In behalf of defendant.

### 1. In behalf of prosecution.

1. **Ground for.** When the injured party is to be used as a witness by the prosecution, and there is a civil action pending for the same offense, the court will continue the criminal case. Com. v. Elliott, 2 Mass. 372.

2. **Affidavit.** The trial will not be continued in order that the prosecutor may issue a capias against a witness, who has been summoned and refused to attend, unless the prosecutor makes an affidavit, that in his opinion he cannot safely proceed to trial without the witness. U. S. v. Frink, 4 Day, 471.

3. **When it will operate as an acquittal.** In Virginia, where an indictment for felony was continued at the first term of the court for the want of time to try it, and at the second term on the motion of the prisoner, upon the ground of the absence of a material witness for him, and at each of the three succeeding terms for want of time to try it, it was held that he was entitled to be forever discharged. Green's Case, 1 Rob. 731. But see State v. Patterson, 1 McCord, 177.

4. Where the prisoner was not present at the postponement of the trial, it was held that although he ought to have been present and had a right to be, yet the postponement in his absence was a mere irregularity which could not be reached by *habeas corpus*. People v. Ruloff, 5 Parker, 77.

### 2. In behalf of defendant.

5. **In general, discretionary with court.** The prisoner cannot demand the postponement of his trial as a right. The court will not give the same credence to the affidavit of a person indicted for felony that it would to the affidavit of a party to a civil action. The disposition of the motion raises no question of law, unless the record shows that the court decided as a question of law that a postponement could not be granted; or that the court decided that a witness was material and that his absence was cause for a postponement, and then compelled the prisoner to proceed forthwith to trial. People v. Horton, 4 Parker, 222, referring to People v. Vermilyea, 7 Cow. 369.

6. The statute of New York (3 R. S. 303, 5th ed)., which provides that Courts of Sessions shall send all indictments not triable therein, to the next Court of Oyer and Term-

iner, there to be determined according to law, and that the said courts may also by an order to be entered in their minutes, send all indictments for offenses triable before them which shall not have been heard and determined to the next Court of Oyer and Terminer to be there determined according to law, does not require that the prisoner shall be tried during the next session of the court or not at all, but leaves the control of the calendar with the presiding judge, who may if he choose postpone the trial. Real v. People, 55 Barb. 551.

7. **Decision may be reviewed on error.** It must be a most arbitrary and oppressive exercise of power on the part of the court in refusing a continuance, to justify a court of error to interfere. Sealy v. State, 1 Kelly, 213; but it will do so, were the refusal of a continuance has worked a manifest injury. McDaniel v. State, 8 Smed. & Marsh. 401; *contra*, Lindsay v. State, 15 Ala. 43; State v. Duncan, 6 Ired. 243. And see Green v. State, 13 Mo. 382.

8. The prosecution having entered a *nolle prosequi*, the defendant entered into a recognizance with sureties for his appearance on the first day of the next term of the court, and from day to day thereafter, to answer to any indictment that might be preferred against him, and was then released from custody. The same day, the judge directed a special grand jury to bes ummoned caused the defendant to be arrested, and on the finding of another indictment, tried the defendant against his objection, refusing a continuance. *Held* not a ground for reversing a judgment of conviction. Blemer v. People, 76 Ill. 265.

9. In California, decisions on application for continuances are reviewable on appeal. People v. Diaz, 6 Cal. 248. In Georgia, unless the prisoner expressly waives an objection to the legality of an adjournment, with a view to a trial which is to bind him, he may take advantage of it, even after verdict. Heye v. State, 39 Ga. 718.

10. **What defendant required to show.** To entitle a party to a postponement of the trial, on the ground that witnesses are absent, three things must be shown: 1st. That the witnesses are material. 2d. That the party applying has been guilty of no neglect. 3d. That there is reasonable expectation of his being able to procure their attendance at the time to which he asks to have the trial put off. Hyde v. State, 16 Texas, 445.

11. The absence of a witness who lives beyond the jurisdiction of the court is not a ground for a continuance. Com. v. Millard, 1 Mass. 6; State v. Fyles, 1 Const. 234; Allen v. State, 10 Ga. 85. A person being indicted for felony, made affidavit that he had four material witnesses who were absent and resident in other States, but did not name them, or state that he tried to procure their attendance, or that he had expected to be able to do so. *Held* that it was not a proper case for a continuance. Hurd's Case, 5 Leigh, 715. And see Com. v. Gross, 1 Ashm. 281.

12. It is not a ground for a continuance, that the witness summoned to prove a particular fact is not present, unless it is shown that the fact cannot be proved by any other person whose attendance can be procured. Freleigh v. State, 8 Mo. 606.

13. When the prisoner moves to postpone the trial, the strict rule requires that he shall make a full disclosure of the names of his witnesses and of the facts he expects to prove by them. But the court ought to grant reasonable opportunity to correct and amplify the affidavits before a decision. People v. Horton, 4 Parker, 222.

14. The court may require that the affidavit of an absent witness, setting forth what he will testify, shall be produced as the ground for a continuance, notwithstanding the prisoner shows diligence. Mendum v. Com. 6 Rand. 704.

15. The trial will usually be postponed on account of the absence of the defendant's witnesses, on a general affidavit, unless it is apparent that the application for postponement is merely for delay, in which case the affidavit must state the nature of the defense to be sustained by the absent witnesses, in order that the court may judge of their materiality. People v. Wilson, 3 Parker, 199. Where it appeared that no person except the prisoner and the deceased was at

the scene of an alleged murder, and there was no pretense of an *alibi*, it was held proper for the court to refuse a postponement, unless the prisoner disclosed the nature of the defense which he intended to establish by the testimony of the absent witnesses. Ib.

16. Where an affidavit for a continuance in a prosecution for horse stealing, on account of the absence of a witness by whom the defendant expected to prove that he "did not steal the horse," but "traded" for him, did not state any of the attending circumstances, or show from whom or when and where the defendant purchased, it was held insufficient. Cockburn v. State, 32 Texas, 359.

17. The admitting by consent, of an affidavit for a continuance, on the ground of the absence of a material witness, is an admission of the facts which the affidavit contains, as to what the absent witness will testify. Willis v. People, 1 Scam. 399.

18. **When defendant entitled to continuance.** In South Carolina, on the trial of an indictment for a misdemeanor, the defendant has a right to a continuance until the next term after the indictment is found. State v. Frazer, 2 Bay, 96.

19. Where the prisoner was committed so short a time before the court that he could not obtain his witnesses, it was held that he was entitled to a continuance. State v. Lewis, 1 Bay, 1.

20. Illness of counsel, where there is but one, or the leading counsel, where there are more than one, is ground for a continuance, where the sickness is so sudden that another counsel cannot do the case justice. Allen v. State, 10 Ga. 85.

21. Where it appeared that B. had been subpœnaed, but was unable to attend on account of illness, and that his attendance could be procured at the next term of the court, and that the affidavit was not made for delay, it was held that a motion for a continuance should have been granted. Gross v. State, 2 Carter, 135.

22. During a trial for murder, before the defense had closed, a material witness for the defendant, who had been subpœnaed, was taken so sick as not to be able to attend. It was thereupon agreed, that if the witness was able to testify at any time before the case was submitted to the jury, he should be allowed to do so, and if he was not able, the defendant should have a right to move for the postponement of the trial. When the rebutting evidence on the part of the State was closed the defendant moved the court to postpone the trial for eight days, and in support of such motion, filed affidavits showing the materiality of the witness, and that his sudden and serious illness prevented his attendance. The court having refused to put off the trial, it was held error. Jenks v. State, 39 Ind. 1. See Cutler, v. State, 42 Ind. 244.

23. Where an indictment for having in possession counterfeit bank notes, was found on the first day of the term, and on the second day, the defendant being arraigned, moved for a continuance on an affidavit made by him, stating that he could not safely proceed to trial for the want of the evidence of A. and B. who resided in another State; that he could prove by them and each of them, that he was an honest and upright man; how he came by the possession of the counterfeit money; that he had no knowledge that the money was counterfeit until he was arrested; that he did not know of any other witness within the jurisdiction of the court, by whom he could prove the same facts; that he could obtain their testimony by the next term, and that the affidavit was not made for delay—it was held that the court erred in refusing to grant the continuance. Spence v. State, 8 Blackf. 281.

24. Where a continuance was granted on the application of the prosecution to the next regular term of the court, and afterward it appearing that a material witness on behalf of the State was in the last stages of consumption, the case was moved for trial at an adjourned term of the court, when the prisoner's counsel asked for a continuance, on the ground that material witnesses for the prisoner were absent, which application the court refused, it was held that it was error to bring on the case before the term to

which it was at first continued, and that the denial of the motion on the part of the prisoner to continue the case was also error. McKay v. State, 12 Mo. 492.

25. **Absence of witnesses to character.** Trials are not usually put off on account of the absence of witnesses to character, but where an admission from the public prosecutor of the previous good character of the accused is necessary to prevent a postponement, the admission must be unqualified. People v. Wilson, 3 Parker, 199.

26. The affidavit of a prisoner who is a stranger, that at the next term of the court he can prove good character by witnesses from another State; that he can show that the property charged to be stolen belongs to another person than the one stated to be the owner in the indictment, and that he can also show an *alibi*, which he cannot now prove because of his recent arrest, is sufficient ground for a continuance. Bledsoe v. Com. 6 Rand. 673.

27. **Admission of absent testimony.** Where the prisoner is entitled to a continuance on account of the absence of material witnesses, he cannot be compelled to go to trial upon the admission of the prosecution that the witnesses, if present, would testify as claimed. The admission must be of the truth of the proposed testimony. State v. Brette, 6 La. An. 652.

28. **Imposition of terms.** The failure of the defendant to obtain compulsory process for his witnesses, is not such negligence as will deprive him of the right to a continuance, but it will authorize the court to impose terms in granting the motion. Allen v. State, 10 Ga. 85.

## Conviction.

*See* SUMMARY CONVICTION; VERDICT.

## Coroner's Inquest.

1. **Nature.** At common law, a coroner holding an inquest *super visum corporis* is in the performance of functions judicial in their character. People v. Devine, 44 Cal. 452; s. c. 2 Green's Crim. Reps. 405.

2. **Second inquest.** After inquisition found, a second coroner's inquest cannot be held until the first has been vacated and a new inquiry ordered by the court. People v. Budge, 4 Parker, 319.

## Corporation.

1. **Right under charter.** Where a company has complied with the conditions of their charter by the payment of large sums of money, it is not competent for the Legislature, without any change of circumstances, under its authority to amend the charter, to pass a law requiring the company to do acts from which, by the terms of the charter, they had been exempted. Com. v. Essex Co. 13 Gray, 239.

2. **Forfeiture of franchises.** On an information filed against a railroad company, it appeared that their road had been used for the transportation of freight so as to meet the public demands; that the respondents had been ready to carry any passengers and draw any passenger cars for a reasonable compensation; that none had been offered which they had not transported; that there was not sufficient business to pay the expenses of running regular passenger trains; that the want of such business had been caused by establishing, under authority of the Legislature, a competing line; and that for these reasons the respondents discontinued the running of regular trains, and gave public notice thereof. *Held*, that such discontinuance was not a breach of public duty involving the forfeiture of the franchises of the company. Com. v. Fitchburg R. R. Co. 12 Gray, 180.

3. **Indictment.** A corporation is amenable to indictment for a misfeasance. Com. v. Proprs. of New Bedford Bridge, 2 Gray, 339.

4. **Judgment.** When a corporation, after due notice, fails to appear to answer to an indictment, judgment by default may be rendered against it. Boston, &c., R. R. v. State, 32 New Hamp. 215.

# Dead Body.

**Leaving unburied.** It is indictable to throw a dead body into a river without the rites of christian burial. Kanavan's Case, 1 Maine, 226.

*See* CEMETERY; DISINTERRING THE DEAD.

# Deadly Weapons.

*See* CONCEALED WEAPONS.

# Demurrer.

**1. Judgment on.** The rule that judgment on demurrer must be given against the party who commits the first substantial error in pleading, is applicable to criminal as well as to civil actions. People v. Krummer, 4 Parker, 217.

**2.** When an indictment is adjudged good on demurrer, the prisoner may except. If his exceptions are sustained, judgment will be rendered in his favor. If the exceptions are overruled, or if no exceptions are taken, judgment will be rendered for the State, unless at the time of demurring, the prisoner has, with the consent of the prosecution, reserved the right to plead anew. State v. Dresser, 54 Maine, 569.

**3. Admission by.** Where a demurrer to a plea of former conviction was sustained, it was held that if the defendant desired to answer further, he should have claimed the right when he filed his demurrer, or have obtained leave to plead double at the beginning, and that as he had not done either, his right must be deemed waived. State v. Inness, 53 Maine, 536.

**4.** In Vermont, to an indictment under the statute (Gen. Stats. ch. 113, § 31), for "removing and carrying away one saw-mill saw, which was then and there a part of the machinery of a certain water saw-mill," &c., the defendant demurred, on the ground that the saw was not "a part of the machinery." *Held*, that the offense was admitted by the demurrer. State v. Avery, 44 Vt. 629.

# Disinterring the Dead.

**1. At common law.** It was a crime at common law to dig up and remove a corpse. Com. v. Cooley, 10 Pick. 37.

**2. What constitutes.** The crime of disinterring the dead consists in the removal of a dead body without the consent of such deceased person obtained in his or her life time, or of the near relatives of the deceased since his or her death. Tate v. State, 6 Blackf. 110.

**3.** In Massachusetts, the removal of a dead body is not an offense within the statute (of 1830, ch. 57), unless done with the intent to use it or dispose of it for the purpose of dissection. Com. v. Slack, 19 Pick. 304.

**4.** To constitute the offense of disinterring a dead body, it is not necessary that all engaged should be actually present, provided that they are near enough to render assistance should it be needed. Tate v. State, 6 Blackf. 110.

**5. Indictment.** An indictment for removing a dead body, need not state to whom the burying ground belonged. Com. v. Cooley, 10 Pick. 37; or allege that it was the body of a human being; and an allegation of the name sufficiently indicates the sex. Where the place of burial is described as "a grave yard in the town of B., O. County," the particular grave yard need not be designated. People v. Graves, 5 Parker, 134. A count in an indictment, which charged the removal from its grave of a certain other deceased child of said Burke, "that yet had no name given to it," without the consent, &c., was held good. Tate v. State, 6 Blackf. 110.

**6. Evidence.** On the trial of an indictment for feloniously removing a dead body from the grave, a charge of the court to the jury, that "it would be just as good to identify a foot or a hand as the whole person," is not erroneous. People v. Graves, 5 Parker, 134.

# Disorderly House.

*See* NUISANCE.

# Disorderly Person.

**1. Proof of marriage.** On a complaint against a man as a disorderly person for neglecting to support his wife, proof that the parties had for many years lived together as husband and wife, is competent evidence of marriage. People v. McCormack, 4 Parker, 9.

**2. Defense.** On a charge against one of being a disorderly person, in that he neglected to support his wife and child, the defendant proved in defense, that there was depending in the courts, an action for divorce, brought by him against his wife, and that while it was depending, there was an order made in the Supreme Court by which he was required to pay her alimony during the pendency of the action; that a determination had been had in said action, which determination had been reversed; that the case was now in the Court of Appeals, and that after its removal there, the application had been renewed for the original allowance of alimony, and an order made granting $50 as a gross sum and for expenses of the action, which sum he had paid to her attorney. *Held*, that the conviction of the defendant should be affirmed with costs. People v. Mitchell, 2 N. Y. Supm. N. S. 172.

**3. Security.** In New York, where on the return of the warrant, it appears that the defendant was a disorderly person, the justice may require sufficient sureties for good behavior for one year, in default of which he may be committed. The justice has no power to organize a Court of Special Sessions, require the defendant to plead, and after trial, sentence him to pay a fine or be imprisoned. People v. Carroll, 3 Parker, 73.

**4. Appeal.** Where one is brought before a New York police justice, as a disorderly person, under the statute of 1866 (N. Y. Sess. Laws of 1860, ch. 508, p. 1007), for abandoning his wife, and ordered to pay a sum weekly for her support, the Supreme Court will not review the proceedings on certiorari, any appeal from, or amendment to, such an order, belonging exclusively to the Court of Sessions, which may be compelled by mandamus to entertain the case. Matter of Hook, 55 Barb. 257.

# Disturbing Religious Meeting.

*See* RELIGIOUS MEETING.

# Drunkenness.

*See* COMMON DRUNKARD; INTOXICATION AS A DEFENSE.

# Dueling.

**1. Sending challenge.** On an indictment for carrying a challenge to a duel, in the county of Suffolk, Massachusetts, it was proved that the duel was fought in Rhode Island. *Held* that sending the challenge was an offense within the statute of Massachusetts. Com. v. Boott, Thach. Crim. Cas. 390.

**2.** Where a challenge was delivered in South Carolina, to fight a duel in Georgia, it was held a violation of the statute of the former State, and indictable there. State v. Taylor, 3 Brev. 243. See State v. Taylor, 1 Const. R. 106.

**3.** Any agreement to fight with loaded pistols, and actually fighting in pursuance of the same, constitutes a duel under the statute of South Carolina, without reference to the time when the agreement was made. Herriott ads. State, 1 McMullan, 126.

**4.** In South Carolina, the proper construction of the words in the statute of 1812, "If any person resident in or being a citizen of this State, shall send, give, or accept a challenge to fight a duel within this State," is, "if any person," &c., "shall within this State send or give, or accept," &c. Cunningham v. State, 2 Speers, 246. And such act is constitutional. State v. Dupont, 2 McCord, 334. So likewise, is the act of New York, of 1816 (Sess. 40, ch. 1). Barker v. People, 3 Cow. 686.

5. In Alabama, since the statute of 1819, the mere sending of a challenge to fight a duel is not indictable, unless a combat takes place. Smith v. State, 1 Stewart, 506.

6. In North Carolina, a challenge to fight a duel *out* of the State is indictable. State v. Farrier, 1 Hawks, 487.

7. **Form of challenge.** No particular form of words is necessary to constitute a challenge to fight a duel. Whether it amounts to such, is a question for the jury. Ives v. State, 12 Ala. 276. In South Carolina, under the statute of 1812, a challenge to fight a duel, may be given verbally. State v. Strickland, 2 Nott & McCord, 181.

8. **Indictment.** An indictment for sending a challenge, need not set out a copy of the challenge. State v. Farrier, 1 Hawks, 487; Brown v. Com. 2 Va. Cas. 516.

9. An indictment for challenging another to fight a duel, need not aver that the parties were citizens of the State, or that the paper charged to have been meant by the defendant as a challenge, was so understood by the parties. Moody v. Com. 4 Metc. Ky. 1.

10. The place where a proposed duel is to be fought need not be alleged in the indictment. Ivey v. State, 12 Ala. 276.

11. An indictment for sending a challenge to fight a duel, in which the time was stated in the alternative, and which did not conclude "against the peace and dignity of the United States," was held bad. U. S. v. Chittenden, Hemp. 61.

12. An indictment which charges that the defendant "did fight a duel with pistols," will be bad on demurrer at common law. Lambert's Case, 9 Leigh, 603.

13. In South Carolina, an indictment against a person for carrying a challenge need not charge that the challenger was a citizen or resident of the State. Cunningham v. State, 2 Speers, 246.

14. In Virginia, an indictment for aiding and abetting in fighting a duel must allege that a duel was fought. Dudley's Case, 6 Leigh, 613.

15. **Evidence.** On the trial of an indictment for sending a challenge to fight a duel, the prosecution may prove that a written challenge was sent, without producing the challenge. Com. v. Hooper, Thach. Crim. Cas. 400.

16. On the trial of an indictment for carrying a challenge to fight a duel, it must be proved that the offense was committed within the State, or within the jurisdiction of the court. Gordon v. State, 4 Mo. 375.

17. Upon the trial of an indictment against a second for "giving, sending and delivering a challenge" to fight a duel, proof of a custom which required a second to deliver a challenge was held inadmissible. So likewise is evidence that the defendant was a friend of the principal in a previous difficulty with another person. Com. v. Boott, *supra*.

18. The declarations of the second in a duel are admissible in evidence against the principal. State v. Dupont, 2 McCord, 334. And so likewise, the declarations of the principal are admissible against the second on the trial of the latter. Com. v. Boott, *supra*.

19. A. in a letter to B. employed language supposed to amount to a challenge to fight a duel, and by a postscript referred B. to C. (the bearer of the letter) to learn whether any further arrangements were necessary. *Held* that B. might testify to the conversation between C. and himself. State v. Taylor, 1 Const. R. 106.

20. The intent and meaning of the supposed challenge may be shown upon the trial, by proof written or oral. Com. v. Pope, 3 Dana, 418; Com. v. Hart, 6 J. J. Marsh. 619; Herriott v. State, 1 McMullan, 126.

## Duress.

1. **What is.** An arrest for improper purposes without a just cause, or for a just cause but without lawful authority, or for a just cause and under lawful authority for unlawful purposes, constitutes a duress. Strong v. Grannis, 26 Barb. 122.

2. **How determined.** The question of duress is to be left to the jury upon the

whole evidence bearing upon it, and not to be determined as matter of law, either upon the whole or certain excepted portions of the evidence. State v. Learned, 41 Vt. 585.

3. **Excuse for illegal act.** An illegal act cannot be justified by an order from superior authority, no matter how high the source from which it emanates. But such order may go in extenuation of it. State v. Sparks, 27 Texas, 627.

## Eavesdropping.

**What constitutes.** The offense was held to have been committed by one who clandestinely approached near to the room occupied by the grand jury, while they were engaged in the discharge of their duties, for the purpose of overhearing what was said and done. State v. Pennington, 3 Head, Tenn. 299. Eavesdropping was indictable at common law. State v. Williams, 2 Tenn. 108.

## Embezzlement.

1. What constitutes.
2. Indictment.
3. Jurisdiction.
4. Evidence.
5. Verdict.

### 1. What constitutes.

**1. Need not have been demand.** It may be embezzlement, although there has been no demand of the property alleged to have been embezzled, or denial of its receipt, or false account given of it, or false statement or false entry concerning it, or a refusal to account for it. Com. v. Tuckerman, 10 Gray, 173.

2. The fiduciary relation essential in embezzlement is sufficiently expressed by the averment that the property was delivered to the defendant upon the trust and confidence that he would return it to the owner on demand. A fraudulent conversion to the defendant's own use would be embezzlement, whether demand were made or not, and therefore such demand need neither be averred or proved. Com. v. Hussey, 111 Mass. 432. But it is otherwise in Illinois, under the statute of March 4th, 1869, for the protection of consignors of goods. Wright v. People, 61 Ill. 382; s. c. 2 Green's Crim. Reps. 558.

**3. Defendant mingling funds with his own.** A person having received a note for the purpose of causing it to be discounted for another at a bank, sent it to the cashier with other notes of his own to be discounted on his private account, and procured the proceeds to be passed to his own credit. *Held* that he was guilty of embezzlement as soon as the note was delivered to the cashier to be thus misused, and that the subsequent payment of a part of the money on the other's account, did not purge the previous criminal act. Com. v. Butterick, 100 Mass. 1.

4. Where the treasurer of a railroad company deposits in a bank, to his own credit as treasurer, money of the company, and afterwards in that capacity draws his own check upon the bank therefor, and receives the amount of it in bills, which he fraudulently converts to his own use, it is embezzlement, although when he drew the money from the bank he did not intend to appropriate it, and although when he converted it, he intended to make it good, and had the means to do it. Com. v. Tuckerman, 10 Gray, 173. See Com. v. Mason, 105 Mass. 163.

5. On the trial of an indictment for embezzlement it was proved that J. L., being in need of money, made his two notes and delivered them to the defendant to sell on commission and pay over the proceeds to a brother of J. L.; the defendant at the same time giving to J. L. as receipts, the defendant's own notes which were deposited by J. L. with his brother, to be surrendered to the defendant when he should deliver the proceeds of J. L.'s notes pursuant to agreement. *Held* that if the defendant was employed merely to sell the notes, receive the proceeds, and pay over the same to the brother of J. L., without any authority to mingle them with his own funds, a fraudulent conversion of them would constitute embezzlement. Com. v. Foster, 107 Mass. 221.

**6. Misappropriation of property.** Where bonds were pledged to the defendant by the maker of a note, to secure the defendant as indorser, which note the maker paid at maturity, it was held that after such payment the defendant still held the bonds in his custody upon the further trust to restore them on demand, and that by fraudulently misappropriating them he was guilty of embezzlement. Com. v. Butterick, 100 Mass. 1.

**7.** An agent who appropriates money left with him by his principal for the purchase of land is guilty of embezzlement, although the title to the land is in litigation, and whether the contract of purchase can be completed depends upon the event of the suit. State v. Healy, 48 Mo. 531.

**8.** Whether one who holds the property of another as collateral security can be convicted of embezzlement for pledging it to secure his own debt, before the debt is due to secure which it has been given—*query*. Com. v. Butterick, 100 Mass. 1.

**9. Fraudulent conversion of property.** A. engaged the defendant to transport thirty-four tons of pig iron in bars from Albany to Buffalo. On the passage the defendant, with the help of one of his men, removed from the boat one hundred bars of the iron, and took the remainder to Buffalo. *Held* that this constituted embezzlement, and that the acquittal of the defendant of larceny did not bar his subsequent trial and conviction for the first named offense. People v. Nichols, 3 Parker, 579.

**10.** An agreement was entered into between A. and B., by which B. undertook, in consideration of $5, to be paid him by A., to trade a watch, the property of A., for a wagon. The watch being delivered to B., he did not make the trade, but converted the watch to his own use. *Held* that he was guilty of embezzlement. State v. Foster, 37 Iowa, 404.

**11.** In Iowa, under the statute (§ 4237), a bond, bank note, bill of exchange, or other bill, order or certificate, may be the subject of larceny or embezzlement. Therefore where the private secretary of the governor, who had the custody of a United States treasury draft, drawn in favor of the State and payable to the order of the governor, feloniously converted it to his own use, it was held that he was guilty of embezzlement, although the governor had not indorsed the draft, and the amount could not be recovered from the government. State v. Orwig, 24 Iowa, 102.

**12.** Where money delivered by a bank to a servant on the master's check is apropriated by the servant to his own use, it is embezzlement and not larceny. Com. v. King, 9 Cush. 284.

**13.** Where a bar-keeper in an inn, intrusted to carry letters to and from the post office, fraudulently converted to his own use a letter inclosing money, given to him to carry, it was held that he was guilty of embezzlement. People v. Dalton, 15 Wend. 581.

**14.** In New York, an indictment for embezzlement will lie against a clerk or servant for converting to his own use the money, goods, &c., of his master or employer, as well as for thus converting the money, goods, &c., of any other person which shall have come into his possession, or be under his care, by virtue of his employment. People v. Hennessy, 15 Wend. 147.

**15.** A clerk may be convicted of embezzlement of a bill of exchange under the statute of Alabama (Code, § 3143), on proof that he fraudulently disposed of the bill, which he had obtained by virtue of his employment, although it first came to the possession of his employer. Lowenthal v. State, 32 Ala. 589.

**16.** One who is employed by a post commissary to superintend a bakery, and whose duty it is to receive all the flour sent to the bakery by the commissary, and have it made into bread, and deliver the bread on the order of the commissary, may be indicted for embezzlement, as the agent of the commissary. Hinderer v. State, 38 Ala. 415.

**17. Acts which do not amount to the offense.** Where a party receiving money, has a right to mix it with his own, being accountable for a balance, an indictment for embezzlement will not lie upon a misappropriation. Where therefore a person was indicted for embezzling a balance due from him to an insurance company, for whom he

had received for premiums various sums at various times from different individuals, a part of which he had paid over, and the appropriation of no specific money by him was shown, it was held that his conviction could not be sustained. People v. Howe, 2 N. Y. Supm. N. S. 383.

18. Where a woman allowed a man to take bank bills for the purpose of counting them in her presence, and taking therefrom a small sum which she consented to lend him, and instead of returning any portion, he walked away with the whole, it was held that he was not guilty of embezzlement. Com. v. O'Malley, 97 Mass. 584.

19. Where on the trial of an indictment against the treasurer of a bank, for fraudulently taking and secreting moneys with intent to appropriate the same to his own use, the evidence tended to show that the defendant took the money from a depositor without any fraudulent intent to convert it to his own use, and entered it properly in the books of the bank, and that five days afterward he altered the entries in the books in order to conceal the fact that he had received this sum, thereby to cover up some previous deficit occasioned by former dishonest and fraudulent acts, it was held that a verdict of guilty was erroneous. Com. v. Shepard, 1 Allen, 575.

20. Where the clerk of a mercantile firm, whose duty it was to receive, safely keep and disburse the moneys of the firm, being about to leave, took from the money in his hands the amount due him for his salary, without the knowledge or consent of the firm, and charged the same to himself on their books, it was held that he was not guilty of embezzlement. Ross v. Innis, 35 Ill. 487.

21. The conversion, by a mechanic, of materials received by him at his shop, is not embezzlement within the statute of Massachusetts (R. S. ch. 126, § 29). Com. v. Young, 9 Gray, 5.

22. **Who not deemed servant or agent.** In New York, where a constable was employed to collect certain demands without suit, if the debtors would pay, and otherwise to sue them before a justice of the peace, it was held that he was not a servant of the creditor within the meaning of the statute concerning embezzlement. People v. Allen, 5 Denio, 76.

23. The relation between the superintendent and keeper of a county poorhouse, is of a public nature, and the latter is not, when acting as the keeper of the poorhouse, the servant or agent of a private person within the New York statute of embezzlement (2 R. S. 678, § 59). Neither is he the agent or servant of an incorporated company within such statute. Coats v. People, 22 N. Y. 245.

24. In Massachusetts, a person employed to collect bills for the proprietor of a newspaper office, who appropriates the money he collects, is not an agent or servant, within the statute (R. S. ch. 126, § 29) against embezzlement. Com. v. Libby, 11 Metc. 64.

25. Where an auctioneer received money on the sale of his employer's goods, and did not pay it over, but misapplied it, it was held that he was not an agent or servant within the meaning of the statute of Massachusetts (R. S. ch. 126, § 29), whether he received the goods for sale in the usual mode, or on an agreement to pay a certain sum therefor within a specified time after the sale. Com. v. Stearns, 2 Metc. 343.

### 2. Indictment.

26. **Averment of relation of defendant to party injured.** In New York, an indictment for embezzlement under the statute (2 R. S. 678, § 59), must charge that the defendant was a clerk or servant of some person (or an officer or agent of a corporation), and that the property embezzled came to his possession, or under his care, by virtue of such employment. People v. Allen, 5 Denio, 76.

27. But an indictment for having feloniously received goods which had been embezzled, knowing them to have been embezzled, need not charge that the person who embezzled the goods was the clerk or servant of the owner of them. People v. Stein, 1 Parker, 202.

28. An indictment which alleged that the defendant had collected and received a cer-

tain sum of money, in the capacity of an attorney at law for and in behalf of A., and in the name of A., was held bad in not showing that the relation of attorney and client existed between A. and the defendant. People v. Tryon, 4 Mich. 665.

**29. Description of property.** An indictment which does not allege the object for which the defendant was intrusted with the property, or describe the property, is fatally defective. Com. v. Smart, 6 Gray, 15. This was held of an indictment against an officer, for the embezzlement of money paid to him as fines, which failed to state the character or kind of the fines, and to charge a fraudulent intent. Peacock v. State, 36 Texas, 647.

**30.** An indictment for embezzlement is sufficient which describes the property embezzled with as much particularity as is required in an indictment for larceny. Com. v. Concannon, 5 Allen, 502; People v. Cox, 40 Cal. 275.

**31.** An indictment for embezzling coin need not specify the denomination of the several pieces; and if it do, evidence of the embezzlement of coin of equal aggregate value will be sufficient without proving the denomination. Riley v. State, 32 Texas, 763.

**32.** An indictment for embezzlement which describes the property "as certain books, letter-files, knives, bank shares, slates, and sealing-wax, to about the value of forty dollars," is sufficient under the statute of Alabama. Mayo v. State, 30 Ala. 32.

**33.** An indictment which alleges the larceny or embezzlement of printed sheets, is not sustained by proof that they were delivered to the defendant by the owner to be bound, and that after he had folded and trimmed them, he embezzled and fraudulently converted them to his own use. The indictment should have charged a larceny or embezzlement of books. Com. v. Merrifield, 4 Metc. 468.

**34.** A count for embezzlement may charge the embezzling of several different articles, some of them greater and some less than $25 in value. Coats v. People, 4 Parker, 662.

**35.** An information against a county treasurer for embezzling public funds in the county treasury, need not specify the kind of funds embezzled. State v. Smith, 13 Kansas, 274; Same v. Graham, Ib. 299.

**36.** An indictment under the act of Congress of March 3d, 1825, for embezzling a letter containing a bank note, need not state what office the defendant held, nor set out the bank note. U. S. v. Clark, Crabbe, 584.

**37.** An indictment which charges the embezzlement of "a lot of lumber," "a certain lot of furniture," and "certain tools," is bad for uncertainty. State v. Edson, 10 La. An. 229.

**38.** An indictment is not demurrable as being vague and indefinite, which charges the defendant with having received a certain amount of money to be applied for the use or benefit of the bailor, and that on a certain day, he fraudulently converted a specific portion thereof to his own use, without the consent of the owner and to his injury. But it is not competent for the prosecution to prove that the accused had reported to the bailor special payments as having been made to particular persons in the performance of his duty as bailee, and that such payments were not in fact made to the amounts so reported, or that there were no such persons as those to whom the payments were reported to have been made. Hoyt v. State, 50 Ga. 313.

**39. Averment of ownership.** Money intrusted to an express company for transportation may be described in an indictment for the embezzlement of it to be the property of the company. Riley v. State, 32 Texas, 763.

**40.** An indictment for the embezzlement of bank bills intrusted by a soldier who was a minor, to the defendant, to be carried to the minor's father, may aver the ownership of the bills to be in the father. Com. v. Norton, 11 Allen, 110.

**41.** Where an indictment for embezzlement properly alleges the ownership at the date of the delivery of the property to the defendant, and it is averred that the embezzlement occurred while the trust continued on which the property was received, there need not be an averment that the title to the property continued in the party who

intrusted it to the defendant down to the time when the embezzlement was committed. Com. v. Butterick, 100 Mass. 1.

42. It is not a good objection to an indictment for embezzlement and larceny of provisions belonging to a county poorhouse that they are laid in the indictment as the property of the superintendent of the poor of the county. Coats v. People, 4 Parker, 662.

43. An indictment against a public officer for fraudulently embezzling and converting to his own use moneys under his control by virtue of his office, need not allege that the money was the property of another, or whose money it was. State v. Walton, 62 Maine, 106; s. c. 2 Green's Crim. Reps. 465.

44. **Charging distinct acts.** The indictment may contain counts for both embezzlement and larceny. Coats v. People, 4 Parker, 662.

45. An indictment for embezzlement charged the defendant 1st, with embezzling the sum of three hundred and sixty dollars and fifty cents, the 19th of November, 1861; 2d, with embezzling the sum of six hundred and thirty-two dollars and twenty-five cents, January 1st, 1862. *Held* on demurrer, by Norton, J., that it was bad in charging two distinct offenses. Doubted by the rest of the court. People v. Bailey, 23 Cal. 577.

46. An indictment which alleges that the defendant having received as tax collector a certain sum for licenses due the State, and a certain other sum for licenses due the county, amounting in the whole to a sum specified, embezzled said last mentioned sum, the property of said State and county, does not charge two distinct offenses. People v. De La Guerra, 31 Cal. 416.

### 3. Jurisdiction.

47. **Of state courts.** The fact that when an officer of a national bank embezzles the funds of the bank, he is liable to punishment under the act of Congress of 1864, ch. 106, § 55, does not exclude the jurisdiction of the State courts over the same offense. Com. v. Barry, 116 Mass. 1.

48. Notwithstanding the act of Congress which provides that if any teller or other officer of the bank shall embezzle the property of the bank, he shall be punished by fine and imprisonment, it is competent for the legislature of a State to pass a law affecting the business of the bank with its citizens, or protect the bank or its customers in the conduct of that business by a penalty. Where, therefore, a teller of a national bank in Connecticut stole a package of bonds which had been left in the bank on special deposit by one of its customers, it was held that under the statute of the State (Gen. Stats. tit, 12, § 191) in relation to embezzlement by the officers of a bank, the courts of the State had jurisdiction of the offense. State v. Tuller, 34 Conn. 280.

49. In Maine, under the statute (R. S. ch. 156, § 7), where a person to whom property is intrusted, to be carried for hire and delivered in another State, before such delivery fraudulently converts the same to his own use, he is liable whether the *act* of conversion be in Maine or in the other State. State v. Haskell, 33 Maine, 127.

### 4. Evidence.

50. **Delivery of property.** An indictment which alleges that property embezzled was possessed by B., and by him delivered to the defendant, is supported by proof that it was delivered by B. to some one acting for the defendant. State v. Hinckley, 38 Maine, 21.

51. **Must show fraud.** A person cannot be convicted of embezzlement upon proof that he received money for the purpose of paying a note, and did not pay the same, unless it is further proved that being the agent of another, and having received the money as such, he failed to pay the same in consequence of some fraudulent use or conversion of the money. State v. Snell, 9 R. I. 112; s. c. 1 Green's Crim. Reps. 533.

52. On the trial of an indictment for embezzling a mortgage, the following instruction was held proper: That to make out the charge against the defendant, it must be proved that he feloniously and fraudulently converted to his own use the mortgage, and that it belonged to the complainant; that if the mortgage was a mere cheat on the complainant's part, and ob-

tained by fraud, the defendant might lawfully take it into his possession wherever he could find it; but if it came into the complainant's hands upon a valuable consideration actually paid by him, though he was not entitled to the whole amount nominally due, and the defendant received it upon the trust that he was to give it to the complainant, and instead of doing so appropriated it to his own use, he might be found guilty. Com. v. Concannon, 5 Allen, 502. See U. S. v. Taintor, 11 Blatch. 374; s. c. 2 Green's Crim. Reps. 241.

**53. Need not be proof of separate acts.** On the trial of an indictment for embezzling United States bonds, it is not necessary to show that the several bonds were misappropriated by separate acts, or at different times, in order to justify a conviction on each of the counts in which the bonds are separately described. In this respect, the law of larceny and embezzlement is alike. Com. v. Butterick, 100 Mass. 1.

**54. Presumptions.** Evidence of other acts of embezzlement by the defendant than that charged in the indictment is admissible on the question of guilty intent. Com. v. Shepard, 1 Allen, 575; Com. v. Tuckerman, 10 Gray, 173.

**55.** The agent of an express company, to whom money was intrusted to be delivered by him to consignees, stated that the money was stolen from him on the way. *Held* that in the absence of any reasonable account given by him of the occurrence, he might be convicted of embezzlement. Riley v. State, 32 Texas, 763.

**56. Employer as witness.** On a trial for embezzlement alleged to have been committed by a servant or agent, the employer is a competent witness to show that he did not authorize the accused to do the acts complained of, and that the accused has not accounted to him for the property. Coats v. People, 4 Parker, 662.

5. Verdict.

**57. Against several.** Where several are charged with feloniously receiving embezzled goods, knowing them to have been embezzled, all who are proved to have been confederates in the transaction may be found guilty, though the receiving was at different times and places, and though all were not present. People v. Stein, 1 Parker, 202.

**58. Effect.** Where an indictment contains counts for embezzlement and larceny, and the prisoner is tried for both offenses, finding the prisoner guilty of embezzlement is equivalent to a verdict of not guilty of the larceny charged. Guenther v. People, 24 N. Y. 100.

**59. For other offense.** Under an indictment for embezzlement, there cannot be a conviction of a breach of trust. State v. Reonnals, 14 La. An. 278.

## Embracery.

**At common law.** There is no such crime at common law as an attempt to commit embracery. State v. Sales, 2 Nev. 268.

## Enlistment.

**Indictment.** In Vermont, an indictment for a violation of the statute (R. S. ch. 119, § 29) in relation to the enlistment of men within the State for military service without the State, alleged that the defendant, "of Fairfax, in the county of," &c., "on," &c., "at Fairfax," &c., "without due authority from this State or the United States, did enlist," &c., "one Edward Orton, of Fairfax aforesaid, a person in this State," &c. *Held* that it was alleged with sufficient certainty that the person enlisted was in the State at the time of enlistment. State v. Cook, 38 Vt. 437.

## Error.

*See* Writ of error.

## Escape.

**1. At common law.** A person who es-

capes from lawful custody, though he use no force or violence, is amenable to punishment at common law. Com. v. Farrell, 5 Allen, 130.

2. **What is.** If a sheriff discharges the duties of his office so negligently that in consequence of such negligence, a prisoner leaves the jail and walks out into the surrounding town, even for a few minutes only, this constitutes an escape, though it be proved that the prisoner actually returned. Nall v. State, 34 Ala. 262.

3. It is no justification for breaking prison to effect an escape that the commitment was irregular. State v. Murray, 15 Maine, 100.

4. Where a person confined in jail went by direction of the jailer to market for the jail, cooked food for the prisoners in the kitchen of the dwelling-house attached to the jail, went to the adjacent barn and there fed and milked the cow, and thence, without the knowledge of the jailer, ran away and left the State, it was held that the conduct of the jailer did not excuse the escape. Riley v. State, 16 Conn. 47.

5. **Who not liable.** An indictment for a negligent escape cannot be sustained against a mere servant of the officer upon whom the law imposes the obligation of safe custody. State v. Errickson, 3 Vroom (32 N. J.) 421.

6. In Massachusetts, the statute (R. S. ch. 143, § 21) punishing persons who forcibly break prison with intent to escape, or by force or violence attempt to escape therefrom, although no escape be effected, does not refer to persons who are held in custody for trial or for not obtaining bail for appearance, but only to those who are sentenced to a term of imprisonment as a punishment. Com. v. Homer, 5 Metc. 555. See Com. v. Briggs, Ib. 559.

7. **Aiding.** Informality in the complaint and in the sentence as orally announced, but under which no commitment has taken place, is no justification for aiding the prisoner to escape from the custody of the officer. Com. v. Morihan, 4 Allen, 585.

8. On the trial of an indictment for aiding the prisoner to escape when held under a warrant, it is no defense that the prisoner was not in fact guilty of the offense with which he was charged. State v. Bates, 23 Iowa, 96.

9. Any assistance given to one known to be a felon, in order to hinder his apprehension, trial or punishment, or aiding him to escape, will make a person an accessory after the fact. But merely suffering the felon to escape, or agreeing for money not to prosecute him, or failing to make known the felony, will not make the party an accessory after the fact. Wren v. Com. 26 Gratt. 952.

10. Until the offense has been consummated, any aid or assistance rendered to a party in order to enable him to escape, will not make the person affording such assistance guilty as an accessory after the fact. Harrol v. State, 39 Miss. 702.

11. **What does not amount to aiding.** It is not a violation of the statute of Arkansas (R. S. ch. 44, § 7), which forbids the conveying to any person lawfully imprisoned, any instrument, arms or other thing calculated to aid his escape, for a person to convey to a prisoner a written communication informing him that he has a friend and can be released from confinement. Hughes v. State, 1 Eng. 132.

12. When the prisoner is out on bail, the finding of a verdict of guilty does not *ipso facto* place him in the custody of the sheriff; and therefore one who aids his escape is not liable to prosecution. Redman v. State, 28 Ind. 205.

13. When a person charged with crime is out on bail, and his sureties, with his consent, surrender him to the sheriff, taking the latter's receipt therefor, the sheriff, if he have no copy of the recognizance, has not lawful custody of him, and a person who assists him to escape is not guilty of felony. State v. Beebe, 13 Kansas, 589.

14. **Indictment.** An indictment which charges an intent to break open the jail to liberate A., confined therein, to effect his escape, sufficiently alleges an intent to aid his escape. State v. Abbott, 16 New Hamp. 507.

15. An indictment which alleges that the defendant "willfully and negligently" per-

mitted an escape, is bad for duplicity. State v. Dorsett, 21 Texas, 656.

16. It is not a good objection to an indictment for an escape that the defendant, who was not regularly appointed and qualified as a constable, but had assumed to act as such, was charged therein with negligence as a lawful constable. State v. Mayberry, 3 Strobh. 144.

17. **Evidence.** Under an indictment against a sheriff for negligent escape, a conviction may be had on proof of a voluntary escape. Nall v. State, 34 Ala. 262. Doubted in Kavanaugh v. State, 41 Ala. 399.

18. On the trial for an escape from the penitentiary, the original conviction and sentence to the prison may be proved by a transcript of the judgment without the indictment, it appearing from the record that the prisoner was sentenced for the crime alleged in the indictment for the escape. Sandford v. State, 6 Eng. 328.

19. Where an indictment for escape alleges that the prisoner was convicted of larceny, sentenced to the penitentiary and escaped therefrom, the fact that he was the same person that had been convicted of larceny is material, and by pleading not guilty he does not admit it. But circumstantial evidence of identity will be sufficient. State v. Murphy, 5 Eng. 74.

20. In Massachusetts, under an indictment for an escape from the house of correction, the whole yard of the house, though divided by a public street against which it is fenced, is deemed to be adjoining or appurtenant, within the statute (Gen. Stats. ch. 178, §§ 6, 7). Com. v. Curley, 101 Mass. 24.

21. **Effect on rights of defendant.** Where a person an trial for felony escapes as the jury are in the act of bringing in their verdict, the jury should be discharged, and the prisoner when re-arrested be put on trial before another jury. Andrews v. State, 2 Sneed, 550.

22. Legal proceedings will not be allowed to be taken in behalf of a prisoner when he is no longer in custody or out on bail, but has fled from the custody of the law. People v. Genet, 59 N. Y. 80. So far as the defendant has any right to be heard after conviction, he must be deemed to have waived it by escaping from custody and failing to appear and prosecute his exceptions in person. Com. v. Andrews, 97 Mass. 543.

23. Where it appears that the defendant since his conviction has escaped, the court will direct that so much of the order awarding the writ of error as operates as a *supersedeas* to the judgment be discharged, and that the writ of error be dismissed, unless by a certain day, the defendant is in custody. Sherman v. Com. 14 Gratt. 677.

24. Although where a prisoner after conviction escapes and remains a fugitive he cannot require at the hands of the courts any proceedings in his favor, or insist upon any steps adverse to the prosecution, yet he cannot be deprived of the benefit of proceedings already taken before his escape. Sharkey v. People, 3 N. Y. Supm. N. S. 739; 8 Ib. 300.

25. A convict may be returned to the State prison from which he has escaped, after the expiration of the time for which he was imprisoned, upon information or suggestion and trial, as to his identity and escape, in the court which sentenced him. In New York, a Court of Sessions has jurisdiction of such a case. Haggerty v. People, 6 Lans. 347. A person having been convicted of robbery, and sentenced to the State prison, escaped therefrom, and after the expiration of the time for which he was sentenced, committed a burglary. The court in which he was tried and convicted for the robbery directed his return to the State prison for a time equal to the remainder of his term unserved, and he was then put upon trial for the burglary, convicted and sentenced therefor, the second term to commence at the expiration of the first. *Held* proper. Ib.

## Estray.

1. **Taking up.** It is an indictable offense to take up and use an estray without first having complied with the requirements of the law in relation thereto. State v. Armontrout, 21 Texas, 472.

2. **Indictment.** An indictment for taking up and using an estray, need not state the

age, color, sex, or brand of the animal. State v. Christ, 32 Texas, 99.

3. An indictment for taking up and using an estray belonging to A. B. is good, the fact that the owner of the animal had been discovered and was known when the indictment was found, being no proof that it was not an estray when taken up. State v. Fletcher, 35 Texas, 740. And an animal may be an estray although the owner is known, provided the animal was a great distance out of its usual range. State v. Apel, 14 Ib. 431.

## Evidence.

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### 1. In general.

**1. When material must be received.** Although evidence which it is probable may be ruled out should not, if possible, be heard by or be discussed before the jury, Carter v. State, 37 Texas, 362; yet competent evidence cannot be rejected on the ground that it is inconclusive, or of little weight. Marx v. People, 63 Barb. 618.

2. The law does not favor estoppels; and a party cannot be precluded from giving evidence touching matters directly or collaterally involved in the issue, unless it appear with certainty that such matters have been determined against him by competent judicial authority. People v. Frank, 28 Cal. 507.

**3. Must be derived from facts proved.** Circumstantial evidence consists in reasoning from facts which are known or proved, to establish such as are conjectured to exist. But the process is fatally defective, if the circumstances themselves from which it is sought to deduce the conclusion, depend upon conjecture. People v. Kennedy, 32 N. Y. 141.

4. The evidence cannot be helped out by the jury, by taking notice from their own knowledge, that as early as nine o'clock of the night, the part of the street where the offense was committed, was more likely to be deserted than any other part of the city; and where the judge so charged, it was held error. Lenahan v. People, 5 N. Y. Supm. N. S. 265.

5. Where motive is material, it cannot be imagined; but the facts from which it may be inferred must be proved. People v. Bennett, 49 N. Y. 137.

6. Eleven of the jurors who sat on the trial of a complaint for selling intoxicating liquors in violation of law, had tried other similar cases at the same term, in which law books and the constitution of the State had had been read and commented on by counsel without objection. The court charged them "that they had the right to bring to their aid all the information they had derived from any sources equally open to the observation of all, but that any particular information which had been communicated to portions of the jury from sources equally open to the use of all, they could not employ as evidence in the case; that they were to decide the case according to the evidence introduced into it, and not on evidence of the law or facts introduced in other cases; that the instruction of the court was the only evidence of the law in the case, and they were bound so to consider it. *Held* proper. Com. v. Lawrence, 9 Gray, 133.

7. On a trial for passing a counterfeit bank bill, a witness testified without objection, that after the prisoner and his com-

panion had been taken to the station house, a boy brought in a roll of counterfeit bills which he said the prisoner's companion had thrown down in the street after their arrest *Held* that although the hearsay evidence of the boy was given without objection, yet the admission of the counterfeit bills in evidence was error. Cantor v. People, 5 Parker, 217.

**8. Must be responsive to the issue.** Where irrelevant testimony is calculated to mislead or prejudice the minds of the jury, it is error to receive it. State v. Arnold, 13 Ired. 184. On a trial for murder, the prosecution having offered the reputed wife of the defendant as a witness, and proved a marriage in fact, proposed to introduce evidence to show that the marriage was void, so as to make the alleged wife a competent witness against the defendant—*Held* that as the marriage was not in issue, and the pleadings did not give the defendant notice that such a question was to be tried, the evidence was not admissible. Dixon v. People, 18 Mich. 84.

**9.** On an indictment against A. for the willful burning of the barn of P., evidence was given implicating S. To show malice on the part of S. toward P., the latter had been asked by the prosecution whether some time before the fire, S. had instituted a criminal prosecution against him, from which he was discharged. Having answered in the affirmative, an offer by the defense to show that such prosecution was founded on probable cause, was rejected. *Held* proper. Com. v. Vaughan, 9 Cush. 594.

**10.** On a joint indictment against two, proof that the offense was committed severally will not sustain a conviction of either or both. Johnson v. State, 44 Ala. 414. And where the circumstances proved, implicate two persons equally, but who are in no way connected in committing the crime, neither can be convicted. Kirby v. State, 3 Humph. 289. And see Stephens v. State, 14 Ohio, 386.

**11. Name of defendant.** It may be proved on the trial, that the prisoner was known by the name mentioned in the indictment, and also by another name, notwithstanding the indictment does not allege that he was known by both names. Johnson v. State, 46 Ga. 269.

**12.** Whether a person is as well known by one name as another, is a question of reputation, custom, and usage, and not to be determined by records, or limited to names used in the person's presence. Com. v. Gale, 11 Gray, 320. The defendant being indicted for larceny, pleaded misnomer in abatement. Issue was joined on the replication that he was known as well by the name in the indictment as by that in the plea. The judge after stating to the jury the question for them to decide, gave them the following illustration: "If a stranger should go where the defendant is known and inquire for his house, would those of whom he inquired, recognize the man inquired for as well by one name as the other?" *Held* proper. State v. Dresser, 54 Maine, 569.

**13.** Upon the issue raised by a plea in abatement as to whether the defendant was indicted by the right name, the fact that to a former indictment by the same name she answered upon her arraignment, and pleaded not guilty, is proper for the consideration of the jury. State v. Homer, 40 Maine, 438.

**14.** If a person is in the habit of using initials for his christian name, and is indicted by these initials, the fact whether he is so known may be put in issue; and if the issue is proved against him, he may be convicted. Diggs v. State, 49 Ala. 311.

**15. Name of person injured.** Where it is alleged in the indictment that the name of the person injured is unknown to the grand jury, the proof must correspond to the allegation; and if there be no proof on the subject, the defendant cannot be convicted. Stone v. State, 30 Ind. 115. But see State v. Wilson, 30 Conn. 500.

**16.** An indictment charged the prisoner with defrauding John J. Robinson. The evidence was that the name was spelt Robison. The court charged the jury that it was for them to determine whether the names had the same sound, and if the sound was not

the same it would be their duty to acquit. *Held* correct. People v. Cooke, 6 Parker, 31.

17. Where an indictment alleged the name of the deceased to be *Louis Boudet*, or *Boredet*, while his real name was proved to be *Louis Burdet*, and to be sometimes pronounced as if spelt Bouredet, it was held that if his real name was the same in sound as if written *Boudet* or *Boredet*, or so nearly the same that the difference would be scarcely perceptible, the variance was immaterial. Aaron v. State, 37 Ala. 106.

18. An indictment for murder charged that deadly and mortal bruises were inflicted on *Augustine*, and that "of the said mortal bruises and wounds the said *Augustina* died." *Held*, not bad after verdict. Com. v. Desmartean, 16 Gray, 1.

19. An indictment for an assault with a deadly weapon charged the name of the person assaulted as "*Mary Danner*." On the trial it was proved that her name was "*Dannaher*." *Held*, that the variance was immaterial. Gahan v. People, 58 Ill. 160; s. c. 1 Green's Crim. Reps. 704.

20. **Middle letter of name.** The middle letter has been held no part of the name. Therefore, where the indictment charged that a robbery was committed on I. R. R., and it was proved that it was committed on I. B. R., it was held that there was no variance. Miller v. People, 39 Ill. 457. But an indictment which charged the defendant as O. Alonzo Rockwell was held not sustained by proof that the defendant usually signed his name O. A. Rockwell, and was generally called O. A. Rockwell, that some of his relatives called him Alonzo, and that O. A. were the initials of his name. Rockwell v. State, 12 Ohio, N. S. 427.

21. **Proof of identity of prisoner.** When the identity of the prisoner is an important inquiry, it is competent to show the acquaintance and familiarity of the witness with him, and the witness may be asked where the acquaintance was, and what was his own business. State v. Bartlett, 55 Maine, 200.

22. The question as to what is *idem sonans* is for the jury, and not the court. Taylor v. Com. 20 Gratt. 825. The defendant has a right to submit to the jury as a question of fact whether the name proved is *idem sonans* with that laid in the indictment, and by omitting to do so he waives all claim to insist on the objection. Com. v. Gill, 14 Gray, 400.

23. The court instructed the jury thus: "If Geo. W. Bell is the name of the defendant, his wife is correctly named and described when called Mrs. Geo. W. Bell." *Held* error, in deciding what was the name of the defendant's wife as matter of law, instead of leaving it to be determined by the jury. Bell v. State, 25 Texas, 574.

24. **Immaterial averments need not be proved.** Although the general rule is that all descriptive averments in an indictment must be proved as laid, yet when an averment may be omitted without affecting the charge against the prisoner, and without detriment to the indictment, it may be disregarded in evidence. Where an indictment for perjury committed in testifying in an action in favor of J. B. against the trustees of the "Colebrook" Academy, subsequently employed the words "*Colebath* Academy aforesaid," it was held that the word *Colebath* might be rejected as surplusage. State v. Bailey, 31 New Hamp. 521.

25. Where an indictment charged the defendant with willfully and falsely marking sixty sacks of flour with a certain brand, with intent to defraud S. and W., and that he then sold and delivered them to S. and W., it was held sufficient to prove that the defendant falsely marked such sacks, or any of them, with intent to defraud, and that the prosecution need not prove that the same were sold and delivered to S. and W. State v. Burge, 7 Iowa, 255.

26. **Time not material.** It is not necessary to prove the precise day on which the crime was committed. Com. v. Dacey, 107 Mass. 206. The evidence may extend back to any period previous to the finding of the indictment within the statutory limits for prosecuting the offense. McBryde v. State, 34 Ga. 202. Whether in the computation of time, the day on which an act is done is to be included or excluded, will depend

upon the circumstances. State v. Asbury, 26 Texas, 82.

**27. Place.** It is erroneous to instruct the jury that they may find the defendant guilty without proof that the offense was committed in the county in which the indictment was found, and within the time prescribed by the statute of limitations. Hughes v. State, 35 Ala. 351; Green v. State, 41 Ib. 419. Where the evidence on a trial for grand larceny conduced to show that the offense was committed at a drinking saloon, but there was nothing in the record which tended to prove that the saloon was in the county, it was held that there must be a new trial. People v. Parks, 44 Cal. 105; s. c. 2 Green's Crim. Reps. 398.

2. Amount of proof required to convict.

**28. Must satisfy the jury beyond a reasonable doubt.** The legal test of the sufficiency of evidence to authorize a conviction is not that it excludes every possibility that another person, and not the accused, may have committed the crime, but its adequacy to satisfy the understanding and conscience of a jury, and to exclude from their minds all reasonable doubt of the guilt of the accused. Murphy v. People, 6 N. Y. Supm. N. S. 369; Chisholm v. State, 45 Ala. 66. But it ought not only to be consistent with the prisoner's guilt, but inconsistent with any other rational conclusion. Stephens v. People, 4 Parker, 396; 19 N. Y. 549; People v. Bennett, 49 N. Y. 137; Williams v. State, 41 Texas, 209; Barnes v. State, Ib. 342; Carter v. State, 46 Ga. 637; Algheri v. State, 25 Miss. 584; Sumner v. State, 5 Blackf. 579; People v. Murray, 41 Cal. 66; U. S. v. Douglass, 2 Blatchf. 207.

**29.** The following instruction was held erroneous: In order to convict, "the jury should be satisfied as reasonable men, so that they would be willing to act upon it as in matters of great importance to themselves;" the rule requiring that they should be satisfied to the extent they would be in matters of the highest concern and importance. State v. Dineen, 10 Minn. 407; s. p. State v. Shettleworth, 18 Ib. 208; Bradley v. State, 31 Ind. 492.

**30.** To warrant a conviction upon proof of circumstances which are inconclusive, they must be so multiplied as to increase the probability to an indefinite extent beyond mere calculation. But before the appellate court can determine that the court below erred in refusing a charge which asserted the principle generally, the record must show that the evidence was confined to facts entirely inconclusive. The correct rule is not whether the circumstances proved produce as full conviction as the positive testimony of a single credible witness, but whether they produce moral conviction to the exclusion of every reasonable doubt. Mickle v. State, 27 Ala. 20. Where there is *prima facie* proof of the defendant's guilt, and no rebutting testimony, it is not erroneous to refuse to charge the jury that the testimony offered by the prosecution is not conclusive evidence of guilt. Swallow v. State, 22 Ala. 20.

**31. Meaning of reasonable doubt.** Proof "beyond a reasonable doubt" is not beyond all possible or imaginary doubt, but such proof as precludes every reasonable hypothesis except that which it tends to support. It is proof "to a moral certainty," as distinguished from an absolute certainty. Com. v. Costley, 118 Mass. 1, per Gray, Ch. J. The following instruction was held proper: "By reasonable doubt, is ordinarily meant such a one as would govern or control you in your business transactions or the usual pursuits of life." State v. Millain, 3 Nev. 409.

**32.** The following instruction was held proper: "Jurors have sometimes said after the acquittal of a prisoner, that they were satisfied of his guilt, and had no doubt of it, but did not think there was sufficient evidence to warrant a conviction. This is wrong; for if a juror goes into the trial of a case with his mind unprejudiced, and knowing nothing of the facts, and becomes satisfied without doubt from the testimony offered, that the prisoner is guilty, there can be no reasonable doubt in his mind." State v. James, 37 Conn. 355.

**33. Positive negation equal to affirma-**

tion. Where a trustworthy witness swears positively that the defendant did not strike the blow, it is not negative evidence, but entitled to equal weight with the testimony of a witness who swears that he did do so. Coughlin v. People, 18 Ill. 266.

34. **Testimony partly false.** It is not an inflexible rule, that when a witness has sworn falsely, his testimony is to be disregarded except in those particulars in which it is corroborated. Com. v. Billings, 97 Mass. 405; State v. Williams, 2 Jones, 257; State v. Smith, 8 Ib. 132; State v. Brantly, 63 N. C. 518. But in Tennessee, it has been held that where evidence proposed contains an admixture of illegal matter, the court may disallow the whole. Harman v. State, 3 Head, 243; and in Ohio, that where a witness is proved to have committed perjury, his evidence must be wholly rejected. Stoffer v. State, 15 Ohio, N. S. 47.

### 3. Burden of proof.

35. **On prosecution.** Where the court charged the jury, that when the prosecution had made out a *prima facie* case, the burden of proof was on the defendant to restore him to that presumption of innocence in which he was at the commencement of the trial, it was held that the instruction was erroneous, that the jury should have been told that the burden was on the commonwealth to establish the guilt of the defendant, and that he was to be presumed innocent, unless the whole evidence in the case satisfied them of his guilt. Com. v. Kimball, 24 Pick. 366. See Ogletree v. State, 28 Ala. 693.

36. When an indictment charges that the defendant kept a ferry without license, the burden of proof is on the prosecution to show that the defendant had no license. Territory v. Reyburn, McCahon's Kansas, 134; *contra*, Wheat v. State, 6 Mo. 455.

37. **On the defense.** When the matter of defense is wholly disconnected from the body of the crime charged, the burden of proof rests upon the accused. State v. Murphy, 33 Ind. 270; and where the subject-matter of a negative averment relates to the defendant personally, or is peculiarly within his knowledge, the averment will be taken as true, unless disproved by him. State v. McGlynn, 34 New Hamp. 422.

38. Where it is proved that there was a conspiracy to commit murder, and that one of the conspirators was in a situation in which he might have given aid to the perpetrator of the homicide, the burden is on him to rebut the presumption by showing that he was there for a different purpose. Com. v. Knapp, 9 Pick. 496.

39. Where a miller, who had received barilla to grind, was charged with fraudulently retaining part of it, and returning a mixture of barilla and plaster of paris, it was held that the prosecution was not bound to produce the cartman who carried the barilla to and from the mill, to prove that it was not adulterated in the transportation, although there was only circumstantial evidence, that is was adulterated by the miller. Com. v. James, 1 Pick. 375.

40. A person is presumed to intend the ordinary consequences of his acts, and the burden to rebut the presumption, rests upon the person charged with crime. People v. Orcutt, 1 Parker, 252. But an instruction that if the jury find certain facts, they will be justified in finding the defendant guilty, as "the law presumes that he intended the natural and probable consequences of his own act, unless he should rebut such presumption by evidence sufficient to satisfy the jury," is erroneous. The jury should have been instructed to find the defendant guilty, if satisfied by the evidence of the criminal intent, as well as of the other facts, and not otherwise. Madden v. State, 1 Kansas, 340.

### 4. Documentary evidence.

41. **When record must be produced.** To prove the previous conviction of a witness, the record of conviction must be produced. People v. Reinhart, 39 Cal. 449; People v. Melvane, Ib. 614; People v. McDonald, Ib. 697. A witness may refuse to answer when asked whether he had at the term of the court then in session pleaded guilty to a crime, the record being the best evidence.

Johnson v. State, 48 Ga. 116. But the denial of a motion for delay in order to obtain such record, is not ground of exception. State v. Damery, 48 Maine, 327.

42. The prisoner has the right to insist that the conviction of a witness of a penitentiary offense, if proved, be shown by the record of conviction. The witness cannot be asked whether he has been convicted and sentenced to the penitentiary, although he does not object. Even on cross-examination, the conviction of the witness cannot be proved by the admission and consent of the witness, if the prisoner object. Matter of Real, 55 Barb. 186.

43. Where a witness admits without exception on the part of his counsel that he has been in the penitentiary, asking him how long he was there does not involve the question of his conviction, which can be proved only by the judgment record. Real v. People, 55 Barb. 551; s. c. 42 N. Y. 270.

44. **Copy of record.** A certified copy of the complaint from the record of proceedings in the police court, is competent to contradict the testimony of the complainant on the trial of the indictment. Com. v. Goddard, 2 Allen, 148.

45. **Proof of record.** Whether an instrument offered is a record or not, is always open to inquiry. And if words have been struck out of a record so as to render it erroneous, witnesses may be examined to show that such words were improperly struck out; but not to falsify the record by showing that an alteration whereby the record was made correct, was improperly made. Schirmer v. People, 33 Ill. 276.

46. For the purpose of proving the record of a conviction in another State, the seal of the court must be affixed to the record with the certificate of the clerk, and not the certificate of the judge merely. Kirschner v. State, 9 Wis. 140. For proof of record sent up on appeal from police court, see Com. v. Barry, 115 Mass. 146; s. c. 2 Green's Crim. Reps. 285.

47. **Proof of indictment.** It is improper to ask a witness on cross-examination if he has been indicted for perjury. The indictment or a certified copy of it, should be produced. Peck v. Yorks, 47 Barb. 131.

48. **Entries.** Entries made in the usual course of business upon the books of a third person, by those whose duty it was to make them, and who testify that they were correct when made, but that they have now forgotten the transaction, are admissible in evidence, although the entries were first written by the party making them on a slate during the day, and copied by him into the books at night. State v. Shinborn, 46 New Hamp. 497.

49. Where a witness to a transaction has made a memorandum at the time of the facts for the purpose of preserving the memory of them, and can, at any subsequent period, swear that he made the entry at the time, for that purpose, and that he knows from the memorandum that the fact existed, it will be good evidence, although the witness does not retain a distinct recollection of the facts themselves. State v. Rawls, 2 Nott & McCord, 331.

50. **Books of science.** Medical books are not admissible in evidence, either to sustain or contradict the opinion of a witness. Davis v. State, 38 Md. 15; Com. v. Sturtivant, 117 Mass. 122. In Wisconsin and Massachusetts, the extent to which books may be read to the jury is discretionary with the court. Luning v. State, 1 Chand. 178; Com. v. Austin, 7 Gray, 51.

51. In Rhode Island, it has been held that books of science are not admissible, notwithstanding the counsel for the prisoner dismissed a witness under the belief that such a book might be read to contradict him. Neither does the fact that a witness read passages in such a book to which on cross-examination he was referred, and in relation to which he answered questions, render the book admissible. State v. O'Brien, 7 R. I. 336.

52. In Illinois, where the prosecution was permitted, against the objection of the prisoner, to read to the jury extracts from medical works, which had not been introduced in evidence or proved to be authority, and also to read to the jury the testimony of a professor of chemistry given in a case tried

in another State, it was held error. Yoe v. People, 49 Ill. 410.

**53. Map.** It is in the discretion of the court to allow a witness to use a map to point out to the jury the location of an alleged way. Com. v. Holliston, 107 Mass. 232.

**54. Advertisements.** On a trial for murder, a witness for the prosecution on cross-examination identified certain advertisements in a newspaper as his, and it was held that they might be read to the jury in order to affect his credit, but that the newspapers could not be put in evidence. Com. v. Hersey, 2 Allen, 173.

**55. Letters.** Press or machine copies of letters, purporting to have been written by the defendant, are admissible in evidence in connection with proof of due effort on the part of the prosecution to produce the original letters; and it is not ground for a new trial that experts were allowed to testify to the handwriting of the originals, instead of the copies. Com. v. Jeffries, 7 Allen, 548.

**56.** The prosecution cannot give in evidence an anonymous letter, written by a stranger, though a witness for the prosecution had spoken of the letter, on the direct examination, and had been cross-examined as to the circumstances under which it was received by the prisoner's counsel, its contents not having been disclosed on such examination. People v. Costello, 1 Denio, 83.

**57. Papers of insolvent.** To render the papers of an insolvent debtor, which are produced by his assignee, admissible in evidence as coming from the possession of the insolvent, it must be shown that the assignee received them from the messenger, and that the latter took possession of them under his warrant. Com. v. Eastman, 1 Cush. 189.

**58. Depositions.** Depositions cannot in general be used against the prisoner; nor in his favor, unless by his consent. Dominges v. State, 7 Smed. & Marsh. 475. But where the prisoner previous to his being accused, in his examination on oath, charged another with the commission of the offense, it was held that his examination might be given in evidence against him on the trial. State v. Broughton, 7 Ired. 96.

**59.** Where on a trial before a court of Special Sessions, the prisoner's counsel agreed that a deposition might be read in evidence, provided time was given him to procure testimony in order to show that the witness was incompetent, and several days' adjournment were accordingly allowed, it was held that the court having afterward heard such testimony and decided in favor of the witness's competency, the prisoner was not entitled to have the deposition excluded. Bebee v. People, 5 Hill, 32.

**60.** The provision of the statute of Maine (R. S. ch. 107, § 20), that the court may exercise a discretion in admitting or rejecting a deposition taken out of the State, is not restrictive; but the court may admit the deposition notwithstanding an omission of some things in the certificate deemed essential in depositions taken in the State. State v. Kimball, 50 Maine, 409.

**61.** The affidavit of a witness, sworn to before a magistrate, may be read at the trial, either to support or contradict his testimony. State v. Lazarus, 1 Mills, 12. The same is true of the depositions of a witness given before a coroner's jury, and certified and returned by the coroner to the District Court, as required by law, introduced for the purpose of contradicting the witness. People v. Devine, 44 Cal. 452; s. c. 2 Green's Crim. Reps. 405. But a memorandum of the testimony of the witnesses examined before a coroner's jury taken by a person who was present, is not competent evidence. State v. McElmurray, 3 Strobh. 33.

**62. Writing partly legal and partly illegal.** When a writing contains both legal and illegal evidence, the court are not required to expunge that which is illegal; but only to point out to the jury the illegal testimony, and designate it in such a way that they can identify it. Johnson v. State, 17 Ala. 618.

5. Written instruments how proved.

**63. In general.** A writing must be proved by the original, if in the possession or control of the party. If lost or destroyed, or in the possession of the opposite party who refuses to produce it, an examined copy

is the next best evidence. If there is no such copy, the contents may be proved by parol. U. S. v. Britton, 2 Mason, 464.

64. Where upon a trial for murder what purported to be a recognizance was introduced for the purpose of showing an inducement to commit the crime, but there was no proof of its execution except the instrument itself and the testimony of an agent of the governors of the almshouse that the accused had made payments upon it, and it did not appear to have been filed, it was held that the proof of its execution was insufficient to make it admissible in evidence. People v. Williams, 3 Parker, 84.

65. **Proof of handwriting by witness who has seen party write.** To prove handwriting, a witness must have seen the person write, or have corresponded with him. West v. State, 2 Zabr. 213. A witness may testify his belief of the handwriting of a party from having seen him write his signature only once; and if his impression is indistinct, his memory may be revived by inspecting a writing which he knows to be genuine. McNair v. Com. 26 Penn. St. 388.

66. Where a witness acquired a knowledge of the prisoner's handwriting by seeing his signature at different times to from eight to twelve chattel mortgages, which the prisoner recognized as instruments he had executed, it was held that the witness was competent to express an opinion as to whether a paper shown to him in court was in the handwriting of the same person. Donoghoe v. People, 6 Parker, 120.

67. **Proof of handwriting by comparison.** In the case of deeds or papers so old that no living witness can be produced, the handwriting may be proved by comparison with papers whose genuineness is acknowledged. West v. State, 2 Zabr. 213.

68. Where a writing is proved to be genuine, comparisons may be made between it and the writing in dispute, by witnesses, who may give their opinions founded on such comparisons, all of which is to be submitted to the jury. State v. Hastings, 53 New Hamp. 452; s. c. 2 Green's Crim. Reps. 334; State v. Clark, 54 New Hamp. 456; *contra*, in New York, People v. Spooner, 1 Denio, 343.

69. An expert in handwriting may testify whether, in his opinion, anonymous letters in a disguised hand, and calculated to divert suspicion from the prisoner, are in his handwriting, and may give the reason for such opinion. But where an expert testified that, in his opinion, certain anonymous letters, in a disguised hand, were in the prisoner's handwriting, and that some portion of them could not have been made with a pen, it was held that he could not be asked whether those marks were made with a peculiar instrument found in the defendant's possession. Com. v. Webster, 5 Cush. 295.

70. On a trial for grand larceny, experts, who had no previous knowledge of the handwriting of the accused, were shown disputed papers, and also certain other writings which had been proved on the trial to be in his handwriting, and they were permitted to testify that, upon comparison of the disputed with the proved writing, they believed that both were written by the same person. Calkins v. State, 14 Ohio, N. S. 222.

71. On a trial for burglary, it was held competent for an expert to testify that a signature he had seen on a leaf of a hotel register before it had been torn therefrom and destroyed, was written by the same person who wrote certain other signatures which were admitted to be those of the prisoner. State v. Shinborn, 46 New Hamp. 497.

72. Persons skilled in handwriting are competent to testify, although they never saw the person write. Hess v. State, 5 Ohio, 5.

73. The skill of an expert in handwriting cannot be tested by placing before him irrelevant papers, in order to contradict his testimony as to the handwriting contained in them. U. S. v. Chamberlain, 12 Blatch. 390. When handwriting is to be proved by comparison, the standard employed must be original writing, and must first be proved. Impressions of writings taken by a press, and duplicates made by a copying-machine, are not originals for this purpose. Com. v. Eastman, 1 Cush. 189.

74. The genuineness of handwriting cannot be proved or disproved, by allowing the

jury to compare it with the handwriting of the party proved or admitted to be genuine. Jumpertz v. People, 21 Ill. 375.

75. **Proof of standard of comparison, how determined.** Upon the question whether a given writing is sufficiently proved to have been written by the defendant to allow of its being submitted to the jury as a standard of comparison, the judge at the trial must pass in the first instance; and, so far as his decision is a question of fact merely, it will be final. Com. v. Coe, 115 Mass. 481; s. c. 2 Green's Crim. Reps. 292. When the court has adjudged the papers genuine, it is the duty of the jury, before making comparison of a disputed writing with them, to examine the testimony respecting their genuineness, and decide whether their genuineness is established beyond a reasonable doubt. It is incumbent on the court to determine whether the witnesses possess sufficient skill to entitle them to pass upon handwriting as experts. If the court decides that they do, they may compare the contested papers with the genuine, and give their opinion as to whether they were written by the same hand. It is for the jury to determine what weight shall be given to such evidence, and the prisoner is entitled to the benefit of any reasonable doubt. State v. Ward, 39 Vt. 225.

76. **Proof of alterations.** The officer of a bank, whose business it has been for many years to examine papers with the view of detecting alterations, erasures and counterfeit signatures, may be asked his opinion as to whether alterations or erasures had been made in a certain paper. Pate v. People, 3 Gilman, 644.

77. **Proof of contents of writing.** Proof of the contents of papers in the possession of the adverse party is admissible after notice to produce the originals. State v. Kimbrough, 2 Dev. 431; *contra*, State v. Wisdom, 8 Port. 511.

78. Parol evidence of the testimony before the coroner's inquest, which was reduced to writing by him, cannot be received. State v. Zellers, 2 Halst. 220.

79. The contents of a letter written by the defendant cannot be proved by the prosecution unless it is shown that the letter is destroyed or in the possession of the defendant. Com. v. Thompson, Thach. Crim. Cas. 28.

80. When the magistrate before whom one is accused of crime is required by the statute to reduce the testimony to writing, parol evidence of what a deceased witness swore on such examination is not admissible until the absence of the written evidence is accounted for. Davis v. State, 17 Ala. 415.

81. On the examination of the prisoner, only so much of the testimony was reduced to writing as the committing magistrate deemed material, the accused being present and cross-examining the witness. The witness died, and the minutes of the examination being lost, it was held that the magistrate could not prove the substance of the testimony thus reduced to writing without also proving what was omitted. Sharp v. State, 15 Ala. 749.

82. Where on a trial for rape, a witness testified that the prosecutor, who was deaf and dumb, had, more than a year after the commission of the alleged offense, given to her in writing the substance of what she had now testified, and that such witness did not know where the writing was, it was held that the proof was insufficient to dispense with the production of the writing. State v. De Wolf, 8 Conn. 93.

83. It will be presumed that a confession made before a magistrate was reduced to writing; but it must be shown that the defendant signed it, or admitted it to be correct, in order to exclude parol proof in relation to it. State v. Eaton, 3 Harring. 554.

84. Parol evidence may be given of the contents of a writing, without accounting for its absence, if the object is not to prove such facts as the writing would show if produced, but only a collateral matter, as its identity with or diversity from another writing. West v. State, 2 Zabr. 212.

85. The rule that a party shall have previous notice to produce a written instrument in his possession, before the contents can be proved as evidence in the case, does not apply where from the nature of the

prosecution the party must know that he is charged with the possession of the instrument. Where, therefore, the defendants were charged in an indictment, a copy of which was furnished them, with the fraudulent possession of certain papers, it was held that they were not entitled to further notice to produce the papers. State v. Mayberry, 48 Maine, 218.

**86.** The existence and acts of a corporation in another State may be proved by parol. Com. v. Read, Thach. Crim. Cas. 180.

**87.** Words written on the tag of a valise, which serve to identify it, may be proved orally without the production of the tag or showing its loss. Com. v. Morrell, 99 Mass. 542.

6. Proof of testimony given on former trial.

**88. Waiver by defendant.** The accused may waive his constitutional right to be confronted by the witnesses against him; and testimony taken down on a former trial, based upon the same facts, may be read as evidence. State v. Polson, 29 Iowa, 133.

**89. Testimony before grand jury.** A grand juror may be compelled to testify as to what was given in evidence by a witness before the grand jury. State v. Broughton, 7 Ired. 96. And it is competent for the defense to prove, by a person who was present, that a witness for the prosecution testified differently before the grand jury. Little v. Com. 25 Gratt. 921. But it is not proper, in order to assist the recollection of a witness, to ask him to recur to his recollection of his testimony before the grand jury. Com. v. Phelps, 11 Gray, 73.

**90. Testimony of deceased witness.** The testimony of a deceased witness, given upon a former trial, may be proved upon a subsequent trial of the same case between the same parties by a person who was present and heard it. People v. Murphy, 45 Cal. 137; Greenwood v. State, 35 Texas, 587; Pope v. State, 22 Ark. 372; State v. Cook, 23 La. An. 347; Kean v. Com. 10 Bush, 190; Pound v. State, 43 Ga. 88.

**91.** Evidence of what a deceased witness testified on a preliminary examination before a magistrate relative to the same charge for which the accused is on trial, is admissible. State v. Hooker, 17 Vt. 658; Brown v. Com. 73 Penn. St. 321; Barnett v. People, 54 Ill. 325; and it is thus admissible notwithstanding the examination was not reduced to writing. Davis v. State, 17 Ala. 354.

**92.** Where the testimony of a witness since deceased is proved by a person who was present at the trial and heard it, he must state the substance of the testimony as the witness gave it, and not merely what he conceives to be the substance of it. He may refresh his memory from notes taken at the time, or from a newspaper printed by him containing the evidence as taken down by himself. U. S. v. Wood, 3 Wash. C. C. 440; Kendrick v. State, 10 Humph. 479.

**93. Testimony of living witness.** Where on the trial of an indictment for assault and battery the defendant pleaded a former conviction for the same offense, and offered in evidence the record of conviction, and to show that the offense was the same, produced a person to prove what a witness on the former trial swore to, it was held proper, although the latter witness was still living and within the State. State v. Smith, 11 Ired. 33.

7. Admissions and declarations.

**94. Of party injured.** The declarations of a party injured, when no one is present, are not in general evidence to show the manner in which the injury occurred, however nearly contemporaneous with the occurrence. It is therefore not competent to prove that a person robbed, when first discovered, stated that he had been robbed by the prisoner, nor upon the question of the *corpus delicti*, to show that he asked the persons who found him if they had seen the accused. State v. Davidson, 30 Vt. 377.

**95.** But statements made by a sick person to a physician as to the nature, symptoms and effects of his illness, are admissible as original evidence. Johnson v. State, 17 Ala. 618.

**96. Of accused in general.** What the prisoner said at any time after the commis-

sion of the offense is competent against him as admissions, and these admissions can be proved by himself or any other person who knew them. Fralich v. People, 65 Barb. 48. An admission of a fact made at the trial in open court may be properly considered by the jury. People v. Garcia, 25 Cal. 531.

97. Where it becomes necessary to prove a corrupt intent, the previous acts and declarations of the prisoner are admissible in evidence in connection with the *res gestæ*. Tuttle v. People, 36 N. Y. 431. And threats made by the defendant against the parties engaged in the prosecution are admissible in evidence to show the character of the defense. State v. Rorabacher, 19 Iowa, 154.

**98. Distinction as to time.** There is a distinction between a declaration or statement made before, and one made after the accused was conscious of being charged with or suspected of the crime. If before, it is admissible in all cases, whether made under oath or without oath, upon a judicial proceeding or otherwise. But if made afterward, the law becomes at once cautious and hesitating. The inquiry then is, was it voluntary? For unless entirely voluntary it is held not to be admissible. People agst. McMahon, 15 N. Y. 384, per Selden, J.; Phillips v. People, 57 Barb. 353; 42 N. Y. 200. See Teachout v. People, 41 N. Y. 7.

**99. Must be confined to subject of inquiry.** In giving evidence of oral statements and declarations, the proof is to be confined to what was said concerning the subject of inquiry; but the whole of what was said is to be received. Com. v. Keyes, 11 Gray, 323. Yet the jury are not bound to give equal credit to all parts of the statement. State v. Mahon, 32 Vt 241. See People v. Davis, 56 N. Y. 95; Real v. People, 55 Barb. 551; 42 N. Y. 270.

100. Declarations of a party as to his state of health, to be admissible in evidence, must be confined to his condition at the moment of speaking, and cannot be extended to past matters. Hunt v. People, 3 Parker, 569.

**101. Must be made understandingly.** The declaration of a child too young to testify, is not admissible in evidence. Smith v. State, 41 Texas, 352. And the same is true of words spoken by the accused, while asleep. People v. Robinson, 19 Cal. 40.

**102. By husband or wife.** Where a husband and wife are jointly indicted for murder, and the wife tried separately, his declarations cannot be given in evidence against her. Kingen v. State, 50 Ind. 557.

**103.** Declarations of the prisoner's wife made in his absence, are not admissible in evidence against him. People v. Simonds, 19 Cal. 275.

**104. Conversations.** A conversation can only be evidence against the accused when it took place not merely in his bodily presence, but in his hearing and understanding. A declaration made in the presence of one unconscious from sleep or stupor, is not admissible against him. Lanergan v. People, 39 N. Y. 39; s. c. 6 Parker, 209; Com. v. Harwood, 4 Gray, 41.

**105.** Where the prosecution proves a conversation with the defendant, it cannot also give in evidence a writing which was read by the defendant during the interview, but which formed no part of the conversation. Cook v. State, 4 Zabr. 843.

**106.** Conversations are to be received with great caution. But when the witness hears the whole conversation, although he may not remember all of it, his evidence for that reason, is not to be excluded. Kelsoe v. State, 47 Ala. 573. The prisoner is entitled to proof of the entire conversation. But it does not follow that it must be taken as true, although there may be no other evidence in the case incompatible with it. Corbett v. State, 31 Ala. 329.

**107.** The prisoner and the deceased having had a difficulty the evening before the homicide, the prisoner threatened that between the setting of the sun on that evening and its rising on the next day, he would kill the deceased. The next morning, the sun having just risen, the prisoner armed with a gun, was on the road that led to the house of the deceased, and immediately before he shot the deceased, had a conversation with a witness who was examined upon the trial. *Held* that

the door was open for the admission of the entire conversation, and that it was error to exclude it. McLean v. State, 16 Ala. 672.

**108.** On the trial of an indictment for adultery, a witness for the prosecution testified that the defendant was her step-father, that he and her mother had lived together as husband and wife for several years, and that he had had children by her who took his name. On cross-examination, she testified that she supposed or had understood that her mother had been divorced from the witness's father, but did not know whether or not he was still living, or whether any marriage had ever taken place between her mother and the defendant; that the first time she ever saw the defendant was when he and her mother first met in Montreal. *Held* that the defense had a right to ask the witness what was said on that occasion. Com. v. Belgard, 5 Gray, 95.

**109.** A conversation between the prisoner and his accomplice before the committing magistrate, in which the accomplice threatened to kill the prisoner, if he made any disclosures, and the prisoner replied that he would not do so, may be given in evidence against the prisoner; and a subsequent conversation between them while confined in the same room together, in which each accused the other of having been the cause of their detection, is also admissible. Scott v. State, 30 Ala. 503.

**110.** Where a conversation had with the opposite party has been proved, the party whose conversation has been proved cannot, on cross-examination, show by the witness a subsequent conversation between the party cross-examining and the witness, two or three hours after the first conversation, though such second conversation related to the same subject as the first, and was in explanation of it. People v. Green, 1 Parker, 11.

**111. Declarations of defendant in his own behalf.** As a general rule, the declarations of the prisoner in his own behalf, are not admissible in evidence. State v. Hildreth, 9 Ired. 440; U. S. v. Imsand, 1 Woods, 581. To be admissible, they must have occurred within the period covered by the criminating evidence, or tend in some way to explain some fact or circumstance introduced by the prosecution, or to impair or destroy the force of evidence against him. Chaney v. State, 31 Ala. 342; Birdsong v. State, 47 Ib. 68; s. c. 1 Green's Crim. Reps. 729.

**112.** On the trial of an indictment for burglary, witnesses in order to establish an *alibi* had testified to the fact that the defendant on the night in question was at a ball; had certified their recollection by the circumstances of talking and drinking with him; had fixed the time, from its being a ball succeeding the excursion of a target company, in the evening, and that the defendant was not present at the excursion, although expected. *Held* that the fact that the declarations of the defendant to these witnesses at the ball, to show their means of knowledge and recollection as to his being at the ball and the occasion, were ruled out, afforded no ground of exception. Com. v. Williams, 105 Mass. 62.

**113.** A woman was charged in separate complaints with larceny of napkins from the shop of A. and of other goods from the shop of B. The evidence showed that the defendant went with another woman into the two shops successively; that in the second shop the other woman requested the defendant to hold her shawl, which she claimed she took without knowing that it contained anything; and that while she was holding it, the napkins dropped out, and the defendant picked them up and carried them to the counter, and spoke to one of the clerks about them. *Held* that proof of the defendant's conversation with the clerk, and of her accompanying gesture to point out the other woman, were admissible to explain the defendant's possession. Com. v. Rowe, 105 Mass. 590.

**114.** Where a deputy sheriff indicted as an accessory before the fact to a burglary, was charged with being intentionally unfaithful in the discharge of his duty, and with having conducted himself in a manner calculated to screen the burglars from arrest, it was held that he might prove conversations between him and another officer as to the best means of securing their conviction, and also inquiries instituted and information

obtained by him while in pursuit of the burglars. Com. v. Robinson, 1 Gray, 555.

115. A letter written for the prisoner by the witness while they were in jail together is not admissible in evidence for the accused, either as original testimony of its contents, or for the purpose of impeaching the witwitness. Campbell v. State, 23 Ala. 44.

116. Where on the trial of an indictment for receiving and having stolen property, one of the defendant's witnesses swore that he saw samples of the property in the store of the defendants, the latter cannot show by the witness what was said by one of them then present, "as to what the property was doing there." Wills v. People, 3 Parker, 473.

117. Where the defendant gives in evidence a statement made to him, he cannot prove his reply, although the prosecution has cross-examined the witness as to such statement. Cook v. State, 4 Zabr. 843.

118. Where a witness for the people is asked on cross-examination if the defendant did not say a certain thing to him or in his hearing on a certain occasion, and the witness answers in the negative, the defendant cannot prove by another witness that he, the defendant, did make such remark at the time and place in question. Wills v. People, 3 Parker, 473.

119. The declarations of the prisoner cannot be proved for the purpose of drawing out the reply of the witness to whom they were made, unless they form a part of a conversation put in evidence by the prosecution. Campbell v. State, 23 Ala. 44.

120. Although where the declarations of the prisoner are proved, the jury ought to take the whole into consideration, yet they may reject those in his favor, and believe those against him. Green v. State, 13 Mo. 382; Blackburn v. State, 23 Ohio St. 146; s. c. 2 Green's Crim. Reps. 534. Therefore it is erroneous to instruct the jury that what was said by the prisoner in his own behalf must be taken as true, if what he said against himself in the same conversation is taken as true. People v. Graham, 21 Cal. 261.

121. In Michigan, although the statement of the prisoner under the statute is not evidence in the ordinary acceptation of that term, because not made under oath, yet the jury have a right to give it such credit, in whole or in part, as they think it deserves. Maher v. People, 10 Mich. 212.

122. **Declarations of codefendant.** The declarations of a codefendant not on trial, made in the absence of the defendant on trial, are not admissible in evidence against the latter, unless made during the pendency of the criminal enterprise, and in furtherance of its objects. People v. Moore, 45 Cal. 19; Com. v. Ingraham, 7 Gray, 46; Com. v. Eberle, 3 Serg. & Rawle, 9; State v. Pike, 51 New Hamp. 105.

123. The confessions or declarations of an accomplice, made when the parties were in the act of committing an offense, or on the way to commit, are admissible in evidence against all concerned. Hunter's Case, 7 Gratt. 641.

124. Any act or declaration of one of several conspirators, in reference to the common purpose, may be proved against the others. State v. Soper, 16 Maine, 293; Malone v. State, 8 Ga. 408.

125. A. and B., being jointly indicted for grand larceny, and A. tried separately, it was held that a letter written by B. to a person whom he called C., advising him to run away, was admissible in evidence, it having been proved that A. and B. committed the larceny. State v. Barton, 19 Mo. 227.

126. The declarations of codefendants, after the commission of the offense, are admissible in evidence against the defendant, not as proof of the facts admitted in such declarations, but as tending to show that previous confessions of the defendant were true. State v. Knight, 19 Iowa, 94.

127. On the trial of B., under a joint indictment against A. and B., it became material, in order to establish the guilt of B., to prove certain conduct of A. on the day of the alleged offense. A. having been made a witness, it was held that statements made by him before the alleged offense was committed, relating the circumstances of his conduct, and showing that it occurred on a

prior day, were admissible in evidence. State v. Cruise, 19 Iowa, 312.

**128.** When an accessory is tried before the principal, the acts and conduct of the latter, immediately following the commission of the offense, are admissible to prove the guilt of the principal. State v. Rand, 33 New Hamp. 216.

**129.** When the declarations of one of two defendants are of such a character that they cannot be stated without implicating both, they may, notwithstanding, be received. But the court must instruct the jury that they are evidence only against the party by whom they are made. Kelsoe v. State, 47 Ala. 573.

**130. Declaration of third person.** On the trial of an indictment for a riotous assault upon an officer while serving a legal precept on A., who was charged with being a fugitive from another State, it was held that the defendants could not introduce evidence that B., who claimed the custody of A., had declared that the officer knew B. had stated that A. had not committed larceny, and that the charge was made merely for the purpose of getting him into custody, so that he could the more easily be carried home. Com. v. Tracy, 5 Metc. 536.

**131. Tacit admission of defendant.** Admissions and confessions may be implied from the acquiescence of the defendant in the statements of others made in his presence, when the circumstances are such as afford him an opportunity to act or speak, and would naturally call for some action or reply from a person similarly situated; and it makes no difference that the statements which call for a reply are made by a party who is incompetent to testify. People v. McCrea, 32 Cal. 98; State v. Reed, 62 Maine, 129; s. c. 2 Green's Crim. Reps. 468.

**132.** Where a slave told his master, in the presence of the prisoner, that the latter wanted the slave to go off with him, for which the master was at the time threatening to arrest the prisoner, under circumstances which justified the suspicion of his guilt, and to which he made no reply, it was held admissible against him as an implied admission of the truth of the charge. Martin v. State, 39 Ala. 523.

**133.** A slave being called before a number of persons, among whom were his master and mistress, in order to have his shoes compared with certain tracks supposed to have been made by a person who had committed a crime; several of the company exclaimed, when it appeared that his shoes and the tracks corresponded, that they were the shoes that made the tracks. *Held* that this exclamation, with the fact that the slave made no reply to it, was not admissible against him as an implied admission. Bob v. State, 32 Ala. 560.

**134.** A declaration proved to have been made in the presence of the prisoner will be presumed to have been made in his hearing. And an act of a third person done in the presence of the prisoner, is equally admissible as a declaration made in his presence. Hochrieter v. People, 2 N. Y. Ct. of Appeals, Decis. 363; s. c. 1 Keyes, 66.

**135.** Where declarations are made in the presence of a person who is partially intoxicated, and not contradicted by him, it is for the jury to say whether he was too much intoxicated to understand the statement when made. State v. Perkins, 3 Hawks, 377.

**136.** Where on the trial of an indictment for being a common seller of spirituous liquors, a declaration made by a person in the defendant's employ, in the defendant's presence, was proved, and the jury were instructed that they were not to regard it unless they were satisfied the defendant heard it, it was held that as the jury might infer that if he did hear it, his silence was without reference to the accompanying circumstances to be deemed a tacit acquiescence on his part, the defendant was entitled to a new trial. Com. v. Harvey, 1 Gray, 487.

**137.** Conduct of the defendant relative to the charge against him, tending to show an admission of guilt, is competent evidence; as where one of his bail, having suggested to him that he might risk a liability on his bond for six months longer, and possibly compromise it if necessary, he replied, "Do as you see fit." Huggins v. State, 41 Ala. 393.

**138. Telegram.** Telegraphic messages in the handwriting of the defendant are competent as admissions by him; it being proved by the telegraph operator that such messages were received at the office and duly transmitted over the wires, directed to the parties to whom they were addressed by the defendant. Com. v. Jeffries, 7 Allen, 548.

**139. Admissible although improperly obtained.** A circumstance tending to show guilt may be proved, although it was brought to light by a declaration not admissible in itself, as having been obtained by improper influence. Where therefore, on a trial for murder, it appeared that the prisoner had stated that her hand was burned in extinguishing fire on the deceased, it was held proper to show that at the coroner's inquest she carried her hand wrapped up in a handkerchief, that she was made to unwrap and show her hand, and that upon examination, it showed no indication of a burn. State v. Garrett, 71 N. C. 85; s. c. 2 Green's Crim. Reps. 751.

**140.** It is not competent to prove declarations of the defendant by a written memorandum made by the witness at the time, which he states to be correct. They must be proved by the witness himself. People v. Elyea, 14 Cal. 144.

**141. Order of proof.** It is competent for the court to permit the district attorney to show that a certain letter written by the prisoner was a voluntary statement, before permitting the prisoner to attempt to prove the contrary; the letter not being read to jury until the prisoner has introduced his evidence respecting it. Gardiner v. People, 6 Parker, 155. The admissions and declarations of the prisoner may be proved without first showing that no promise or threat was held out to induce him to make them. Dixon v. State, 13 Fla. 636; s. c. 1 Green's Crim. Reps. 687.

**142. Evidence in rebuttal.** Where on a trial for causing death by effecting an abortion, a witness for the accused testified without objection on the part of the prosecution to a conversation she had with the deceased a day or two before her death, during which the deceased informed the witness that her illness was caused by a miscarriage, and that the miscarriage had been brought on by natural causes. *Held*, that although such evidence was improper, yet as it was not objected to, the prosecution might prove that the deceased was not in her right mind when she made such declarations. Hunt v. People, 3 Parker, 569.

**143.** On a trial for murder, the prosecution introduced a letter in evidence alleged to have been written by the prisoner to a fellow convict, but which was intercepted. The keeper of the prison was then called by the prosecution, and testified to a conversation with the prisoner, in which the latter said he had done all the communicating he wanted to. This witness also gave evidence from which it might be inferred that other communications than by writing between the prisoner and other convicts were possible. *Held*, that the court erred in sustaining an objection to an offer to show by the prisoner that he had held no communication in any way with any one in the shop where he worked and where the homicide was committed from the day of its occurrence. Donohue v. People, 56 N. Y. 208.

**144. Do not bind prosecution.** The prosecution by proving the declarations of the prisoner is not bound or concluded by them, but they are taken in connection with all the other evidence. Lowenberg v. People, 5 Parker, 414; 27 N. Y. 336.

*For dying declarations, see* HOMICIDE.

### 8. CONFESSIONS.

**145. Capacity to make.** Where a servant girl between the age of twelve and thirteen years, who was shrewd, sensible and artful, was accused of arson, it was held that if she had such mental capacity as rendered her amenable to the law, she had sufficient to make a confession of her guilt. State v. Bostick, 4 Harring. 563.

**146. Manner of.** Where a person arrested for having in his possession an altered bank bill with intent to pass the same, made confession of his guilt, partly in English and partly in German, to an officer who employed no promises or threats, it was held

that the confessions were admissible in evidence, although the prisoner when he made them was very much frightened, and the officer did not understand what was said in German. People v. Thoms, 3 Parker, 256.

**147.** On a trial for murder, a witness was permitted to testify to a confession of guilt made to him by the prisoner in a conversation which the witness carried on with him through the soil pipes of the jail, and that he knew the prisoner from his voice. *Held* proper. Brown v. Com. 76 Penn. St. 319.

**148. Subject of.** A confession or declaration to be admissible need not be minute or explicit in its reference to the subject-matter, or define the time, place or person with whom the transaction occurred; and it may apply to other occurrences beside the one under investigation. Where on the trial of an indictment for sodomy, the defendant was proved to have declared a week after the alleged crime that he "had done it with other boys," it was held competent for the jury to determine whether or not this declaration referred to the offense in question. Com. v. Snow, 111 Mass. 411.

**149.** A confession that the accused had assisted to get another man's son out of jail who would aid him in escaping, together with the fact that this man had gone to the jail where the accused was confined, is admissible in evidence against him. Campbell v. State, 23 Ala. 44.

**150.** Where an accomplice under a promise from the prosecution that he shall not be tried, makes a confession and then refuses to testify, his confession will be admissible in evidence against him. Com. v. Knapp, 10 Pick. 478.

**151.** On a trial for concealing a horse thief, the prosecution cannot prove the confessions of the alleged thief in the presence of the defendant, that a horse had been stolen. Morrison v. State, 5 Ohio, 438.

**152. General grounds of admission or exclusion.** Before the confessions of the prisoner can be admitted in evidence, the court must be satisfied, upon taking into consideration the prisoner's age, condition, situation and character, and the attendant circumstances, that they were made voluntarily. Miller v. State, 40 Ala. 54. Confessions are excluded only when made under circumstances that may tend to produce doubt as to their truth, arising from the operation of hope or fear in the mind of the prisoner. When made under the effect of threats, or the sanction of an oath without the proper caution being given that he need not answer, and that what he says may be used against him, and some other circumstances, the admissions are excluded. But where the admissions are purely voluntary they are to be submitted to the jury. O'Brien v. People, 48 Barb. 274; 36 N. Y. 276; State v. Grant, 22 Maine, 171; Peter v. State, 4 Smed. & Marsh. 31.

**153. By witness.** A sworn statement made by the prisoner upon his examination as a witness, before he was accused of the crime, is admissible in evidence against him. State v. Baignew, 5 Rich. 391. Therefore, where on the trial of a husband for the murder of his wife, it appeared that the prisoner had been a witness before the coroner's jury the evening after the death, and that he had not then been accused of the crime; it was held that his testimony was admissible in evidence against him. People v. Hendrickson, 1 Parker, 406; 10 N. Y. 13.

**154.** In New York, it has been held that although a person may be suspected of the crime, yet that his testimony in other respects freely and voluntarily given before the coroner, may be used against him on his trial, on a charge of such crime subsequently made. Teachout v. People, 41 N. Y. 7, Grover and Lott, JJ., *dissenting*. But where it appeared on a trial for murder, that the prisoner was a witness after his arrest, before the coroner's jury, but his arrest was not known to the coroner at that time, it was held not competent to prove what the accused testified before the coroner's jury. People v. McMahon, 15 N. Y. 384.

**155.** And in North Carolina, where a woman accused of murder, confessed her guilt in response to a question put to her by the foreman of the coroner's jury, without any previous advice as to her legal rights, and the probable consequences of her guilt,

it was held that the confession was not admissible in evidence against her. State v. Mathews, 66 N. C. 106. And in California, where a person accused of grand larceny confessed his guilt to the examining magistrate in answer to questions put to him after being sworn, it was held that the confession was not admissible in evidence against him. People v. Gibbons, 49 Cal. 557; s. c. 1 Green's Crim. Reps. 592. See also, U. S. v. Prescott, 2 Dillon, 405; s. c. 1 Green's Crim. Reps. 439.

**156. By person under arrest.** The circumstance that the party making a confession was at the time under arrest, though proper to be taken into consideration, is not of itself sufficient to exclude the evidence. Hartung v. People, 4 Parker, 319; People v. Rogers, 18 N. Y. 9; Com. v. Mosler, 4 Barr, 264; Stephen v. State, 11 Ga. 225; State v. Jefferson, 6 Ired. 305; People v. Rodundo, 44 Cal. 538; s. c. 2 Green's Crim. Reps. 411. But it seems that in Louisiana, when the arrest is made by private persons, a confession by the prisoner to them, is not admissible in evidence against him. State v. George, 15 La. An. 145.

**157. By intoxicated person.** It is not good ground of objection to confessions of guilt, that the defendant was intoxicated, that he was excited and scattering in his conversation, and that no one who heard him could repeat all he said. Eskridge v. State, 25 Ala. 50. But confessions made by a person so much under the influence of liquor as not to understand what he is confessing are to be disregarded; and the defendant may show that the facts did not take place as alleged. Com. v. Howe, 9 Gray, 110.

**158.** In Virginia, a member of the jailer's family holding no office, and having no connection with the prisoner further than to attend about the jail and in the absence of the jailer to have control of it and carry the keys, is not a person having authority within the meaning of the rule excluding a confession obtained through his influence. Shifflet v. Com. 14 Gratt. 652.

**159. Given by prisoner of his own accord.** A person arrested for murder, but not informed of the charge against him, said to a fellow prisoner, "If you will not tell on me, I will tell you something." The other said he would not tell, but if he did, it would make no difference as one criminal could not be a witness against another. The first speaker then said, "I want to know what to do." The other answered, "If I knew the circumstances, I could tell you what to do." *Held* that the confession which was thereupon made, was admissible in evidence. State v. Mitchell, Phil. N. C. 447.

**160. Obtained by artifice.** The confession will be admissible, even where it has been obtained by a deception practiced on the prisoner. Rutherford v. Com. 2 Metc. 387; State v. Jones, 54 Mo. 478; s. c. 2 Green's Crim. Reps. 602; State v. Staley, 14 Minn. 105. Where a person arrested for murder, was falsely told by the officer who had him in charge, that his alleged accomplice had informed against him and would testify to his guilt, it was held that a confession which he thereupon made to the officer, was admissible in evidence against him. Price v. State, 18 Ohio, N. S. 418.

**161. In answer to question.** The mere fact that a confession is made in answer to a question which assumes the prisoner's guilt, does not for that reason render the confession inadmissible. Miller v. State, 40 Ala. 54; People v. Wentz, 37 N. Y. 303; State v. Staley, *supra*.

**162.** The officer who committed the prisoner on a charge of murder, asked him whether if it were to be done over again, he would do it? To which he replied, "Yes Siree Bob." It was held that both question and answer, were admissible, as well as the fact that in making the reply, the prisoner's manner was short. Carrol v. State, 23 Ala. 28.

**163.** Where on the trial of an indictment for stealing a cow it was proved that an officer on the night of the arrest went to the defendant's house with a warrant against him for stealing another cow, and after searching the house said to him (alluding to the other cow), "Where did you get that cow? We've got you this time. We have traced it round until we are satisfied you've got the cow." Subsequently on the same

evening the officer had a conversation with the defendant about both cows. *Held* that his confession then made, was admissible in evidence. Com. v. Whittemore, 11 Gray, 201.

**164.** On the trial of a slave for murder, the confessions of the accused made to a free white citizen were held admissible in evidence, notwithstanding slaves were compelled to answer any question a white man might put to them. Jim v. State, 15 Ga. 535. Where a slave made a confession while being taken to jail in chains on a charge of murder, in reply to the question "what he had against the deceased to induce him to strike him," there being no promises or threats, it was held that the confession was admissible in evidence against him. Austin v. State, 14 Ark. 555.

**165.** In Massachusetts, where a negro boy thirteen or fourteen years of age was arrested by two police officers on suspicion of murder, stripped and searched, locked up in a station house, and at ten o'clock at night taken from his cell and questioned until midnight without being warned of his right to refuse to answer, or afforded an opportunity to consult with counsel or friends, it was held that in the absence of proof of threats or promises other than might be inferred from the above, the statements made by the boy were admissible in evidence. Com. v. Cuffee, 108 Mass. 285.

**166.** Knowledge ordinarily acquired in consequence of a search warrant is admissible in evidence at common law, notwithstanding one of the objects of the search was to obtain evidence, even if the search warrant was illegally issued. State v. Flynn, 36 New Hamp. 64.

**167. Obtained by promise of advantage.** A slave being in prison on a charge of assault with intent to kill, was induced to make a confession by an implied promise that his master would prevent his being hung. *Held* that the fact that he was kept in prison, and that his confession was used against him on his trial, did not render a subsequent reiteration of the confession admissible in evidence against him on the second trial. Bob v. State, 32 Ala. 560.

**168.** The prosecutor testified that the prisoner being taken to his residence by a policeman, told them that he had broken into the house by lifting the door from its hinges, and that he had taken property from the house. Another policeman testified that finding on the prisoner when he arrested him articles supposed to have been stolen, he promised him that he should be released if he would tell where he got the property, and that the prisoner agreeing to do so, was sent to the prosecutor's house for that purpose. The court excluded the prisoner's confessions, but admitted proof of his acts in connection therewith. *Held* proper. Mountain v. State, 40 Ala. 344.

**169.** Where the day before a confession was made to an officer, the officer told the prisoner that he could make him no promises, but if he made any disclosures that would be of any benefit to the government the officer would use his influence to have it go in his favor, the confession was held not admissible in evidence. Com. v. Taylor, 5 Cush. 505. And see Barnes v. State, 36 Texas, 356; s. c. 1 Green's Crim. Reps. 648.

**170.** Officers told a person who was accused of grand larceny that all they wanted was to recover the goods, and if he would tell them where they were, so that they could get them, it would end the matter and nothing further would be done. The defendant then told what he knew about the larceny, and where the stolen articles were. *Held* that his confession was not admissible in evidence against him. State v. Hagan, 54 Mo. 192.

**171.** The prosecutor said to a negro boy eighteen years of age, who was arrested on a charge of burglary: "You are very young to be in such a difficulty as this; there must have been some one with you who was older, and I, if in your place, would tell who it was; it is not right for you to suffer the whole penalty and let some one who is guiltier go free; it may go lighter with you." And the man with whom the prisoner previously lived said to him: "Tom, this is mighty bad; they have got the dead wood on you, and you will be convicted;" and at the same time said something to him

about "owning up;" also, that he could have nothing to do with one who had acted so badly, and if the prisoner had anything to say as to his assisting him in the difficulty, to do so. *Held* that the confessions thus obtained were inadmissible. Newman v. State, 49 Ala. 9.

**172. Promise of collateral benefit.** It is not necessary to render a confession admissible that it should be the prisoner's own spontaneous act. Where no hope or favor in respect to the criminal charge is held out, it will be competent though obtained by a promise of some collateral benefit. State v. Wentworth, 37 New Hamp. 196; Rutherford v. Com. 2 Metc. Ky. 387.

**173. Urged to make.** It is not a sufficient objection to a confession that the prisoner was urged to make a statement with no promise of favor or intimidation. Where after the arrest of a person on a charge of murder he was asked where he was the day before, and told to give an account of himself through the day, and to tell it quick, it was held that his statement was properly admitted. State v. Howard, 17 New Hamp. 171.

**174. Justifiable inducements.** Saying to a prisoner that it would be better for him to confess, or words to that effect; or that if he was guilty it could not put him in a worse condition, and he had better tell the truth, will not exclude his confession. State v. Nelson, 3 La. An. 497; Fouts v. State, 8 Ohio, N. S. 98; *contra*, Phillips v. People, 57 Barb. 353; State v. York, 37 New Hamp. 175. See Hawkins v. State, 7 Mo. 190.

**175.** The officer who had charge of the prisoner, a slave, said to him, "If you did it, you had better confess; it would be best for you to tell the truth; truth is always the best policy; but if you did not kill him, we don't want you to say so." *Held*, that the prisoner's confessions, subsequently made to the constable in the same conversation, were admissible in evidence. Aaron v. State, 37 Ala. 106. And the same was held where a friend of the defendant advised him to confess that he was guilty, and that it would be better for him, in view of the fact that the sheriff and his *posse* then held him in their power and further resistance must be useless. Young v. Com. 8 Bush, 366; s. c. 1 Green's Cr. Reps. 710.

**176.** On the trial of an indictment for stealing three twenty dollar gold pieces, the property of L., it was proved that an officer in company with L. met the defendant, and told him that he had a warrant for his arrest for stealing L.'s money; that the defendant denied it; that L. then said to him there was no use in denying it, that he had found where the defendant had passed two of the twenty dollar gold pieces, and could prove it; and that the officer then told the defendant that "he had better just own up to it." *Held*, that the confession was admissible in evidence. State v. Freeman, 12 Ind. 100.

**177.** On the trial of the treasurer of a railroad company for embezzling the funds of the company, one R., who was a surety upon his official bond, and stockholder in the company, testified that he told the defendant "he had better go to the directors and make a clean breast of it;" "that it would be for his interest to go and confess all." Witness "said nothing in terms of a prosecution;" that he told the defendant "to commit no violence on himself, nor run away; that the disgrace was in doing wrong, not in suffering punishment for it; he had better stay and meet the punishment." And that witness "advised the defendant as a friend and son." *Held*, that the confessions were admissible. Com. v. Tuckerman, 10 Gray, 173.

**178.** When the prisoner was first arrested on a charge of murder, one of the two constables who had him in custody, said to him, "Come, Jack, you might as well out with it." The magistrate interposed, and warned him not to confess. Some hours afterward the prisoner confessed to B., who had no authority over him, but with whom, and in whose buggy, he was riding to jail, the two constables being near, but not within hearing. *Held*, that the confession to B. was admissible. State v. Vaigneur, 5 Rich. 391.

**179.** A person being arrested by H. and S., who were officers, in the evening on suspicion of larceny, H. said to him out of the

hearing of S., that it would be better for him to own up and make a clean breast of it to S. The same evening S. asked the defendant if he knew anything about the stolen property, to which he replied that he did not; and the same question was put and the same answer received by S. the next morning. Later in the day, however, S. found the property, and told the defendant so. *Held*, that certain statements which were then made to S. by the defendant, respecting the stolen property, tending to show that the defendant stole it, were admissible in evidence. Com. v. Crocker, 108 Mass. 464.

**180.** The prisoners being in custody before the coroner's jury, were told by several of the jury that their statements were contradictory, and that if they were guilty of the homicide they had better tell the truth and confess. The following day they made a confession to a person who was not present at the inquest. *Held*, that the confessions were admissible in evidence. Lynes v. State, 36 Miss. 617.

**181.** A person in jail on a charge of larceny, was visited by the prosecutor, who told him that it was better in all cases for the guilty party to confess. The prisoner then said he supposed he should have to stay there, whether he confessed or not. The prosecutor replied that he supposed he would, that in his opinion it would make no difference as to legal proceedings, and that it was considered honorable in all cases, if a person was guilty, to confess. *Held*, that the confession was admissible. Com. v. Morey, 1 Gray, 461.

**182. Improper inducements.** The owner of a hog having lost it, went into his field, in company with two other white men, where the defendant, a colored man in his employ, was at work, and telling him that the hog had been stolen, said to him, "I believe you are guilty; if you are, you had better say so; if you are not, you had better say that." Thereupon the defendant confessed the larceny. *Held*, that the confession was not admissible in evidence against him. State v. Whitfield, 70 N. C. 356.

**183.** A person having been committed by a magistrate on a charge of larceny, was being taken to jail by a constable, when the latter said to him, "You had as well tell all about it." After riding about a mile further, the prisoner, without anything more being said to him on the subject, confessed. *Held*, that the confession was not admissible in evidence. Vaughan v. Com. 17 Gratt. 576.

**184.** On a trial for grand larceny in stealing a horse, the prisoner was convicted mainly on his confessions, which were made by him after being told in the presence of the officer who made the arrest, and while he was in custody, that "the best he could do was to own up," and that the "complainant would not be so hard upon him if he could get his horse back." It was held that the confessions were improperly received in evidence. People v. Phillips, 42 N. Y. 200.

**185.** A confession made to the officer who had the prisoner in custody, immediately after he had been told by the officer "that he did not wish to advise him one way or the other, for fear it might not suit him," but that "as a general thing it was better for a man who was guilty to plead guilty, for he got a lighter sentence," was held made under an improper inducement and inadmissible. Com. v. Curtis, 97 Mass. 574.

**186.** A person having been arrested for burning a factory, the officer who had him in charge told him that if he knew anything about the fire, either that B. had anything to do with it, or set him on, the best thing he could do was to own up before his trial, and that if he wanted to say anything to him (the officer), and would tell, he would help him if he could. A few days after he was imprisoned, the owner of the factory said to him that "he wanted him to tell the truth, just as it was; that it would be better for him; that they had got B., and probably they would both be tried that day, and that it would be better to tell the truth, just as it was, for if B. should get the start of him it might go hard with him; that he was a young man, and it would be better for him to tell it just as it was." *Held*, that the confession was not admissible in evidence. State v. Walker, 34 Vt. 296.

**187.** The prosecutor, who had been the

former master of the defendant, accused him of stealing,' which he denied. The prosecutor said he knew better—he knew all about it, and the defendant had better own up. The defendant asked whether if he confessed he would be let alone, and not be prosecuted. The prosecutor replied that he would make no promises; that he would not say whether he would let him go or not, but that he might as well own up, and that it would be better for him. The defendant then said he would tell all about it. No other persons were present. The prosecutor then reduced the confession to writing, no one else being present. The next morning the defendant denied its truth, and demanded the delivery of the paper, but an officer was called, and he was arrested. *Held*, that the confession was not competent evidence. State v. Brockman, 46 Mo. 566.

**188. Made through fear.** A person accused of robbery was taken from his home at midnight by a body of armed and disguised men, conveyed to a neighboring wood, and there hung by the neck to a tree; and when taken down, almost senseless, he confessed that he, with others, committed the robbery.' *Held*, that his confession was not admissible in evidence. Miller v. People, 39 Ill. 457.

**189. Obtained by threats.** Where a person accused of murder was taken before a magistrate, and there sworn to tell the truth, and told, "If you do not tell the truth I will commit you," it was held that a confession then made was inadmissible on the trial against the prisoner. Com. v. Harman, 4 Barr, 269.

**190.** Where a slave accused of crime, and threatened by persons armed with guns that if he did not confess he would be hung, confessed his guilt, and shortly afterward was taken before a magistrate in the presence of some of the same persons, and interrogated as to his guilt without being previously cautioned by the magistrate of the effect of his replies, and again confessed, it was held that the last confession of the accused was not admissible in evidence against him. Peter v. State, 4 Sm. & Marsh. 31.

**191. Threatening circumstances.** Where no promises are made, or threats used to obtain confessions, they should not be excluded because the circumstances surrounding the defendant were threatening. But such circumstances are proper to be considered by the jury in determining the credibility of the confessions, and what force and effect should be given to them. Rice v. State, 47 Ala. 38; s. c. 1 Green's Crim. Reps. 708.

**192.** Where a magistrate, on the examination of a person accused of robbing another of a watch the previous night, and on whom the watch was found, told him that unless he could account for the manner in which he came by the watch, he should be obliged to commit him to be tried for stealing it, it was held that his subsequent confession was admissible, especially as the magistrate repeatedly warned him not to commit himself by any confession. State v. Cowan, 7 Ired. 239.

**193.** Where the employer of a person charged with larceny told him that he would be dismissed unless he settled with the owner of the stolen property, but that if he settled he should be retained, and the employer would say nothing about it to hurt him, it was held that a confession afterward made in the same conversation was admissible. Com. v. Howe, 2 Allen, 153.

**194.** A., pursuing a person suspected of theft, overtook him in the road, drew his gun, and ordered him to stop, and B., who was also armed with a gun, coming up, remarked that A. ought to have shot the accused, when A. said he should not be harmed. The parties then proceeded upon their return, and had gone between two and three miles, when the prisoner confessed. *Held*, that his confession was admissible in evidence. Wilson v. State, 3 Heisk. 232; s. c. 1 Green's Crim. Reps. 582.

**195.** A slave being accused of murder was told by the witness that "he might as well tell all about it," for he was satisfied, and "if you belonged to me I would make you tell." The first remark was repeated several times, and the second made angrily, to each of which the accused replied, denying the charge, but afterward he made a full disclosure of his own accord. *Held*, that the

confession was admissible in evidence. State v. Patrick, 3 Jones, 443.

**196. Obtained while the prisoner is tied.** Confessions of guilt voluntarily made by the prisoner after he was arrested, and whilst his hands and feet were tied, may be given in evidence against him. Franklin v. State, 28 Ala. 9.

**197.** On a trial for murder it appeared that the crime was committed in the night; that the next morning the accused, being arrested about a mile from the place of the homicide, was told that some one had shot the deceased, to which he replied that "she was not shot, but knocked on the head;" that eight or ten freedmen then tied the hands of the accused and took him to where the body of the deceased was; that a large and excited crowd gathered around him and insisted that he should be hung, but no threats or promises were made to induce a confession; and that the accused then stated that he and the deceased had quarreled, and that she had struck him, and that he had returned the blow, not intending to kill her. *Held*, that the admission of the confession in evidence was proper. Cady v. State, 44 Miss. 332.

**198.** A person having been arrested on a charge of larceny was tied by the officer for the purpose of securing him. Promising to confess if he were untied, the officer released him, when he stated that he broke into the prosecutor's house, and committed the offense charged. *Held* that the confession was admissible in evidence. State v. Cruse, 74 N. C. 491.

**199.** Where a slave was arrested, tied and left by his master in charge of a third person, to whom he immediately afterward made a confession, it was held that evidence was admissible that the master had always been in the habit of tying his slaves when they were charged with an offense, and whipping them until they confessed, and that he had often treated the prisoner in the same way, on the question whether the confession was induced by improper influence. Spencer v. State, 17 Ala. 192.

**200. Admissible notwithstanding improper influence.** Where a promise of favor is held out to a person charged with crime, to induce him to confess, which he does not do, a confession made subsequently, after the promise has ceased to be operative, is admissible in evidence against him. People v. Jim Ti, 32 Cal. 60. And although a prisoner has previously made a confession under improper influence, yet a subsequent confession which is free from such influence will be admissible in evidence against him. Maples v. State, 3 Heisk. 408; Peter v. State, 4 Smed. & Marsh. 31; State v. Hash, 12 La. An. 895; State v. Gregory, 5 Jones, 315; State v. Scates, Ib. 420; State v. Fisher, 6 Ib. 478; Thompson v. Com. 20 Gratt. 724. See Venable v. Com. 24 Ib. 639.

**201.** Where a person after being arrested on a charge of murder, was induced by hopes of benefit, to make a confession, and five hours afterward made a second confession to the State's attorney, after being told that he must not expect any favor in consequence of making it, and was under no obligation to do so unless he wished, it was held that the second confession was admissible in evidence. State v. Carr, 37 Vt. 191.

**202.** The fact that a negro woman slave on trial for an attempt to poison, had been whipped by her master the morning before she made a confession to compel her to confess, held not to make her voluntary confession subsequently made inadmissible. Sarah v. State, 28 Ga. 576. But where a confession was made by a slave on the same day, a few hours after making a confession which was improperly obtained, in the presence of some of the persons to whom the first confession was made, it was held not admissible. Simon v. State, 37 Miss. 288.

**203.** In Georgia, it was held on the trial of a white person that the prosecution might prove the confession of a negro, even when extorted by punishment, not as independent testimony, but to show what was said and done by the accused, he being present and giving his consent that the negro should tell all he knew. Berry v. State, 10 Ga. 511.

**204. Proof of facts obtained through confession which is inadmissible.** Where a confession in itself inadmissible, leads to

the discovery of a fact, so much of such confession as relates to the fact may be received in evidence. State v. Vaigneur, 5 Rich. 391; White v. State, 3 Heisk. 338. Thus, it is competent to show that property which was the subject or instrument of the crime, was discovered through the confession of the prisoner, although such confession was improperly obtained. Jordan v. State, 32 Miss. 382; Belote v. State, 36 Ib. 96; McGlotherlin v. State, 2 Cold. Tenn. 223; Frederick v. State, 3 West Va. 695; People v. Ah Ki, 20 Cal. 177; Done v. People, 5 Parker, 364; Duffy v. People, Ib. 321; s. c. 26 N. Y. 588; Com. v. James, 99 Mass. 438.

205. Where a confession was improperly obtained from a female slave who was accused of the murder of a child, and she immediately thereafter conducted persons to a pond into which she walked and brought out the body of the deceased, it was held that the fact that she did so was admissible in evidence against her; but that although it showed that she was cognizant of the homicide, it did not prove that she committed it or was an accomplice in it. Elizabeth v. State, 27 Texas, 329.

206. On the trial of an indictment for murder by poisoning, it is competent to show that a phial containing the poison was found from information derived from the prisoner, although what the prisoner said concerning the phial was inadmissible, for the reason that it was elicited by improper influence. Jane v. Com. 2 Metc. Ky. 30.

207. **Confession of codefendant.** A confession is admissible against the person making it, although it also implicates others who are jointly tried with him. Fife v. Com. 29 Penn. St. 429. But where two persons are tried together for the same offense, unless a previous combination between them is proved, the confession of one is not admissible in evidence against the other. State v. Hogan, 3 La. An. 714; State v. Havelin, 6 Ib. 167.

208. On the trial of an accessory, the confessions of the principal are admissible for the purpose of establishing the guilt of the latter. Lynes v. State, 36 Miss. 617.

209. Where on the trial of an indictment for larceny, a confession of the defendant is proved, that shortly after the larceny he had part of the stolen property and gave it to his mother, she is a competent witness for him to prove that she never received the property from her son. Com. v. Howe, 2 Allen, 153.

210. **Admissibility of, how determined.** It is the province of the court to decide as to the admissibility of the confession, and of the jury to estimate the degree of credit due to it. Young v. Com. 8 Bush, 366; State v. Andrew, Phil. N. C. 205; State v. Davis, 63 N. C. 578; State v. Fidment, 35 Iowa, 541; s. c. 2 Green's Crim. Reps. 632.

211. **Burden of proof.** Where confessions have been obtained by improper influences, the law presumes that subsequent confessions were made and influenced by the same hopes and fears as the first, and this presumption continues until it is affirmatively established by the prosecution that the influences under which the original confession was made, had ceased to operate before the making of the subsequent confession. People v. Johnson, 41 Cal. 452; Nicholson v. State, 38 Md. 140; Deathridge v. State, 1 Sneed, 75; Love v. State, 22 Ark. 336.

212. **How proved.** The prisoner is entitled to proof of the whole confession, as well that which makes for, as that which makes against him. Chambers v. State, 26 Ala. 59. In Alabama, it was held that a slave's confession to his master, though voluntary, could not be given in evidence against him, upon its being shown that the master interrupted him, and would not let him finish his statement. Williams v. State, 29 Ala. 532. But the defendant cannot have the confession stricken out on the ground that the witness stated that he did not remain to hear the entire conversation. Bob v. State, 32 Ala. 560.

213. The jury may believe part of the prisoner's confession, and disbelieve part. People v. Ruloff, 3 Parker, 401; Brown's Case, 9 Leigh, 633; State v. Wedemeyer, 11 La. An. 49. But if the part of the confession which goes in discharge of the defendant is not disproved, the jury cannot be

allowed arbitrarily to reject it, and to go upon the part only which criminates him. Crawford v. State, 4 Cold. Tenn. 190. The deductions of the witness from the conversation are not admissible. Peterson v. State, 47 Ga. 524.

**214.** A witness introduced by the prosecution to prove the defendants' confessions, and who states, on re-examination, that he has testified to the substance of all that each of said defendants stated on that occasion, but that they might have stated something which he does not recollect, is competent to testify to the confessions. Brister v. State, 26 Ala. 107.

**215.** It will be presumed that a confession made before a magistrate was reduced to writing; but it must be proved that the defendant signed it, or admitted it to be correct, in order to exclude parol proof of the confession. State v. Eaton, 3 Harring. 554. In Maine, the confession of the prisoner, on his examination before the committing magistrate, may be proved either by the record, or by oral evidence. State v. Bowe, 61 Maine, 171.

**216.** The confession referred to in the second section of the statute of New York, on which a magistrate is empowered to convict a disorderly person, means a plea of guilty, or some equivalent acknowledgment, not an admission argumentatively deduced by the magistrate. Bennac v. People, 4 Barb. 164.

**217. Must be corroborated.** The confessions of a party not made in open court, or on an examination before a magistrate, uncorroborated, and without proof *aliunde* that a crime has been committed, will not justify a conviction. People v. Hennessey, 15 Wend. 147; Robinson v. State, 12 Mo. 592; State v. Scott, 39 Ib. 424; People v. Thrall, 50 Cal. 415; People v. Jones, 31 Ib. 565; Pitts v. State, 43 Miss. 472; Rice v. State, 47 Ala. 38; State v. Laliyer, 4 Minn. 368; Terr. of Mont. v. McClin, 1 Mont. 394; s. c. 1 Green's Crim. Reps. 705; *contra*, People v. McFall, 1 Wheeler's Crim. Cas. 107; Stephen v. State, 11 Ga. 225; State v. Cowan, 7 Ired. 239; Anderson v. State, 26 Ind. 89. This rule is not applicable to the lower grades of crimes and misdemeanors. State v. Gilbert, 36 Vt. 145; and a prisoner may be convicted on his uncorroborated confession, provided the *corpus delicti* be proved. State v. Guild, 5 Halst. 163.

**218.** Under a statute providing that "a confession alone, uncorroborated by other evidence, will not justify a conviction," it is sufficient if the confession be corroborated by a single circumstance. Holsenbake v. State, 45 Ga. 43.

**219. Weight of.** An instruction which states that confessions are the highest and most satisfactory proof, and draws no distinction between confessions deliberately made and such as occur in a casual conversation, is erroneous. Brown v. State, 32 Miss. 433.

**220.** The following instruction, in relation to the confession of the prisoner, was held erroneous: "If what is said in his own favor is not contradicted by evidence offered by the prosecution, nor improbable in itself, it will naturally be believed by the jury; but you are not bound to give weight to it, on that account." Conover v. State, 34 Texas, 659.

**221. Waiver of objection.** It is the right of the prisoner to object to confessions, unless the circumstances under which they were made be also proved. But if he does not object, and the confessions go to the jury without any special inquiry as to the circumstances, he is not entitled to a new trial. Eberhart v. State, 47 Ga. 598.

**222. Reversal of decision.** The decision of the judge at the trial, that the confession of a person accused of crime is admissible in evidence, will not be reversed, excepting in a case of clear and manifest error. It is not a sufficient ground for the reversal of such a decision, that S. told the respondent he wished him to disclose the really guilty person, that he might be punished, with a suggestion that if the respondent should ever testify in the case, they would have to get him pardoned for the offense for which he was then confined; but that he could not promise him he should receive any benefit from his confession. State v. Squires, 48 New Hamp. 364.

9. Privileged communications.

223. **Attorney and client.** On principles of public policy, communications from a client to his attorney touching the subject-matter under investigation are privileged, and will not be allowed to be disclosed by the attorney. Where it appeared that the witness was unable to state whether the admissions to which he had testified were made to him as counsel of the defendant, or whilst the accused was under examination as a witness in his own behalf, it was held the duty of the court to exclude the testimony of its own motion. People v. Atkinson, 40 Cal. 284. But a communication between attorney and client to be privileged, must relate to some legal right or obligation. Alderman v. People, 4 Mich. 414. See State v. Hazelton, 15 La. An. 72.

224. A., B. and C., being jointly indicted for a conspiracy to defraud D., and separately indicted for forging the note of D., held a joint conference in relation to their defense, the counsel of A. and B. being present. On the trial of C., B. testified in behalf of the prosecution as to a question he put to C. and the latter's answer. C. then called the counsel of B. as a witness, and asked him to state what answer C. made to the question. *Held* that what the counsel heard at the interview between the parties was privileged, and that the privilege extended to all three of them. Cahoon v. Com. 21 Gratt. 822.

225. A written admission made by the accused, solely with a view to compromise the matter with the injured party, is not admissible in evidence against him. Austine v. People, 51 Ill. 236.

226. A communication to an attorney is not privileged when the party in making it sought professional advice to enable him to commit a felony. People v. Blakeley, 4 Parker, 176.

227. The rule that communications between client and attorney are confidential, does not apply to an accomplice who turns State's evidence under the assurance that his disclosures will not be used against him. State v. Condry, 5 Jones, 418; Alderman v. People, 4 Mich. 414.

228. **Physician.** At common law, the information derived by physicians, in their professional relations with patients, was not privileged from disclosure. The statute of New York on the subject is not confined to communications made by the patient, but extends to all facts which necessarily come to the knowledge of the physician in a given professional case. As the statute is of a remedial nature, it should be construed liberally. Where a physician has attended upon a person under circumstances calculated to induce the opinion that his visit was of a professional nature, and the visit has been so regarded and acted upon by the person, the relation of physician and patient contemplated by the statute exists. People v. Stout, 3 Parker, 670.

229. **Clergyman.** Admissions made to a clergyman are competent evidence, if not made to him in his professional character in the course of discipline enjoined by his church. People v. Gates, 13 Wend. 311.

230. **Husband and wife.** An admission by the prisoner of her guilt, made by her to her husband, and overheard by a person in an adjoining room, is not a confidential communication entitling the prisoner to have it excluded. State v. Center, 35 Vt. 378.

231. **Telegraph operator.** A telegraph operator is bound to testify to the contents of a telegram. State v. Litchfield, 58 Maine, 267.

10. Character.

232. **Proof of, how regarded.** Evidence of good character is not only of value in doubtful cases, but is entitled to be considered when the testimony tends very strongly to establish the guilt of the accused. It will sometimes itself create a doubt, when without it none would exist. Fields v. State, 47 Ala. 603; s. c. 1 Green's Crim. Reps. 635; Lowenberg v. People, 5 Parker, 414; People v. Cole, 4 Ib. 35; Hall v. State, 40 Ala. 698; Jupitz v. People, 34 Ill. 516; People v. Ashe, 44 Cal. 288; People v. Fenwick, 45 Ib. 287; People v. Kaina, Ib. 292; People v. Lamb, 2 Keyes, 360; affi'g 54 Barb. 342; Stover v. People, 56 N. Y. 315; State v. Henry, 5 Jones, 65; Felix v. State, 18 Ala.

720; State v. McMurphy, 52 Mo. 251; s. c. 1 Green's Crim. Reps. 640. But it is in a case of doubt, or to rebut the legal presumption of guilt, arising from the possession of stolen goods, that a good character has the most weight. State v. Ford, 3 Strobh. 517.

233. The following instructions were held erroneous: That good character was a fact to be considered by the jury like every other fact in the case, no matter what the other testimony might be; but that when the evidence was positive, leading to a conviction logically and fairly derived, of guilt, the simple fact that a person possessed previous good character, would be of no avail; that it was only in cases of well reasoned doubt arising out of all the testimony that evidence of good character was available, and then it would be the duty of the jury to find for the prisoner. People v. Ashe, *supra*.

234. The weight that ought to be given to proof of good character does not depend upon the grade of crime but upon the force of the evidence tending to prove the charge, and the motive for the crime. It is therefore erroneous to charge that in higher crimes of great atrocity, good character would not be of the same avail as in minor offenses. Com. v. Webster, 5 Cush. 295; Harrington v. State, 19 Ohio, N. S. 264; or to charge that such evidence can only be used in a doubtful case. Stewart v. State, 22 Ib. 477; s. c. 1 Green's Crim. Reps. 527.

235. **Time.** Evidence of general good character must have reference to a time before and not after the commission of the offense, and when the defendant has introduced evidence of his general good character, the State, even on cross-examination, cannot inquire into his character subsequent to the time the offense was committed. Brown v. State, 46 Ala. 175; *contra*, Com. v. Sackett, 22 Pick. 394.

236. It is not competent for the defendant, on a trial for murder, to prove that other prisoners broke out of the jail in which he was confined after he was indicted, and that certain fellow prisoners tried to induce him to go out, which he declined to do. Gardiner v. People, 6 Parker, 155.

237. **Proof, how restricted.** Evidence of character is restricted to the trial of character which is in issue, and ought to bear some analogy and reference to the nature of the charge. Young v. Com. 6 Bush, 312; McDaniel v. State, 8 Sm. & Marsh. 401; Com. v. Worcester, 3 Pick. 462. The prosecution cannot in general enter into an examination of the particular acts of the accused, even when the latter has called witnesses in support of his general character. Smith v. State, 47 Ala. 540; McCarty v. People, 51 Ill. 231; Gordon v. State, 3 Iowa, 410. Therefore, on the trial of a female for the murder of a man, it was held error to permit the prosecution to prove that the character of the prisoner for chastity was bad. People v. Fair, 43 Cal. 137; s. c. 1 Green's Crim. Reps. 217. But where a witness for the defendant stated that "his character was divided," and the attorney for the State then asked the witness what particular acts of the defendant's life he had heard spoken of, and the witness related various acts of petit larceny he had heard of, it was held that the court did not err in refusing to reject the testimony. State v. Arnold, 12 Iowa, 479. And see Com. v. Robinson, Thach. Crim. Cas. 230.

238. **Effect of failing to prove.** The failure of the defendant to introduce evidence of good character cannot be considered by the jury as a circumstance against him. Ormsby v. People, 53 N. Y. 472; State v. Upham, 38 Maine, 261; State v. O'Neal, 7 Ired. 251; People v. Bodine, 1 Denio, 282. But where on a trial for larceny the prosecution was allowed, contrary to the prisoner's objection, to argue to the jury that the defendant might have shown former good character if it had existed, and that the prosecution was not permitted to introduce evidence as to character unless the prisoner first introduced it, and the court charged the jury to the same effect, it was held not a ground of exception. State v. Tozier, 49 Maine, 404.

239. No credit is to be given to the testimony of a witness who has been convicted of felony and afterward pardoned, unless corroborated. U. S. v. Jones, 2 Wheeler's Crim. Cas. 451.

11. Presumptive evidence.

**240. Capacity for crime.** Capacity for crime in persons above the age of seven years is a question of fact. The law assumes *prima facie* that persons above fourteen years of age are capable of crime, but subjects that assumption to the effect of proof. State v. Learned, 41 Vt. 585.

**241. General presumption as to guilt.** After indictment found, the accused is presumed to be guilty for most purposes, except that of a fair and impartial trial before a petit jury. People v. Dixon, 4 Parker, 654; State v. Mills, 2 Dev. 421.

**242. Concealment.** The fact that the accused partially concealed himself when an attempt was made to identify him, is proper for the consideration of the jury as raising a presumption of guilt. Flanagin v. State, 25 Ark. 92. Concealment may be evidence of malice, and of a premeditated design to commit the deed. Lanergan v. People, 6 Parker, 209; 39 N. Y. 39.

**243. Giving false account.** False statements, or the falsification of the record by the defendant in relation to the crime with which he stands charged, afford a presumption of his guilt; but it is competent for him to prove that he had good reason to believe at the time that the statements were true. U. S. v. Randall, Deady, 524.

**244.** Where on a trial for arson it was proved that the defendant had in his possession bank notes similar to those stolen from the house where the arson was committed, and that he gave contradictory accounts of the manner in which he came by them, it was held not error to charge the jury that these contradictions were evidence to show that he did not come honestly by them. State v. Gillis, 4 Dev. 606.

**245.** After the prosecution has proved that the defendant gave a false account to the officer who arrested him as to where he was and what he did on the night of the occurrence, it is not competent for the defendant to show that he had previously given to others a true account. Com. v. Goodwin, 14 Gray, 55.

**246. Trying to escape.** The fact that the defendant, after being informed of the cause of his arrest, escaped, or attempted to escape, is a circumstance which the jury may consider in determining his guilt or innocence. People v. Strong, 46 Cal. 302; Fanning v. State, 14 Mo. 386; State v. Williams, 54 Ib. 170; Murrell v. State, 46 Ala. 89. But the presumption arising from this circumstance is ordinarily inconclusive. State v. Arthur, 23 Iowa, 430.

**247.** It may be proved that the accused advised an accomplice to break jail and make his escape. People v. Rathbun, 21 Wend. 509. So likewise, it is competent to show that the accused refused to escape after being informed of the charge against him, although he was advised to do so and it was in his power to do it. Ib.

**248.** The offer of the prisoner to bribe the person who has him in custody to allow him to escape, and his attempts to escape, may be proved, though the offer and the attempts were made when he was in custody on a different charge from that for which he was tried, the charges for both offenses depending on the same state of facts. Dean v. Com. 4 Gratt. 541.

**249. Destruction of evidence.** The suppression, destruction, or concealment of evidence by the accused, is a circumstance from which the jury will be justified in drawing unfavorable inferences against him. Miller v. People, 39 Ill. 457.

**250.** Promises and threats made by a third person after indictment, to a witness for the prosecution to induce him to leave the State, are not admissible against the defendant, unless his connection with such third person is otherwise shown. But proof that the witness at the time appointed for his departure with such third person, passed by defendant's house and saw defendant standing in his door—that defendant waved his hand to him to pass along, which he did for a short distance—that he saw the defendant give such third person $25 for the witness, and that such third person then carried the witness away with the defendant's horse and buggy, is competent to be weighed by the jury. Martin v. State, 28 Ala. 71.

**251. Falsehood or silence of defendant.** Falsehood, evasion, or silence, on the part

of one suspected of crime, is evidence for the consideration of the jury, on the question of guilt. State v. Reed, 62 Maine, 129; s. c. 2 Green's Crim. Reps. 468. But declarations made in the presence and hearing of the defendant are not admissible in evidence against him, unless it is shown that he was immediately concerned, so that his silence may be fairly construed into an admission. State v. Hamilton, 55 Mo. 520.

**252.** Statements made by a person in the presence of another, implicating the latter, to which he makes no reply, are admissible in evidence against him on his trial for the crime. Com. v. Galavan, 9 Allen, 271. But one who is in confinement on a charge of crime, is not bound to deny or reply to statements made between a police officer and another person in the prisoner's presence; and the silence of the latter will warrant no inference against him. Com. v. Walker, 13 Allen, 570. See Com. v. Kenney, 12 Metc. 235.

**253.** Where a prisoner is charged with an offense, or declarations are made in his presence and hearing touching or affecting his guilt or innocence of an alleged crime, and he remains silent when it would be proper for him to speak, it is for the jury to interpret such silence. McGuire v. People, 5 N. Y. Supm. N. S. 682. On a trial of two jointly indicted for grand larceny, it was proved that the complainant went to the place where the prisoners were confined and charged them with the offense, telling the officers what each had done and describing the money stolen, to which the prisoners said nothing. Upon searching one of the prisoners, two parcels of money were found on him, one of which answered the description given by the complainant. The other parcel the prisoner asked to have kept separate, saying it "was bar money." *Held*, that the evidence was properly admitted as an implied admission by the accused of the offense charged. Kelley v. People, 55 N. Y. 565.

**254.** Silence showing unusual seriousness on the part of one charged as a participant, at or about the time of the crime, is a circumstance from which guilty knowledge may be inferred. But in itself, it is entitled to little weight. Johnson v. State, 17 Ala. 618.

**255. Failure to produce evidence in explanation.** Where circumstantial evidence strongly tends to support the charge, and it is apparent that the accused is so situated that he could explain it if innocent, and he fails to do so, it will be presumed that the proof if produced by him, instead of rebutting, would tend to sustain the charge. Com. v. Webster, 5 Cush. 295. But the defendant is not required, in order to avoid a presumption against him arising from circumstantial evidence, to produce as witnesses persons who may possibly know something of the matter, but only to produce those who are proved to have been so situated that they must have knowledge which, if divulged, would throw light on the subject. People v. McWhorter, 4 Barb. 438.

**256.** On the trial of an indictment for selling spirituous liquors without a license, the jury are justified in presuming that the defendant had no license, from his omission to produce it. State v. Simons, 17 New Hamp. 83.

**257.** When a person accused of crime is required to show where he was on a certain day, or to show how he became possessed of a given sum of money, or article of personal property, his omission to produce such evidence is not conclusive against him, though it creates a strong presumption of his guilt. It is a question for the jury. It is therefore error in the court to instruct them that it is conclusive. Gordon v. People, 33 N. Y. 501.

**258.** It is not improper for the judge in charging the jury on a trial for murder to remark that the prisoner, if he was present at the homicide, had not been sworn, and that a single witness had related the incidents of the killing; or that the prisoner was not entitled to the benefit of the most innocent and merciful construction of his motives. Ruloff v. People, 5 Lans. 261.

**259.** On a trial for arson, the only direct evidence of the prisoner's guilt was given by his accomplice, G., who testified that on the night of the arson he and his confederates were at the house of W., that they went

to bed there at an early hour, that they afterward got up, committed the crime, and then returned to bed in the same house. The accused produced no evidence to show that he was not at the house of W. on that night. The judge instructed the jury that they might take this omission into consideration as a circumstance which corroborated the evidence of G. *Held* not error. People v. Doyle, 21 N. Y. 578.

260. Where the son of the defendant was in his employ, and could probably have explained some of the facts bearing against him, if susceptible of explanation, it was held that the omission of the defendant to make his son a witness was a proper subject of comment by counsel, and to be considered by the jury. Com. v. Clark, 14 Gray, 367.

261. **Neglect to make special defense.** Where the court refused to charge that "the fact that defendant has offered no evidence is in no way to be taken as an admission of guilt," but charged them that "all circumstances against the prisoner within his power to explain, which he refuses to do, are to be taken and weighed by the jury as circumstances against the prisoner," it was held error. State v. Carr, 25 La. An. 407.

262. Where the court charged that the fact that the prisoner had neglected or failed to introduce evidence as to his previous good character was an element in the case which the jury had the right to take into consideration in determining his guilt or innocence, it was held error for which he was entitled to a new trial. Donoghoe v. People, 6 Parker, 120.

263. Where the judge told the jury that "nothing was to be presumed against the defendant herself for not testifying in her own behalf; but that the failure of a defendant to produce evidence which it was in his power to produce, to meet the evidence adduced by the prosecution, was a competent and proper matter for them to weigh in considering the question of his guilt," it was held error. Com. v. Harlow, 110 Mass. 411.

264. The counsel for the prosecution commented to the jury adversely to the defendant upon the fact that the defendant did not interpose the defense of an *alibi* before the examining magistrate, to which the defendant's counsel objected. The court in overruling the objection remarked that "it was the duty of a defendant, when he had a good defense in the nature of an *alibi*, to interpose the defense at the earliest moment possible, and that a defendant should offer his defense of an *alibi* before the examining magistrate, with the view to saving himself anxiety and trouble, and the people the great expense of a trial." *Held* that as the foregoing was said by the court in the presence of the jury, it was to be regarded as addressed to them, and that it was error. Sullivan v. People, 31 Mich. 1.

265. **Defendant not testifying in his own behalf.** No inference of guilt can be drawn against the prisoner from his declining to avail himself of the privilege conferred upon him to testify in his own behalf. People v. Tyler, 36 Cal. 522; People v. Anderson, 39 Ib. 703; *contra*, State v. Bartlett, 55 Maine, 200; State v. Laurence, 57 Ib. 574; State v. Cleaves, 59 Ib. 298. In Vermont, where the court, when requested, did not prevent the prosecuting counsel from arguing to the jury that the omission of the prisoner to testify was evidence against him, it was held that it was such error and irregularity as to require a new trial. State v. Cameron, 40 Vt. 555. In Michigan, it was held error in the court to permit counsel to argue to the jury that the omission by a husband to call his wife as a witness, the statute making her competent to testify, was a circumstance tending to prove his guilt. Knowles v. People, 15 Mich. 408.

266. Where the prisoner, when testifying as a witness in his own favor, fails to give any explanation of a material fact or circumstance, the same presumption arises from his failure that would arise from a failure to give the explanation by another witness if in his power so to give it. Stover v. People, 56 N. Y. 315.

267. **Conduct of defendant.** The conduct, demeanor, and expressions of the accused, at or about the time of the offense with which he is charged, are for the con-

sideration of the jury. Blount v. State, 49 Ala. 381; Tyner v. State, 5 Humph. 383.

268. When the marriage of the parties has been shown, evidence is admissible of the wife's acts in the usual course of domestic affairs at the place where they cohabit, to show that the tenement so occupied is kept by the husband. Com. v. Hurley, 14 Gray, 411.

269. **Condition of clothes.** Whenever evidence of the condition of clothes or other personal property is competent, their condition may be described by witnesses without producing the articles. The correspondence between boots and foot-prints is a matter to which any person who has seen both may testify. Com. v. Pope, 103 Mass. 440.

270. On the trial of an indictment for procuring another to burn a meeting house by means of kerosene oil, which was furnished by the prisoner, it was held competent to prove that there were stains of kerosene oil on the shirt of the accomplice when he set the fire. State v. Kingsbury, 58 Maine, 238.

271. **Motive.** Where it is proved that a crime has been committed, and the circumstances point to the accused, facts tending to show a motive, though remote, are admissible. Baalam v. State, 17 Ala. 451.

272. Proof of a previous personal difficulty between the accused and the complainant is proper for the consideration of the jury on the question of motive. Breen v. People, 4 Parker, 380.

273. On a trial for an attempt to murder by poison, evidence was given that a criminal intimacy had for some time prior to the attempt existed between the prisoner and the wife of the subject of the alleged attempt, and that she was sought to be used by the prisoner as an instrument in the attempt. *Held* competent as bearing upon the means and opportunity to commit the offense and upon the question of motive. Templeton v. People, 27 Mich. 501.

274. On a trial for murder it is not competent to prove in order to show that the act was committed under the influence of an "insane frenzy," that the prisoner was informed of the infidelity of his wife some time previous to the alleged murder. Sanchez v. People, 4 Parker, 535; 22 N. Y. 147.

275. **Guilty knowledge and intent.** Where the character of an act depends upon the intention with which it was done, the ignorance of the person doing it may be considered on the question of his guilt. State v. Sparks, 27 Texas, 705.

276. An unanswered letter found in the pocket of the accused when he was arrested is not admissible in evidence against him. People v. Green, 1 Parker, 11.

277. The conversion of property is a circumstance which, in connection with other facts, the jury may consider to determine the intent with which the possession was obtained. Long v. State, 1 Swan, 287.

278. Evidence that some of the property which the defendant was accused of having obtained by means of threats, from A., was afterward found concealed in the house of the defendant, was held to be admissible as tending to show guilty knowledge and intent. State v. Bruce, 30 Maine, 72.

279. Proof that a grocer sold liquor, and that it was drunk on the premises, is presumptive evidence that it was with his consent. Casey v. State, 6 Miss. 646.

280. On a trial for stealing a slave, it was held that the prosecution might give in evidence a memorandum of the names of the owners of slaves, with whom the defendant was proved to have been in communication, written in pencil and found in the pocket book of the defendant, and taken from him, although it was not shown to be in his handwriting. Whaley v. State, 11 Ga. 123.

281. Where a shot discharged at one injuries another, who is at the time known to be in such a position that his injury may be reasonably apprehended as a probable consequence of the act, the law holds the intent to have embraced the victim; and the principle is the same where one is purposely shot, under the mistaken belief that he is a different person. Callahan v. State, 21 Ohio, N. S. 306.

282. **Malice.** Malice in law, is the doing of an act wrongful in itself without just

cause or excuse. It is presumed from an assault with an instrument likely to produce death, in the absence of proof to the contrary. State v. Decklotts, 19 Iowa, 447.

283. Malice aforethought may be implied from circumstances. Intent to maim or disfigure, may likewise be presumed from circumstances; and it is not necessary to prove antecedent grudges, threatenings, or an express design. State v. Irwin, 1 Hayw. 130.

284. **Marriage.** Evidence that parties cohabited together as husband and wife, is competent to prove their marriage, excepting in indictments for bigamy and the like, where the marriage is the foundation of the crime to be punished. People v. Anderson, 26 Cal. 129.

285. *Prima facie*, the fact of a marriage celebrated according to the forms of a religious denomination, embraces the assent of the married parties to take each other as husband and wife; and it is incumbent on the party disputing the marriage to negative such assent. Fleming v. People, 27 N. Y. 329.

286. **Coercion of wife.** A wife will be presumed to have acted under the coercion of her husband in committing an offense, when he was at the time near enough for her to be under his immediate influence and control, though not in the same room. Com. v. Munsey, 112 Mass. 287. But if she formed the intent to commit the crime, and actually commenced it in his absence and without his knowledge, the fact that he afterward arrived and aided in completing it, would not create the presumption that she acted under his compulsion. The question of compulsion is to be determined by the jury. Quinlan v. People, 6 Parker, 9.

287. **Independent facts.** When independent facts and circumstances are relied upon to identify the accused, and taken together, are regarded as a sufficient basis for a presumption of his guilt beyond a reasonable doubt, each essential independent fact in the chain or series of facts relied upon to establish the main fact, must also be established beyond a reasonable doubt. People v. Phipps, 39 Cal. 326.

288. **General presumptions.** Where the defendant's neighbors testified, that for a considerable period a large number of persons had been in the habit of going to his house, many more than went to the houses of other persons in the same neighborhood, and many more than the business in which he was ostensibly engaged required, that many of those persons came from other towns, and many called there at unusual hours and under suspicious circumstances, it was held that there was presumptive evidence that the defendant's house was a place of public resort. State v. Pratt, 34 Vt. 323.

289. On a trial for depositing scurrilous postal cards in the mail, the cards given in evidence, showed mistakes in spelling. *Held* proper to prove other writings of the defendant which contained similar errors, in order to connect him with the cards; and that an expert might point out to the jury, peculiarities in such writings corresponding with those in the cards. U. S. v. Chamberlain, 12 Blatch. 390.

290. Where the prisoner voluntarily wrote, swore to, and delivered to the district attorney a letter, with the intention of clearing himself by charging the murder it was alleged he had perpetrated upon one M., it was held that the letter was admissible in evidence against the prisoner on his trial, whether he composed it, or only adopted it after it was composed and written by a fellow prisoner. Gardiner v. People, 6 Parker, 155.

291. On the trial of an information for uttering a forged power of attorney, two letters were given in evidence, proved to be in the handwriting of the defendant; one addressed to a witness in the case, seeking to impress him with the defendant's version of the facts, urging him to help the defendant, and to speak to the jurymen; the second letter was addressed to another person, asking him to labor with the jurymen, and to promise them that they should be well paid. *Held* competent. People v. Marion, 29 Mich. 31.

292. When the prosecution seeks to draw a certain inference from a given state of

facts, it is incumbent on them to show that such inference is necessary and unavoidable from the facts proved. U. S. v. Furlong, 2 Bis. 97; s. c. 1 Green's Crim. Reps. 440. Proof that a person had in his possession and owned a memorandum book does not authorize the inference that he can write and did write what was contained in the book, as a basis for comparison of handwriting to prove the forgery by him of another instrument. Van Sickle v. People, 29 Mich. 61.

**293.** On a trial for murder, photographs of alleged accomplices, taken after their death by drowning, may be shown to witnesses in corroboration of other evidence identifying their bodies. Ruloff v. People, 45 N. Y. 213.

**294.** Where an inquiry into the condition of a person's health is material, any account given by such person relative to health is evidence of complaints and symptoms, but not to charge any other person as to the cause of those sufferings; nor is such an account evidence of the truth of what has been declared. People v. Williams, 3 Parker, 84, per Clarke, J.

**295.** The power of a street lamp to emit rays of light and diffuse them, four months after a homicide, is not competent evidence of its power in that respect at the time of the killing, without showing that all the conditions affecting its power were the same on both occasions. Yates v. People, 32 N. Y. 500.

**296.** On the trial of an indictment against an overseer of highways, the fact that he accepted his appointment may be proved by parol evidence that he acted as such overseer. State v. Stroope, 20 Ark. 202.

**297. Presumption of bias from relationship.** The mother of the prisoner having been called to prove an *alibi*, the court charged the jury that the law regarded with suspicion the testimony of near relations when testifying for each other. *Held* not erroneous. State v. Nash, 8 Ired. 35.

**298. Non-existence of facts on the record.** As the proceedings of a court are only known by its records, if the facts insisted on by the defendant for arresting the judgment do not appear on the records of the court, the presumption is that they do not exist, especially after the lapse of three years. Davis v. McDonald, 42 Ga. 205.

**299. Rebuttal.** Where in commencing a criminal prosecution, the circumstances are calculated to excite doubts as to the truth of the charge, and to create an impression unfavorable to the principal witness, the prosecutor may show any circumstance which will have a tendency to rebut these presumptions. People v. Lohman, 2 Barb. 216; 1 N. Y. 379.

### 12. Proof of other offense.

**300. Not in general admissible.** Evidence of the prisoner's guilty participation in the commission of a crime wholly disconnected from that for which he is put upon his trial, is not as a general rule admissible. Shaffner v. Com. 72 Penn. St. 69; s. c. 2 Green's Crim. Reps. 504; Dunn agst. State, 2 Ark. 229; State v. Shuford, 69 N. C. 486; s. c. 1 Green's Crim. Reps. 247; People v. Jones, 31 Cal. 565; 32 Ib. 80; Watts v. State, 5 West Va. 532; s. c. 2 Green's Crim. Reps. 676. Whether a person on a trial for felony can consent to the admission of evidence of a distinct felony committed by him at another time—*query*. People v. King, 1 Wheeler's Crim. Cas. 33.

**301.** On the trial of an indictment for the larceny of bank bills, alleged to have been committed on the 16th of December, the prosecution after proving the commission of the offense on that day, were allowed to prove that the parties being together on the following day, the defendant enticed the prosecuting witness into an alley, and there knocked him down, beat and robbed him of additional money. *Held* error. Bonsall v. State, 35 Ind. 460.

**302.** On a trial for murder, the prosecution gave in evidence the minutes of the grand jury showing that an indictment had been ordered by that body against the accused upon the complaint of the deceased for blackmailing, without proof tending to show that the prisoner had any knowledge of such action by the grand jury. *Held* error, the evidence having no tendency to

show a motive, and its only effect being to prove that the accused had committed another crime. Stokes v. People, 53 N. Y. 164.

303. An accomplice cannot be permitted to testify that the prisoner proposed to him to join him in committing other crimes, or that the prisoner in the same conversation said that he was going to commit other crimes. Kinchelow v. State, 5 Humph. 9.

**304. May be received when it tends to prove the crime charged.** If the evidence has a direct tendency to prove the particular crime charged, it is admissible, although it also tends to prove the commission of another separate and distinct offense. State v. Harrold, 38 Mo. 496; State v. Braunschweig, Ib. 587; State v. Daubert, 42 Ib. 242.

305. The plaintiff in error was indicted and tried for forging a check upon a bank, purporting to be drawn by C. & Co. The teller was asked on the trial, whether the said firm kept an account at that bank, to which he replied that it did not. The check was shown to the witness, and he was then asked if he ever saw the check before, and if it was presented to him at the bank. The witness said it was his impression that it was presented to him. He was then inquired of whether C. & S., the payees of the check, had an account at the said bank at the date of the check, and the witness replied in the negative. It was urged in the argument that the evidence of the teller had a tendency to prove a different offense from that charged, viz.: obtaining goods by false pretenses. *Held*, that the attempt to obtain the property of C. & S., by this forged check, was, in a minor sense, the crime of false pretenses; that if the evidence tended to prove the minor offense, it was because the greater crime included the lesser; and that the fact that neither the persons purporting to be the drawers, nor the indorsers of the check had any account with the bank, was a part of the history of the check, and so became connected with the alleged crime. Watson v. People, 64 Barb. 130.

**306. Is admissible on the question of motive and intent.** Separate and distinct felonies may be proved for the purpose of establishing the existence of a motive to commit the crime in question, even though an indictment is then pending against the prisoner for such other felonies. People v. Wood, 3 Parker, 681; People v. Stout, 4 Ib. 71; Ib. 132; Baker v. State, 4 Ark. 56; Yarborough v. State, 41 Ala. 405; Defrese v. State, 3 Heisk. 53; s. c. 1 Green's Crim. Reps. 356. Therefore, on the trial of an indictment for stabbing with intent to murder, it is competent to show that the defendant attempted to poison the person stabbed. State v. Patza, 3 La. An. 512.

**307. Offense different from that before grand jury.** It is competent to show that the offense of which the defendant was convicted is a different offense from that which was proved before the grand jury who found the indictment. Spratt v. State, 8 Mo. 247.

### 13. Testimony of accomplice.

**308. When admissible.** The acts of an accomplice are not evidence against the accused, unless they constitute a part of the *res gestæ*, and occur during the pendency of the criminal enterprise, and in furtherance of its objects. Although the flight of a person suspected of crime is a circumstance to be weighed by the jury, as tending to prove a consciousness of guilt, yet the flight of one of several conspirators is not admissible in evidence as a circumstance tending to prove the guilt of all. People v. Stanley, 47 Cal. 113. See People v. Collins, 48 Ib. 277.

**309. Need not be corroborated.** A conviction may be had upon the uncorroborated testimony of an accomplice. People v. Costello, 1 Denio, 85; Wixson v. People, 5 Parker, 119; People v. Cook, Ib. 351; People v. Haynes, 55 Barb. 450; People v. Lawton, 56 Ib. 126; People v. Dyle, 21 N. Y. 578; People v. Jenness, 5 Mich. 305; Gray v. People, 26 Ill. 344; State v. Walcott, 21 Conn. 272; Dawley v. State, 4 Ind. 128; Stocking v. State, 7 Ib. 326; *contra*, People v. Reeder, 1 Wheeler's Crim. Cas. 418; Upton v. State, 5 Iowa, 465; State v. Pepper, 11 Ib. 347; People v. Ames, 39 Cal. 403; People v. Melvane, Ib. 614; Lopez v. State, 34 Texas, 133. But evidence from

such a source should be received with great caution. Coats v. People, 4 Parker, 662; State v. Walcott, 21 Conn. 272; State v. Stebbins, 29 Ib. 463. In Louisiana, although the testimony of an accomplice requires some confirmation (State v. Cook, 20 La. An. 145), yet the jury may convict on his testimony alone. State v. Prudhomme, 25 Ib. 522. In Georgia, the rule that the defendant cannot be convicted upon the testimony of an accomplice alone, does not hold in the case of a misdemeanor. Parsons v. State, 43 Ga. 197; Crisson v. State, 51 Ib. 597. In Alabama and Kansas, to convict on the testimony of an accomplice, it need not be corroborated in every material part. Montgomery v. State, 40 Ala. 684; Craft v. State, 3 Kansas, 450.

**310. Ought in general to be corroborated.** As a general rule, in felonies, the jury ought not to convict on the uncorroborated evidence of an accomplice; and even in misdemeanors, unless the accomplice is corroborated, or there are such circumstances in the case as to relieve him from suspicion, it is safer to reject his testimony. U. S. v. Harries, 2 Bond, 311; U. S. v. Smith, Ib. 323; People v. Haynes, 55 Barb. 450. It is the duty of the court so to advise the jury. Flanagin v. State, 25 Ark. 92; Ray v. State, 1 Iowa (Greene), 316; Allen v. State, 10 Ohio, N. S. 287. In Iowa, under the statute (Revision, § 4102), a conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense. State v. Moran, 34 Iowa, 453; s. c. 1 Green's Crim. Reps. 749.

**311.** The following instruction was held correct: That it was competent for the jury to convict on the testimony of an accomplice alone; but that it was unsafe to rely on such evidence without confirmation. That the corroborating evidence must relate to some portion of the testimony material to the issue, and connect the defendant with the offense charged. Com. v. Brooks, 9 Gray, 299; Com. v. Price, 10 Ib. 472.

**312.** In California an accomplice must be corroborated by evidence, which of itself, and without the aid of the testimony of the accomplice, tends in some degree to connect the defendant with the commission of the offense. People v. Thompson, 50 Cal. 480. It is otherwise as to a feigned accomplice. People v. Farrell, 30 Ib. 316.

**313.** Where counsel for the prosecution assume, and claim, that a witness is an accomplice, an instruction of the court that if the jury believe that the witness was not an accomplice, his testimony need not be corroborated, is erroneous. Com. v. Desmond, 5 Gray, 80.

**314.** Where an accomplice and his wife are witnesses against the accused, it is not error in the judge to instruct the jury that in determining the credibility of the testimony of the husband, they may take into consideration that of the wife. Haskins v. People, 16 N. Y. 344.

**315. What deemed a corroboration.** The statement of the prisoner to the officer who arrested him on a charge of robbery, that the accomplice had nothing to do with the robbery, is a sufficient corroboration of the testimony of the accomplice; since it warrants the inference that the prisoner knew who were engaged in committing the offense, and that this knowledge was derived from his own participation in it. Com. v. O'Brien, 12 Allen, 183. See Com. v. Elliott, 110 Mass. 104; s. c. 2 Green's Crim. Reps. 261.

**316. Where part is false.** The defendant was convicted of larceny on the testimony of M., who swore that he and the defendant committed the crime. It being shown that M. had made contradictory statements, the defendant asked the court to charge the jury that if the witness had, in anything material, sworn willfully and knowingly to anything false, his whole testimony must be disregarded. The court refused to so charge, but charged in substance that any such falsehood would seriously affect all of the witness's testimony, and that no credit should be given to any fact dependent upon his statements alone; but that where corroborated it might receive such credit as the jury thought it deserved. *Held*, that there was no error. Knowles v. People, 15 Mich. 408.

**317. Who not an accomplice.** A detect-

ive who acts without any felonious intent, but solely with the view of discovering the perpetrators of crime, is not an accomplice. State v. McKean, 36 Iowa, 343; s. c. 2 Green's Crim. Reps. 635. So, likewise, a person who has no knowledge of a larceny until after its commission, and who buys the stolen goods by direction of an officer, with funds supplied by the officer, in order to detect the thief, is not an accomplice whose testimony needs corroboration. People v. Barric, 49 Cal. 342.

**318.** Where a witness swore that he was present while the defendants played a number of games with cards; that at the request of one of them, who did not know much about the game, he sat behind him, and from time to time told him how to play; that he took a card once or twice from the hand of said player and threw it down on the table for him, and once, during the momentary absence of said player, played one of his cards for him; and that he was also engaged in reading a part of the time—it was held proper for the court to refuse to instruct the jury that the witness was an accomplice, and that a conviction could not be had on his uncorroborated testimony. Smith v. State, 37 Ala. 472.

### 14. Testimony of Experts.

**319. In general.** Professional witnesses can only give their opinion on questions of skill or science. People v. Bodine, 1 Denio, 282; Woodin v. People, 1 Parker, 464; Cook v. State, 4 Zabr. 843. But their opinions as experts not derived from their own observation and experience, but from books, are admissible in evidence. State v. Terrell, 12 Rich. 321; State v. Wood, 53 New Hamp. 484. Their opinion is not conclusive, but is to be weighed by the jury as other evidence. State v. Bailey, 4 La. An. 376.

**320.** A medical or other professional witness cannot be allowed to give opinions outside of his art or profession. Where, therefore, a physician on the trial of an indictment against a father for having carnal knowledge of his daughter, was permitted to express to the jury his opinion that the child had *gonorrhœa*, based upon the fact that he found that disease upon the father, it was held error. Moore v. State, 17 Ohio, N. S. 515.

**321. Must be based on facts.** An expert cannot be permitted to give a mere opinion not based on facts. The facts on which the opinion is based, must either be stated by other witnesses or by the expert himself, if they passed under his own observation. And the opinion must be founded upon a knowledge of causes and their effects so uniform in their connection as to amount to the establishment of a new fact, relation, or connection which would otherwise remain unproved. Cooper v. State, 23 Texas, 331, per Bell, J.

**322.** An expert who has heard the whole evidence, cannot give his opinion as to the effect of such evidence. Luning v. State, 1 Wis. 178. If the expert has been present in court, and has heard all the evidence, and there is no dispute about the facts, he may be asked his opinion. But when the facts are disputed, the question should be stated hypothetically. State v. Klinger, 46 Mo. 224. An expert who has heard only a portion of the evidence, cannot testify to an opinion based on such portion. State v. Medlicott, 9 Kansas, 257; s. c. 1 Green's Crim. Reps. 227.

**323. As to cause of death.** An expert after having made a *post mortem* examination of the body of a female, may give his opinion that she had been pregnant, and as to the cause of her death. State v. Smith, 32 Maine, 369.

**324.** On a trial for murder, it appeared that the body of the deceased was found in the sink or bin of his mill with six wounds on his head. *Held* that a medical expert, who had heard a medical witness describe the wounds, and had also heard several witnesses describe the construction and condition of the sink, was competent to give his opinion as to whether such wounds were likely to have been occasioned by accidentally falling into the sink, although he did not hear the whole cross-examination of the physician who described the wounds. Davis v. State, 38 Md. 15.

325. **As to instrument.** The form and appearance of the wounds upon the deceased having been ascertained by an expert, it is proper to ask him whether, in his opinion, an instrument shown him could have produced the wounds; also, whether a wound in the neck of the deceased could have been inflicted by her own right hand. State v. Knight, 43 Maine, 11; State v. Porter, 34 Iowa, 131; s. c. 1 Green's Crim. Reps. 241.

326. On a trial for murder, the following question to a medical witness who had examined the wounds on the head of the deceased, and the sink or bin in which the body was found, and also a crowbar and adze, which were found at the same place, was held proper: "State to the jury what kind of an instrument could in your opinion, have inflicted the wounds found on the head of the deceased." Davis v. State, 38 Md. 15.

327. On a trial for murder, the form, nature, extent, depth, length, width, and direction of the fatal wound having been proved, and its precise location on the head, with a general statement of the amount of force requisite, and the probable shape of the instrument, a surgeon is no more competent to give an opinion as to the position of the body when struck, than any other person. But where the only question of fact was as to who was the perpetrator, it was held that the admission of such an opinion furnished no ground for a new trial. Kennedy v. People, 39 N. Y. 245.

328. On the trial of an indictment for burning certain buildings, witnesses who were skilled in woodwork were called, who had examined a block contained in a box alleged to have been used for incendiary purposes, and had compared it with a stick found in the defendant's shop, and were allowed to state their opinion, that these pieces were originally parts of the same stick. *Held* proper. Com. v. Choate, 105 Mass. 451.

329. **On the question of insanity.** Facts or opinions on the subject of insanity, whether stated in the language of the court or counsel in a former case, or cited from the works of legal or medical writers, cannot be laid before the jury except by the testimony under oath of persons skilled in such matters. Com. v. Wilson, 1 Gray, 337.

330. Although medical men are permitted to give their opinion in cases of alleged insanity, yet they should not be allowed to express such opinion, except on all the testimony. Where medical witnesses who had heard only a portion of the evidence, and had had no previous acquaintance with the prisoner, were permitted not only to give opinions in relation to the condition of his mind, but also to testify to their belief that he was sane, it was held error. People agst. Lake, 12 N. Y. 358; s. c. 1 Parker, 495.

331. If a physician visits a person, and from examination or observation becomes acquainted with his mental condition, he may state to the jury his opinion as to the sanity or insanity of the person when he thus observed or examined him; and it may be shown by the witness that the father of such person was insane. State v. Felter, 25 Iowa, 67.

332. A medical witness conversant with insanity, who never saw the prisoner before the trial, but who was present during the whole trial, and heard the evidence, may be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime. State v. Windsor, 5 Harring. 512. *Held* otherwise in New York, but that the witness might be asked whether such and such appearances, were symptoms of insanity, and whether such a fact, if it exist (and which has been sworn to), is, or is not, an indication of insanity. People agst. Lake, 12 N. Y. 358; s. c. 1 Parker, 495.

333. A medical witness examined as an expert, was asked the following question: "Would not the manner in which the act was done, the circumstances of the case, the absence or presence of apparent motive, and the whole details of the transaction, be considered by scientific men in determining the question of sanity or insanity?" *Held* proper. State v. Reddick, 7 Kansas, 143.

334. On a question of insanity, an expert may be asked his opinion as to a hypothe-

tical statement of facts, and also as to what are the symptoms of insanity. But the jury are to determine whether such facts exist, or such symptoms are proved. Lake v. People, 1 Parker, 495; People v. Thurston, 2 Ib. 49. The following question to a medical witness was held incompetent, for the reason that it practically put the witness in the place of the jury: "From the facts and circumstances stated by previous witnesses, relating to the homicide, and from the defendant's conduct on the trial, is it your opinion that the prisoner was sane or insane when he committed the act?" State v. Felter, 25 Iowa, 67.

335. On a trial for murder, there was evidence tending to show that the prisoner before and at the time of the act was laboring under an insane delusion. C., a physician, testified that the facts relied upon by the defense indicated that the prisoner was of unsound mind. The judge, in his charge, told the jury that he placed no reliance whatever upon Doctor C.'s testimony except what was due to the testimony of a sensible and honest gentleman, and that he had equal respect for the opinions of the jury, who were quite as competent, perhaps, to pass upon the testimony as experts as was Doctor C. Exception being taken to these remarks, the judge responded thus: "There is no more reliance to be placed upon it than upon the testimony of any other person in this case. I regard you, gentlemen of the jury, as equally skilled and and as able to decide from the evidence whether or not the prisoner was insane as Doctor C." *Held* error. Templeton v. People, 6 N. Y. Supm. N. S. 81.

336. On a trial for murder, a witness testified that he had examined the prisoner two days after the homicide, and that in his opinion he was then deranged, and that he thought *delirium tremens* was the cause. *Held* that the defendant had a right to pursue the inquiry, and to have the opinion of the witness whether the state of mind in which he found the prisoner had existed at the date of the homicide, but that as the court had merely excluded the question in the form in which it was put, and allowed the witness to state how long in his opinion the prisoner had been in a state of *delirium tremens*, there was no error. People v. McCann, 3 Parker, 272; s. c. 16 N. Y. 58.

337. The counsel for the defendant asked the same witness what, in his opinion, the facts stated on the trial, supposing them to be true, showed as to the defendant's mind on the night of the homicide. The question being objected to, was excluded. But the court decided that the witness might be asked his opinion upon a hypothetical case corresponding to the testimony, or by reading him the testimony and asking for his opinion, on the supposition that those facts were true. *Held* that as the question excluded by the court and those allowed were in substance the same, there was no error. Ib. per Harris, J.

338. The proper mode of examining such a witness is, first to inquire of him as to the particular symptoms of insanity, asking whether all or any and which of the circumstances spoken of by the witnesses upon the trial are to be regarded as such symptoms, and then to inquire of him whether any and what combination of these circumstances would, in his opinion, amount to proof of insanity. Ib.

339. **May be interrogated to test their skill.** After medical witnesses have given their opinions on the direct examination, the counsel for the prisoner may put inquiries to them tending to test their skill and capacity and the correctness of their conclusions, and they may be asked hypothetical questions predicable of the facts proved or that may be fairly claimed to have been proved. People agst. Lake, 12 N. Y. 358.

340. **Interpreter.** A person who is deaf and dumb may testify by signs through an interpreter, though it appear that such person can read and communicate ideas imperfectly by writing. State v. De Wolf, 8 Conn. 93.

341. Where an interpreter is employed, and there is a dispute as to the meaning of a word in the foreign language, the court should require the interpreter to give the primary meaning of all words used in con-

nection with the word in dispute; and the accused is entitled to introduce evidence as to the meaning of the word. Schnier v. People, 23 Ill. 17.

15. Opinions of witnesses who are not experts.

**342. Indistinct recollection.** Where the impression of a witness, as to a past fact, means a remembrance so faint that it cannot be characterized as an undoubting recollection, it is evidence, however indistinct the recollection may be. State v. Flanders, 38 New Hamp. 324.

**343. As to defendant's guilt.** A witness cannot be permitted to express his opinion of the defendant's guilt. Cameron v. State, 14 Ala. 546. And after a witness has testified to facts tending to prove the guilt of the defendant, it is not competent for the latter to show what opinion the witness expressed upon the merits of the case. Com. v. Mooney, 110 Mass. 99.

**344. On questions of common knowledge.** It is competent for a witness to give his opinion as a conclusion of fact to which his judgment, observation and common knowledge has led him in regard to a subject-matter which requires no special learning or experiment, but which is within the knowledge of men in general. It was, therefore, held that a witness who was familiar with blood, and had examined with a lens a blood stain upon a coat when it was fresh, might testify that the appearance then indicated the direction from which it came, although he had never experimented with blood or other fluid in this respect; the witness having previously testified to its appearance at the time he examined it, and to the fact that, at the time of the trial, it was not in the same condition. Also held in relation to shoes which were taken from the defendant's house soon after the homicide, and which, it was claimed, fitted tracks supposed to have been made by the murderer, that a witness might testify that the shoes appeared as if they had been recently washed. Com. v. Sturtivant, 117 Mass. 122.

**345.** Where a witness has testified that he heard the sound of a carriage, he may be asked from what direction the sound seemed to come, or from what point the carriage seemed to start. State v. Shinborn, 46 New Hamp. 497.

**346.** A witness may give his opinion as to the time of day when an event occurred, and as to the length of time which elapsed between the occurring of two events. Campbell v. State, 23 Ala. 44.

**347.** One who has been a money broker in the city of B. for twelve years, buying and selling bank bills, is competent to show that the bills purporting to be issued by a certain bank are not current, and have no market value in B. But his opinion is not admissible in evidence to prove that there is no such bank, or if there is, that its bills are worthless everywhere. People v. Chandler, 4 Parker, 231.

**348. As to age of person.** The mere opinion of a witness as to the age of a person from his appearance, unaccompanied by the facts on which the opinion is based, is not competent evidence. Morse v. State, 6 Conn. 9.

**349. On the question of health.** The difference between health and any sickness whatever in a neighborhood is not to be regarded as open only to medical knowledge, and the contradiction of medical testimony on the subject, is a contradiction of common facts and not of science, not requiring the testimony of an expert. Evans v. People, 12 Mich. 27.

**350.** But a witness who is not an expert is not competent to express an opinion as to the particular kind of fits with which a person is afflicted. McLean v. State, 16 Ala. 672.

**351. As to declarations of the defendant.** It is erroneous to permit a witness to give his "understanding" of the meaning of declarations made to him by the prisoner, unless the witness is an interpreter or expert. Dixon v. State, 13 Fla. 636. Evidence on a trial for murder that the prisoner made threats of violence against a person without naming him, but that, in the opinion of the witness, the prisoner alluded to the defendant, is not competent. Johnson v. Com. 9 Bush, 224.

352. On a trial for murder, the prosecution proved by a witness that he heard cries at the house where the prisoner and his wife (the deceased) lived, on the Saturday night preceding her death. The witness was then asked what those cries indicated; to which he answered (under objection), that it seemed to him she cried for help. *Held* error; it being for the witness to describe the cries, and the jury to draw their own inferences. Messner v. People, 45 N. Y. 1; Peckham, J., *dissenting*.

353. **As to defendant's intention.** On the trial of an indictment for an assault with intent to do great bodily harm, the prosecutor was asked, on cross-examination, whether he believed at the time the shot was fired, that the defendant intended to shoot him. *Held* that the answer to this question was properly excluded, it not appearing that the witness had any better means of judging as to the defendant's intention than the jury. State v. Garvey, 11 Minn. 154.

354. **Speculation or conjecture.** On the trial of an indictment for seduction under promise of marriage, the district attorney asked the prosecutrix, "Were you induced to have the connection on the second of July by the promise of marriage; and would you have consented to it, in the absence of a promise?" *Held* that the latter part of the question was improper, as it called for a mere speculation, and substituted the prosecutrix in the place of the jury. Cook v. People, 2 N. Y. Supm. N. S. 404.

355. On a trial for an assault with an intent to kill, the evidence on the part of the prisoner tended to show repeated acts of violence against him by the complainant, and threats against his life. The prisoner, in testifying, described a motion of the complainant's hand during the collision between them, from which he thought the latter designed to take a pistol from his pocket, and in reference to that circumstance, the judge asked: "Can you explain to me this thing? While C., who was able to whip you, kept picking at you for amusement, why should he have put his hand in his pocket after giving you three terrific blows in the face? What was the occasion of drawing a pistol? I don't see why a man whipping you every day, you should suspect he would draw a pistol." *Held* that as the question called upon the prisoner to furnish the reason or motive for the complainant's act, its admission was error. Evers v. People, 6 N. Y. Supm. N. S. 81.

356. **On the question of sanity.** The opinion of non-professional witnesses as to the mental condition of the prisoner at the time of the occurrence, is not admissible. State v. Pike, 49 New Hamp. 399; State v. Archer, 54 Ib. 465. And it is not competent to ask the witness whether he had discovered, while the prisoner was in jail, that he was a man of very weak mind. Gardiner v. People, 6 Parker, 155. But delirium tremens may be proved by a non-professional witness. Real v. People, 55 Barb. 551.

357. In Massachusetts, witnesses who are not experts are not permitted to state their opinion as so a person's sanity, even if they first state the facts and circumstances on which it is founded. Com. v. Wilson, 1 Gray, 337; Com. v. Fairbanks, 2 Allen, 511. It is otherwise, in Georgia and Tennessee. Choice v. State, 31 Ga. 424; Dove v. State, 3 Heisk. 348; s. c. 1 Green's Crim. Reps. 760. In Missouri, witnesses who are not experts, may state whether they deem the prisoner to be insane, accompanied with the facts existing within their own knowledge and observation. But it can only be done in connection with their statements of the particular conduct and expressions which form the basis of their judgment. State v. Klinger, 46 Mo. 224. And see Powell v. State, 24 Ala. 21.

358. In New York, a layman when examined as to facts within his own knowledge, bearing on the question of sanity, may be permitted to characterize the acts to which he testifies as rational or irrational, and may testify to the impression produced by what he witnessed. But he is not competent to express an opinion on the general question whether the mind of the individual be sound or unsound. O'Brien v. People, 36 N. Y. 276; affi'g 48 Barb. 274.

359. **As to intoxication of defendant.** A witness may be asked whether from the prisoner's conduct and deportment, and other

facts connected with them, he was (in the judgment of the witness), to any considerable extent under the influence of intoxicating liquor. People agst. Eastwood, 14 N. Y. 562.

16. Proof of alibi.

**360. Nature of.** A charge that the law regards evidence to prove an alibi among the weakest and most unsatisfactory of all kinds of evidence, is erroneous. An alibi is a fact, and its existence is established by the same evidence as any other fact. Williams v. State, 47 Ala. 659.

**361. Burden of proof.** On the trial of an indictment for burning certain buildings, the jury were instructed that if the defendant sought to establish an *alibi*, the burden of proof was on him; but that the burden was upon the prosecution to establish the alleged fact that the defendant was present at the fire, and if on the entire evidence the jury had a reasonable doubt on that point, they should acquit him. Held not a ground of exception. Com. v. Choate, 105 Mass. 451.

**362. What required to establish.** An alibi need not be proved beyond a reasonable doubt. Chappel v. State, 7 Cold. Tenn. 92. Therefore the terms "possible" and "impossible" in the instruction of the court with reference to the proof of it, are too strong. Snell v. State, 50 Ind. 516. Where on a trial for larceny, the defense being an alibi, the judge charged the jury in substance that "it must have been *impossible* for the defendant to have been at L. at the times indicated by the evidence offered by him and also to have been present at the time and place of the larceny in order to make the defense available." *Held* error; the term "*impossible*" being too strong, and an improbability being all that was required. Adams v. State, 42 Ind. 373. Same held on a trial for murder. West v. State, 48 Ib. 483.

**363.** It is erroneous to charge the jury that if the defendant seeks to prove an *alibi*, he must do it by evidence which outweighs that given for the State tending to fix his presence at the time and place of the crime; for the reason that if the defendant produces evidence which raises a reasonable doubt of the truth of the charge against him he must be acquitted; and the rule is the same, where the defense set up is an *alibi*. French v. State, 12 Ind. 670; Miller v. People, 39 Ill. 457; Adams v. State, 42 Ind. 373; s. c. 2 Green's Crim. Reps. 686. But see Briceland v. Com. 74 Penn. St. 463; s. c. 2 Green's Crim. Reps. 523.

**364.** It is erroneous to charge the jury on a trial for murder that "the defense of *alibi* does not belong to the doctrine of doubts which entitles the defendant to be acquitted; but when it is successfully established by the evidence, it entitles the defendant to an acquittal upon the higher ground of innocence established." If the jury have a reasonable doubt as to whether the defendant was at the scene of the homicide when it took place they should acquit him. Binns v. State, 46 Ind. 311.

**365.** On a trial for robbery, the defense to which was an *alibi*, the evidence tended to show that when the crime was committed, the prisoner, who was a lad, was at his mother's house in bed. The judge charged the jury that it was for them to determine whether they believed the witnesses who had testified to the *alibi*; that it was singular that a boy like the prisoner should be in bed in July, from seven to half past eleven in the morning, unless he was sick or there was some other special reason, and that the circumstance that neither his mother nor any of his family had been called to show that he was sick or to explain the fact of his thus being in bed might or "would probably turn the scales." *Held*, that the foregoing language of the judge afforded no ground for a new trial. McGrory v. People, 48 Barb. 466.

**366. Proof need not be exact as to time.** Where the court, after informing the jury that to sustain the *alibi* identity of the time of the offense with the presence of the defendant at another place was essential, told them, in effect, that to give the defense its highest character, the required identity must be made to appear by some definite and certain standard of time or time-piece, and that un-

less it was so ascertained, the defense would be greatly weakened, it was held error; such a discrimination between artificial means of keeping time, and other modes of proving the fact relied on, being calculated to mislead. Young v. Com. 8 Bush, 366; s. c. 1 Green's Crim. Reps. 366.

367. It is proper to instruct the jury that where the exact time of the commission of the offense is not shown, but it is shown to have been committed during a night, or part of a night, the evidence of the *alibi* ought to cover the whole of such time. West v. State, 48 Ind. 483. If, however, the evidence touching an *alibi* is sufficient to raise a reasonable doubt of the defendant's guilt in the minds of the jury, it should be considered, although the *alibi* does not cover the whole time during which the crime was committed. Kaufman v. State, 49 Ib. 248.

**368. Evidence to disprove.** Where the prisoner has undertaken to prove an *alibi*, it is competent for the prosecution in reply to disprove it, even by evidence of the same character as that which had been put in at an earlier stage of the trial. Com. v. Moulton, 4 Gray, 39.

369. Where the defendant stated that he was at the residence of a certain person, and transacted business with him there on the evening the offense was committed, it was held competent to prove that unsuccessful efforts were made the next day to get any information as to the existence of such person by inquiring at the place named. State v. Wentworth, 37 New Hamp. 196.

**370. Effect of failure to prove.** Although the fact that an *alibi* was fabricated, would be a strong circumstance against the defendant, yet the mere unsuccessful attempt to establish an *alibi*, is entitled to no greater weight against the prisoner than the failure to prove any other important item of defense. State v. Collins, 20 Iowa, 85; Miller v. People, 39 Ill. 457; Toler v. State, 16 Ohio, N. S. 583; White v. State, 31 Ind. 262.

371. On a trial for larceny the court charged the jury that when the State had made out a *prima facie* case, and the prisoner attempted to set up an *alibi*, the burden of proof was shifted, and if the defense failed to establish the *alibi* to the satisfaction of the jury, they must find the prisoner guilty. *Held*, erroneous; the defendant being entitled to have the whole case left to the jury on both sides. State v. Josey, 64 N. C. 56.

### 17. Evidence to discredit or sustain witness.

**372. Improper conduct of witness.** Improper conduct of a witness in the suppression or alteration of his testimony, cannot take his testimony from the jury. Such conduct goes to his credit, and that rests with the jury. State v. Roe, 12 Vt. 93.

**373. Facts collateral to issue.** When facts elicited on cross-examination are collateral to the issue, they cannot be contradicted by the party calling them out. State v. Hoffman, 46 Vt. 176; People v. McGinnis, 1 Parker, 387.

374. Where on a trial for producing an abortion the prisoner on his cross-examination, testified that he did not know N. W., a young woman present in court then pointed out to him, that he had never seen her, and never procured an abortion upon her, and N. W. afterwards testified against an objection of the prisoner, that he did procure an abortion upon her two years previous, it was held error. Rosenzweig v. People, 6 6 Lans. 462; s. c. 63 Barb. 634.

375. This rule does not exclude testimony contradicting the witness as to facts immediately connected with the subject of the inquiry. The feelings of the witness and the motives and temper governing or influencing him in the particular transaction are proper subjects of inquiry and not collateral. Where, on a trial for grand larceny, the complainant on cross-examination denied that he had offered to withhold evidence, if the prisoner would refund to him a part of the money he had lost, it was held that he could not be contradicted by another witness, it having no tendency to prove or disprove the issue, or to show the feeling entertained by the complainant toward the prisoner. Nation v. People, 6 Parker, 258.

376. The rule under consideration, is applicable to the examination of a prisoner when he avails himself of his privilege to become a witness. On the cross-examination of the accused, who was a witness in his own behalf, he testified that he had not been convicted of burglary before the alleged offense was committed. This question was then put to him: "I ask you again, specifically, were you not, on April 25th, 1856, arraigned at the bar of this court, charged with the crime of burglary? Did you not confess your guilt, and were you not sentenced to three years in the State prison for that offense?" To which a negative answer was given. The prosecution afterward proved by the record of the court that a person by the name of the defendant was convicted of felony at the time specified. *Held*, that this evidence was inadmissible, even in connection with testimony *aliunde* that the prisoner was the person named in the record. It was impossible to say that the prisoner was not prejudiced by it; or that the rejection of the evidence offered to show the identity of the prisoner as the person named in the record cured the error. Marx v. People, 63 Barb. 618.

377. It is not collateral to the issue to inquire into the motives of a witness in giving his testimony; and a party who examines him in regard to them is not bound by his answers, but may contradict him. People v. Austin, 1 Parker, 154.

378. **Party contradicting his own witness.** Although a party is not permitted to assert or present evidence showing one state of facts to be proved, and afterward to assert or prove to the court that his prior evidence is untrue, or not to be relied on; yet where a witness has given evidence against the side calling him, and the court has good reason to apprehend that the witness is mistaken, or has willfully falsified, the party producing him will be allowed to give evidence explaining or even contradicting him. People v. Skeehan, 49 Barb. 217.

379. In Kentucky, under the statute, where a witness testifies to a fact prejudicial to the party calling him, the latter may be allowed to show that such fact does not exist, by proving that the witness had made statements to others inconsistent with his present testimony; but not when the witness fails to prove facts supposed to be beneficial to the party. Champ v. Com. 2 Metc. Ky. 17.

380. Although a party is not bound by the facts testified to by his own witness, but may prove them to be otherwise, yet he cannot go into proof merely to discredit his witness. Where, on a trial for perjury, the accused called a daughter of the prosecutor to prove a material fact, but she swore to the contrary, it was held that he could not prove by a witness that, shortly before the trial, the daughter asserted the alleged fact to the witness. Com. v. Starkweather, 10 Cush. 59.

381. **Failure to testify before magistrate.** No inference prejudicial to the veracity of witnesses can be drawn from the fact that they did not testify before the committing magistrate. Brock v. State, 26 Ala. 104.

382. **Discrediting written statement.** The testimony of a witness taken in writing by a magistrate may be used to show contradictory statements made by him. State v. McLeod, 1 Hawks, 344. But not for any other purpose. Oliver v. State, 5 How. 14; Com. v. Harmon, 4 Barr, 269.

383. Where a witness's attention has been called to his testimony before the coroner, which was reduced to writing, read to and subscribed by the witness, it is admissible for the purpose of discrediting his testimony on the trial. Stephens v. People, 19 N. Y. 549; affi'g s. c. 4 Parker, 396.

384. In discrediting a witness by reading his deposition taken before the examining magistrate, his attention need not be called to the deposition, unless he is cross-examined in relation to it. In the latter case, the entire deposition must be read to the jury in his hearing. If asked if he has made a certain statement in a written instrument, the writing must be produced. Lightfoot v. People, 16 Mich. 507; Gaffney v. People, 50 N. Y. 416.

385. A slight difference in the proof as to the time between the affidavit before the magistrate and the testimony on the trial,

the witness being an ignorant person, is not sufficient to impeach her evidence. State v. McElmurray, 3 Strobh. 33.

386. Where the testimony of a witness on a former trial was mainly founded on a written memorandum, since lost, which he swore he made in his own handwriting, it was held, on a subsequent trial of the same case, that the defendant might show that the memorandum was not in the handwriting of the witness. Com. v. Hunt, 4 Gray, 421.

387. A diagram drawn in accordance with the testimony of the witness may be submitted to the jury, without having been first shown to the witness whose testimony it contradicts. Bishop v. State, 9 Ga. 121.

388. Where the prosecuting attorney made a statement material to the issue, in an affidavit, upon the authority of A., a witness, who was present, and A. afterward testified differently, it was held that the contradiction might be shown for the purpose of discrediting A. State v. McQueen, 1 Jones, 177.

389. **Contradictory acts and declarations.** Where a witness has testified to material facts, any acts or declarations of his which appear to be inconsistent with such testimony, are competent by way of contradiction. On the trial of an indictment for an assault and battery on S., he was a witness, and denied that he had committed a prior assault, on the same day, on the defendant. *Held* that a record of conviction of S. for an assault upon the defendant was admissible to impeach the credibility of S. Com. v. Lincoln, 110 Mass. 410.

390. On a trial for procuring K. to burn a meeting-house, the wife of the prisoner having testified that nothing was said or done by her husband to induce K. to commit the act, it was held that it was proper to prove that when she was told that K. had made a confession, and stated that her husband hired him to burn the house, she replied: "Well, he would never have done it if it had not been for others; others are more to blame than he is." State v. Kingsbury, 58 Maine, 238.

391. The credit of a witness may be impeached by proof that he has made statements material to the issue out of court on the same subject, contrary to what he swears at the trial, provided the witness has been previously cross-examined as to such statements, and his attention not only called to the particulars of the conversation, but asked as to the time, place, and person involved in the supposed contradiction. Brown v. State, 24 Ark. 620; State v. Hamilton, 32 Iowa, 572; State v. Foye, 53 Mo. 336.

392. On the trial of an indictment for rape, the defense offered to prove that two of the witnesses for the prosecution had made statements contradicting their testimony. This evidence was objected to, as "improper, immaterial, and hearsay." But it was not objected that the attention of the witnesses had not been first called to these statements. The evidence being ruled out, it was held error. Haight v. People, 50 N. Y. 392.

393. Where on a trial for larceny the prosecutor testified on cross-examination that he might have said to E. that he did not think that the accused would do anything wrong but wanted to climb too high, but that he did not recollect it, and did not know that he said so, and the prisoner's counsel having called E. as a witness asked him if the prosecutor had ever said so to him, which question was excluded, it was held that as it was not objected to on the ground that it was not sufficiently precise as to time and place, it was proper and its exclusion error. People v. Jackson, 3 Parker, 590.

394. Where a witness swears that another witness testified differently on a previous trial of the same case, it is not competent to introduce the bill of exceptions taken in the former trial, to prove that the witness had contradicted himself. State v. Birney, 35 Maine, 105.

395. A witness cannot be discredited by proof of particular acts not directly involved in the issue on trial; much less by an opinion as to their general character or tendency. Stephens v. The People, 19 N. Y. 549; affi'g s. c. 4 Parker, 396; Hamilton v. People, 29 Mich. 173.

396. **Impeachment of character.** In California, the inquiry into the character of a witness for the purpose of impeaching his

testimony, is confined to his reputation for truth and veracity, and does not extend to the moral standing of the witness in the estimation of society. People v. Yslas, 27 Cal. 630, Currey, J., *dissenting*. In North Carolina and Missouri, the inquiry may extend to the general moral character of the witness. State v. Dove, 10 Ired. 469; State v. Hamilton, 55 Mo. 520; State v. Breeden, 58 Ib. 507.

**397.** Testimony to impeach the character of a witness for truth, is not confined to the character of the witness prior to the prosecution, but extends to the time of the examination of the witness. State v. Howard, 9 New Hamp. 485.

**398.** Proof of the reputation of a witness for truth and veracity, a year and a half previous to the trial, is not too remote in point of time. Com. v. Billings, 97 Mass. 405. And evidence of the bad reputation of a witness for veracity four years previously, the impeaching witness having been absent from the State during the intervening time, is admissible. Keator v. People, 32 Mich. 484.

**399.** Where a record of conviction for petit larceny is offered in evidence, for the purpose of discrediting a witness, it is not good ground for rejecting such evidence that the transaction occurred more than twenty-five years before, though in itself entitled to but little weight. Lake v. People, 1 Parker, 495; affi'd 12 N. Y. 358.

**400.** In Connecticut, the record of conviction of a witness as a common prostitute is not admissible in evidence to impeach the witness. State v. Randolph, 24 Conn. 363. In Maine, under the statute (R. S. ch. 82, § 94), the record of a previous conviction of a criminal offense is admissible to affect the credibility of the prisoner, although his conviction may not have been for an infamous crime. State v. Watson, 63 Maine, 128.

**401.** It cannot be affirmed as a legal proposition, that a witness is not successfully impeached unless the impeaching witnesses testify that from the general reputation of such witness, they would not believe him under oath. People v. Tyler, 35 Cal. 563.

**402.** It is erroneous to charge the jury that "if the general character of a witness for truth is impeached, they are bound to disregard the whole of his testimony." Sharp v. The State, 16 Ohio, N. S. 218.

**403. Prejudice of witness against prisoner.** Although it is improper to ask a witness if he is not prejudiced against the prisoner, yet he may be interrogated as to any particular acts or expressions in reference to the prisoner from which the jury may infer unfriendly feeling or prejudice. Cornelius v. State, 7 Eng. 782.

**404.** Where the defense was permitted, without objection, to ask a witness if he was not prejudiced against the prisoner, and he answered that he was, it was held error for the court, against the objection of the defense, to draw from the witness a statement of the reasons why he was so prejudiced; and the witness having given reasons which were injurious to the prisoner, it was held that the error was not cured by the court telling the jury to disregard them. Ib.

**405.** It is competent for the prisoner, in order to show the bias of S., a witness for the prosecution, to prove that before the indictment or any complaint made, he had instituted an action against S., that S. was instrumental in obtaining the indictment after the commencement of the action; and that subsequent to the finding of the indictment, S. proposed to the prisoner to do all she could to stop the proceedings if he would withdraw his action. Com. v. Byron, 14 Gray, 31.

**406.** On the trial of an indictment for a nuisance in maintaining a dam, it was held that the court erred in not permitting the defendant to ask a witness for the people, on cross-examination, whether there was not an agreement between him and others who had sued the defendant for flowing their land, to get the defendant indicted, and in that way procure a removal of the dam; the proposed evidence tending to show the interest of the witness in the public prosecution. Crippen v. People, 8 Mich. 117.

**407. Testimony to sustain witness.** A corroboration, to be of any avail, should be

as to some matter material to the issue. To prove that a witness has told the truth as to immaterial matters, has no tendency to confirm his testimony involving the guilt of the party on trial. Frazer v. People, 54 Barb. 306.

408. Conversations of third persons with the witness, not to prove the truth of the facts stated to the witness, but merely to show what it was that called the attention of the witness to a fact stated by her, or that fixed the fact in her recollection, are competent evidence. State v. Fox, 1 Dutch. 566.

409. As a general rule, it is not competent, in support of the testimony of a witness, for the party calling him to prove that he has made declarations out of court corresponding with his testimony. The exceptions to this rule stated. People v. Finnegan, 1 Parker, 147. And see State v. Dove, 10 Ired. 419.

410. Where the defendant proves that a witness for the prosecution, at a previous time, gave under oath a different account of the same transaction, it is not competent for the prosecution to show that the witness made earlier statements, not under oath, in the absence of the prisoner, in corroboration of his present testimony. Com. v. Jenkins, 10 Gray, 485.

411. If the witness be charged with the design to misrepresent on account of his changed relation to the parties or the cause, evidence of like statements before such change of relation may be admitted. So if it is attempted to be shown that the evidence is a recent fabrication, or when long silence concerning an injury is construed against the injured party, it is proper to show that the witness made similar statements soon after the transaction in question. State v. Vincent, 24 Iowa, 570.

412. **Proof of good character of witness.** Any inquiries by one party as to the general reputation for truth and veracity of a witness introduced by the other party, are to be considered as an impeachment of the general character of the witness, so far as to open that subject to the introduction of evidence to sustain his good character. Com. v. Ingraham, 7 Gray, 46; Burrill v. State, 18 Texas, 713.

413. In California, under the Code (§§ 2051, 2053), when it has been proved that a witness called by the prosecution has been convicted of felony, the prosecution may introduce evidence to show that the reputation of the witness for truth and integrity is good in the community where he lives. People v. Amanacus, 50 Cal. 233.

414. In Connecticut, where on a trial for an attempt to commit rape, the prosecutrix was deaf and dumb, and she offered evidence to show that her general character for truth was good, it was held that such evidence was proper, although no impeachment of her character had been attempted. State v. De Wolf, 8 Conn. 93.

415. Where a material witness for the prisoner, on cross-examination, acknowledged that he had been complained of, and bound over upon a charge of passing counterfeit money, it was held that the prisoner was called on to give evidence of the witness's good character for truth. Carter v. People, 2 Hill, 317.

416. A person called to sustain the character of a witness, who testifies that he has known the witness for a number of years, and that he is acquainted with his associates, but not with his general character for truth and veracity, may testify that he would believe him on oath. People v. Davis, 21 Wend. 309. And it is competent for him to testify that he has never heard the character of the witness called in question. Lemons v. State, 4 West Va. 755; s. c. 1 Green's Crim. Reps. 667. But a person is not competent to testify as to the general character of a witness simply because he has known him several years. State v. Speight, 69 N. C. 72; s. c. 1 Green's Crim. Reps. 363. The credibility of a witness sought to be impeached, is exclusively a question for the jury. Whitten v. State, 47 Ga. 297; s. c. 1 Green's Crim. Reps. 579.

*For evidence in special cases, see the titles of the different offenses.*

# Examination of Party Arrested.

**Proceedings on.** A person cannot be removed from one district to another for examination. He is first to be taken before the proper officer in the district where he is arrested, who is to examine as to the crime alleged. If there is not probable cause of his guilt, he is to be discharged. If there be found reasonable cause for holding the accused to answer, he is entitled, upon tendering sufficient bail, to his discharge from arrest. Only on a failure to give bail in a bailable case, can he be committed; and an order may then be made to remove him to the district in which the trial is to be had. U. S. v. Shepard, 1 Abb. 431.

# Exceptions.

*See* Bill of exceptions.

# Experts.

*See* Evidence.

# Extortion.

1. What constitutes.
2. Indictment.
3. Evidence.

## 1. What constitutes.

**1. Meaning of.** Extortion at common law is the taking, by color of office, money or other thing of value that is not due, before it is due, or more than is due. Com. v. Wheatley, 6 Cow. 661; Williams v. State, 2 Sneed, 160; Com. v. Mitchell, 3 Bush, 25; Com. v. Bagley, 7 Pick. 246; Ming v. Truett, 1 Mont. 322.

**2. When committed.** Where a defendant appeared before a justice on a summons returnable at 10 A. M., and waited till about 12 o'clock, when the justice told him that he (the justice) must tax the plaintiff with the costs, whereupon the defendant went away; but the justice afterward adjourned the cause to another day, and gave judgment with three or four dollars costs; and the defendant afterward paid to the justice the amount for which the suit was brought; and the justice exacted the costs, which the defendant refused to pay in full, but paid the justice 12½ cents; it was held that this was extortion in the justice, for which he might be indicted and punished. People v. Wheatley, 6 Cow. 661.

**3.** In Indiana, where a county treasurer exacted and received from a taxpayer a fee as for a distress and sale of his goods for taxes, when none had actually been made, it was held that he was guilty of extortion. State v. Burton, 3 Ind. 93.

**4.** In Massachusetts, the receiving of a negotiable promissory note by an officer for fees not due, will not sustain an indictment for extortion under the statute. Com. v. Carey, 2 Mass. 523; Com. v. Pease, 16 Ib. 91; Com. v. Dennie, Thach. Crim. Cas. 165.

**5. Must be a corrupt intent.** In Pennsylvania, a justice of the peace who took larger fees than the law allowed, was held not guilty of extortion, unless he did it with the intention of oppressing. Resp. v. Hammond, 1 Yeates, 71.

**6.** In Alabama, an officer cannot be convicted of extortion (Code, § 3225), unless he designedly made charges for services which he knew had not been rendered, or for which he knew that no fees, or fees other than those charged were allowed; and the fact that, in making out a bill of costs, the whole amount of costs charged is less than the full amount which he was entitled to charge, although some illegal items are included, is a strong circumstance to show the absence of the corrupt intent which the law was designed to punish. Cleaveland v. State, 34 Ala. 254.

**7. Voluntary payment.** Where on a trial for extortion, it appeared that the property of the debtor, sold on execution, was sufficient to pay the officer's fees, but that they were paid by the creditor; it was held that as such fees were a charge to the

debtor, and the payment by the creditor was therefore voluntary, the officer was not guilty of the offense charged. Com. v. Dennie, Thach. Crim. Cas. 165.

8. **Unconstitutionality of statutes.** The exaction from a broker, of fees or duties on sales of imported merchandise, by the acts of New York of 1846 and 1866, is repugnant to that provision of the Constitution of the United States, which authorizes Congress "to regulate commerce with foreign nations and among the several States, and with the Indian tribes." People v. Moring, 3 N. Y. Ct. of Appeals Decis. 539; affi'g 47 Barb. 642; s. c. 3 Keyes, 374.

2. Indictment.

9. **What to contain.** An indictment for extortion should state what was done, and what was received beyond the lawful fees. Halsey v. State, 1 South. 323. Where an indictment charged that the defendant, as constable, traveled four miles to serve an execution, for which travel he was entitled as mileage to sixteen cents, that corruptly, &c., he extorted thirty-two cents for such mileage, whereas, but sixteen cents were due, it was held sufficient. Emory v. State, 6 Blackf. 107. But see State v. Stotts, 5 Ib. 460, where it was held that the indictment need not allege what the defendant extorted.

10. Where the indictment charges a constable with having collected more than was due on an execution, it must set out the recital in the execution showing the judgment on which the execution issued, and state the names of both parties to the execution. Leary v. State, 6 Blackf. 403.

11. An indictment for extortion, may charge that the money was extorted from the county. State v. Moore, 1 Smith, 316.

3. Evidence.

12. **Existence and delivery of writ.** Where an officer is on trial for extortion in receiving fees in the service of a writ, evidence must first be given of the existence of the writ and its delivery to the officer. Leary v. State, 6 Blackf. 403.

13. **Time.** Where upon the trial of a deputy sheriff for extortion in receiving fees in the service of a writ and execution, the indictment charged that the writ bore date the 20th day of a certain month, and it was proved that the writ was dated the 10th day of the same month, it was held that the variance was fatal. Com. v. Devine, Thach. Crim. Cas. 165.

14. **Amount.** Where an indictment for extortion charged a constable with having collected more than was due on an execution for $69, and the execution proved was for $110.43, it was held that the variance was material. Leary v. State, 6 Blackf. 403.

15. **Officer's return.** The rule that the return of an officer cannot be impeached in a collateral proceeding, and that no averment can be made against it, has no application to the trial of an indictment against an officer for extortion; but in such case the return may be shown to be false. Williams v. State, 2 Sneed, 160.

*See* Threatening to accuse of crime.

## Extradition.

*See* Fugitives from justice.

## False Imprisonment.

1. **What is.** To stop and prevent a person, by threats, from proceeding on a public highway, is false imprisonment and an assault. Bloomer v. State, 3 Sneed, 66.

2. Where a father, without a pretense of reasonable cause, confined his blind and helpless son in a cold and damp cellar in midwinter, without fire, during several days, assigning as a reason therefor, that the boy was covered with vermin, it was held that the father was rightly convicted of false imprisonment. Fletcher v. People, 52 Ill. 395. But it has been held that to fasten a seaman to the deck with an iron chain, who has been away from the ship for two nights without leave, in order to prevent his escape, is not unlawful. U. S. v. Turner, 2 Wheeler's Crim. Cas. 615.

**3. Indictment.** An indictment for false imprisonment must charge that the detention was without lawful authority; and the omission of such an averment is not cured by the conclusion "contrary to the form of the statute in such case made and provided." Redfield v. State, 24 Texas, 133. See Barber v. State, 13 Fla. 675; s. c. 1 Green's Crim. Reps. 723.

## False Pretenses.

1. What constitutes.
2. Affidavit for arrest.
3. Indictment.
4. Evidence.

1. What constitutes.

**1. Must be calculated to deceive.** A cheat to be indictable at common law, must affect the public, be calculated to defraud individuals, and which ordinary care and caution cannot guard against; as the use of false weights and measures, and defrauding another by false tokens. People v. Stone, 9 Wend. 182; People v. Gates, 13 Ib. 311; People v. Herrick, Ib. 87; People v. Johnson, 12 Johns. 291. To constitute a false pretense, the false representation must be by words written or spoken; and they must be such that if true, they would naturally and according to the usual operation of motives upon the human mind, guided by prudence, produce the alleged results. People v. Conger, 1 Wheeler's Crim. Cas. 448; State v. Delyon, 1 Bay, 353; People v. Williams, 4 Hill, 1; State v. Simpson, 3 Hawks, 620; State v. Evers, 49 Mo. 542. Therefore, it was held on demurrer, that an indictment for obtaining a watch from a person upon the false representation that the defendant was a constable, and had a warrant against such person for rape, and that he would settle the same if the person would give the defendant the watch, could not be maintained. People v. Stetson, 4 Barb. 151.

2. Defendants bought goods from the prosecutor's clerk, and gave in payment an instrument purporting to be a five dollar bill, of the Bank of Tallahassee, the blanks of which were filled up, except those opposite the words cashier and president, where there was an illegible scrawl, which, on casual inspection, might have been mistaken for the names of the officers. Defendants knew before they passed the instrument that it was counterfeit. *Held*, cheating by a false token at common law. State v. Stroll, 1 Rich. 244. In another case, where it was proved that A. owed B., and that the defendant, who had once been B.'s agent for collecting bills, but whose authority had then been revoked, though without notice to A., presented a bill of B.'s to A., and on receiving payment from him gave a valid discharge on behalf of B., and then fraudulently misapplied the money to his own use, it was held sufficient to sustain the indictment. Com. v. Call, 21 Pick. 509.

3. On a trial for obtaining money by false pretenses it was proved that R. was about eighteen years of age, and unable to obtain his bounty money without having a guardian appointed; that the prisoner had falsely represented himself to be a captain in the Sixth New York Cavalry, in which R. enlisted; that the prisoner showed R. a roll of money, and said that it was the latter's bounty money; that the prisoner paid him $50, and asked him to let the prisoner keep the rest of it for him for a few days, when he would pay it to him; that R. at this time executed an assignment of his $300 bounty to the prisoner; that the prisoner did not in fact receive the bounty money until the next day, and that he then obtained it through the aid of the said assignment. *Held*, that the statement that the prisoner was a captain in the Sixth New York Cavalry was a material fact which would be likely to influence a person of ordinary prudence. *Held*, further, that it was not erroneous for the court to charge the jury that if at the time R. executed the assignment the prisoner had in his possession the amount of money mentioned in the indictment, and it was considered by both parties to belong to R., and the defendant would have paid it over to R. except for the consent of R. that he might retain it, that was just as much an obtaining of the $250 as if he had paid it

over to R. and received it back. People v. Cooke, 6 Parker, 31.

**4. Where party defrauded has means of information.** A false affirmation made to a party who has the same means of knowledge as the person who makes it as to whether the affirmation is true or false cannot be the basis of an indictment for obtaining money under false pretenses. Com. v. Norton, 11 Allen, 266. Where a person who had from time to time deposited money in and drawn checks upon a bank in a fictitious name, and had finally, with a fraudulent intent, drawn a check when he had no funds on deposit, and presented it himself, and the bank paid it, though without regard to the credit of the name, it was held not false pretenses. Com. v. Drew, 19 Pick. 179.

**5. Mere falsehood is not.** At common law an indictment cannot be maintained for "a naked lie," or simple false affirmation; State v. Mills, 17 Maine, 211; nor for an intention to cheat. Com. v. Morse, 2 Mass. 138; Com. v. Warren, 6 Ib. 72.

**6.** Where an indictment alleged that A., who held a promissory note against B., which was due, called for payment, and with intent to defraud B. falsely represented that the note had been lost or burned, whereby the latter was induced to pay it, it was held not a false pretense, and that it would not have been if A., after obtaining payment of the note, negotiated it for value without notice of its having been paid, provided there was no averment that A. intended negotiating it when he made the representation. People v. Thomas, 3 Hill, 169.

**7.** A. having a judgment against B., the latter went to A. and said he would settle it by paying money in part, and giving a note for the residue, upon which A. drew a receipt in full in discharge of the judgment, and B. obtained possession of the receipt without paying the money or giving the note. *Held*, only a false assertion, and that an indictment could not be maintained. People v. Babcock, 7 Johns. 200.

**8.** Where an indictment alleged that the defendant obtained A.'s signature to a deed of land by falsely representing that B., who held a bond and mortgage against A., was about to foreclose the mortgage, and that B. had so told the defendant, it was held that the pretenses set forth were not sufficient to warrant a conviction. People v. Williams, 4 Hill, 1.

**9.** A deed by a wife conveying real estate belonging to her in her own right was executed by her with her husband, at the solicitation of the latter, under the pretense that it was a deed of land belonging to him, but not acknowledged by the wife. *Held*, not such an instrument as was intended in the statute. People v. Galloway, 17 Wend. 540.

**10.** An indictment charged that J. held a note against the defendant, on which there was an unpaid balance of $22.64; that the defendant falsely represented that he owned certain tobacco of a particular description and quality, and that J., believing these false pretenses and representations, was thereby induced to give the defendant credit on said note for said sum of money, and to surrender the note to him, when, in truth, the tobacco was not of the quality and description represented, but was of no value, which the defendant knew. *Held*, not false pretenses within the meaning of the statute. Com. v. Haughey, 3 Metc. Ky. 223.

**11. Must have been part of inducement.** To sustain an indictment for false pretenses, the pretense alleged to be false must have formed some part of the inducement to the doing of the act, and been made for the purpose of prevailing upon the party injured to part with his property, or to do the act. Both the inducement and the fraudulent purpose are facts to be proved, and are not to be presumed. Where a person procures the aid of an agent, or broker, to assist him in making sale of his property, real or personal, and is willing and proposes to such agent to sell at a given price, but at the suggestion of the agent consents to ask a higher price, and to give the difference between the two prices to the agent, in case the higher price can be obtained, neither the principal nor the agent can be convicted of obtaining money, or the signature of the purchaser to obligations, by false pretenses in regard to the price, even though they had pretended that the higher

price was the true and only price, and that they would refuse to sell for anything less. Scott v. People, 62 Barb. 62, Mullin, P. J., *dissenting*.

12. But if the jury believe, from the evidence, that the pretenses proved to have been false and fraudulent were a part of the moving causes which induced the owner to part with his property, and that the defendant would not have got the goods had not the false pretenses been superadded to statements which may have been true, or to other circumstances having a partial influence upon the mind of the owner, they will be justified in finding the defendant guilty. People v. Haynes, 14 Wend. 546; State v. Thacher, 35 N. J. 445; s. c. 1 Green's Crim. Reps. 562.

13. **Must relate to past event.** The essence of the offense of obtaining money or property by false pretenses, is that the false pretense should be of a past event, or of a fact having a present existence, and not of something to happen in the future. State v. Evers, 49 Mo. 542; Dillingham v. State, 5 Ohio, N. S. 280; Johnson v. State, 41 Texas, 65. The following instruction was therefore held bad: That the defendant, with intent to cheat and defraud, falsely represented to A. that B. was indebted to defendant, and if A. would lend defendant five dollars, B. would, on demand, repay it; and A., believing from such representations that B. was so indebted, and would repay him, loaned to the defendant five dollars; and that in truth and in fact the representations so made were false and fraudulent. State v. Magee, 11 Ind. 154.

14. The offense charged consisted in a false representation made by the prisoner to one H., that he could give him employment, and pay him fifty dollars a month for his services, H. depositing $100 as security for the faithful performance of the contract. *Held* not indictable at common law, or under the statute of New York. Ranney v. People, 22 N. Y. 413.

15. But in Massachusetts, where the proprietor of an intelligence office agreed to procure a place for an applicant in consideration of two dollars paid in advance, and falsely stated that he had a situation in view, and the money was accordingly paid, he was held guilty of obtaining money by false pretenses. Com. v. Parker, Thach. Crim. Cas. 124.

16. The defendant represented to the prosecutor that if he would let him have $20, he would go and work it out with him. The prosecutor let him have the money, and the prisoner refused to comply with his contract. *Held*, that an indictment for being a common cheat and swindler could not be sustained. Ryan v. State, 45 Ga. 128.

17. Where it was charged that the defendant promised that he would assign to A. a certain note which he had before that time, for a valuable consideration, passed to him, and that by means of this false pretense he obtained the note with intent to cheat and defraud A., and then failed to assign or return the note to him, it was held not a false pretense within the meaning of the statute of Arkansas (Dig. 345, art. 8), because the promise was an agreement to do a future act. McKenzie v. State, 6 Eng. 594.

18. Where the false pretenses charged related to the payment of the proceeds of a cow and calf when sold, the procurance of another house for the party injured, and her removal thereto, free of expense, it was held that the indictment was insufficient. Glackan v. Com. 3 Metc. Ky. 232.

19. **Property must have passed.** To constitute the obtaining of money or goods under false pretenses, the owner must have intended to part with the right of property. If the legal possession remains in the owner, it will be larceny; but if a right of property passes, the offense is the obtaining of goods under false pretenses. State v. Vickery, 19 Texas, 326.

20. Where a person obtained possession of a promissory note by pretending that he wished to look at it, and then carried it away, and refused to give it back to the holder, it was held that this was merely a private fraud, and not indictable. People v. Miller, 14 Johns. 370.

21. A false representation inducing a person to pay a debt previously due from him is

not an obtaining of property by false pretenses. People v. Thomas, 3 Hill, 169.

22. An indictment cannot be maintained for obtaining money by false pretenses where the money is parted with as a charitable gift. People v. Clough, 17 Wend. 351.

23. It is not a cheating by false pretenses to obtain from a minor his note, which at the time of the prosecution is not due or paid. Com. v. Lancaster, Thach. Crim. Cas. 428.

24. Where the defendants conspired to cheat and defraud P., by obtaining from him valuable papers by means of an altered deed, which alteration was not material, though they at the time supposed it was, it was held that they were not entitled to acquittal on the ground that they failed to accomplish their object. State v. Mayberry, 48 Maine, 218.

25. But where after delivery, the seller on receiving information making him suspicious of the solvency of the buyer, said that he would reclaim the goods, and the buyer then made false representations as to his ability to pay for the goods, by means of which the seller abandoned his intention to reclaim them, it was held that the sale being complete before the representations were made, the accused could not be convicted. People v. Haynes, 14 Wend. 546.

26. **The property must have been parted with for an honest purpose.** If the person injured, in parting with his property was himself guilty of a crime, he will not be protected. People v. Stetson, 4 Barb. 151. The design of the law against obtaining money under false pretenses is to protect those who for some honest purpose are induced upon false and fraudulent representations to give credit or part with their property to another, and not to protect those who for unworthy or illegal purposes part with their goods. Where, therefore, the indictment alleged that the prisoner, intending to cheat and defraud one M., induced him, by falsely and fraudulently pretending that he had a warrant against him, to deliver to the prisoner a gold watch and diamond ring, it was held that a conviction could not be sustained. McCord v. People, 46 N. Y. 470.

27. But it is no defense to an indictment for obtaining goods by false pretenses that the party defrauded made false representations to the defendant as to the goods, or that the goods were of less value than charged in the indictment. Com. v. Merrill, 8 Cush. 571.

28. **Intention to restore property.** Where money is obtained from another by false pretenses, neither the intention or ability to repay it will deprive the false and fraudulent act of its criminality. Com. v. Coe, 115 Mass. 481; s. c. 2 Green's Crim. Reps. 292; State v. Thacher, 35 N. J. 445; s. c. 1 Green's Crim. Reps. 562.

29. To take from their place of deposit the bonds of a depositor, and send them out of the State to be used as collateral security for the defendant's own debt is a fraudulent conversion, and the intention to restore the bonds, and the agreement of the party who received them not to sell or dispose of them, does not do away with the criminal nature of the transaction. Com. v. Tenney, 97 Mass. 50.

30. **False statement as to ownership of property.** An indictment may be maintained for obtaining goods by false pretenses when a party represents that he is the owner of property which does not belong to him, and thus fraudulently induces the owner to sell the goods to him on credit. People v. Kendall, 25 Wend. 399. Proof that the defendant obtained from another three tubs of butter, by falsely pretending that he was a grocer and resided at a particular place, was held sufficient to sustain an indictment for obtaining property by false pretenses. People v. Dalton, 2 Wheeler's Crim. Cas. 161.

31. Where, upon an exchange of goods, one of the parties falsely and fraudulently pretends that the property which he is parting with belongs to him, and is unencumbered, and also warrants it against encumbrances, an indictment may be sustained against him where the false pretenses and not the warranty were the inducement in making the exchange. State v. Dorr, 33 Maine (3 Red.) 498.

32. **False statement as to situation or**

occurrence. It is a false pretense where a party has obtained goods by falsely representing himself to be in a situation in which he was not, or by falsely representing any occurrence that had not happened, to which persons of ordinary caution might give credit. McCorkle v. State, 1 Cold. Tenn. 333.

**33.** Swearing falsely to the loss by fire of goods which have been insured, and thereby getting the value of them from the insurance company, is obtaining money by false pretenses. People v. Byrd, 1 Wheeler's Crim. Cas. 242.

**34. In purchase or sale of goods.** A conspiracy to cheat and defraud another of goods, by obtaining the same on credit by falsely pretending that the party intended to take them to his store and sell them in the ordinary course of retail trade, is indictable as a conspiracy to obtain the goods by false pretenses under the statute of Massachusetts (Gen. Stats. ch. 161, § 64, and Stat. of 1863, ch. 248, § 2). Com. v. Walker, 108 Mass. 309.

**35.** An indictment was sustained against a baker employed by the army of the United States for a cheat in baking 219 barrels of bread and marking them as weighing 88 lbs. each, whereas they only weighed 68 lbs. Resp. v. Powell, 1 Dall. 47.

**36.** An indictment charged that the defendant, in an exchange of horses with one S., knowingly, designedly and falsely pretended that his (defendant's) horse was sound, when in fact it was not; that S. believed said false pretense, and was thereby deceived and induced to exchange and deliver his horse to the defendant, and was thus defrauded. *Held* a false pretense within the statute of Maine (R. S. ch. 126, § 1). State v. Stanley, 64 Maine, 157.

**37.** A person sold to another several barrels of turpentine, representing that "they were all right, just as good at the bottom as they were at the top." The barrels were afterward found to contain only a small quantity of turpentine on the top of each, the remainder being chips and dirt. *Held* a cheating by false tokens. State v. Jones, 70 N. C. 75.

**38. In payment of money.** The defendant, knowing that it was not genuine, passed a bill or paper having the appearance of having been long used, and printed in the ordinary form of a bank bill, but not signed by any one as president or cashier. The jury found him guilty of swindling, and the verdict was sustained. State v. Grooms, 5 Strobh. 158.

**39.** Where spurious coin is not a representation of genuine coin, but an imitation of it only on one side, it is not a counterfeit, but a false pretense to obtain money or property fraudulently. Roberts v. State, 2 Head, 501.

**40. Obtaining note.** Inducing an illiterate person, by false representations, to sign a note for a different amount from that agreed on, is indictable as a cheat. Hill v. State, 1 Yerg. 76.

**41.** An indictment will lie for obtaining a note or contract of suretyship by false pretenses. State v. Thatcher, 6 Vroom (35 N. J.) 445; s. c. 1 Green's Crim. Reps. 562.

**42. Between creditor and debtor.** Where, by means of false representations, a creditor makes his debtor believe that the debtor will receive a new and valuable consideration, and induces the debtor to part with money therefor (the creditor, at the time he takes the money, intending not to give the new consideration, and accordingly never giving it, but applying the money to the payment of the old debt), he is guilty of obtaining property by false pretenses. People v. Smith, 5 Parker, 490, Sutherland, J., *dissenting*.

**43.** A false representation made by a debtor to his creditor, that the debtor is insolvent, whereby the creditor is induced to part with his claim at a sacrifice, is obtaining property by false pretenses, and indictable. State v. Tomlin, 5 Dutch. 13.

**44.** On the trial of an indictment, under the statute of New Hampshire, for fraudulently mortgaging personal property to prevent it from being taken on *mesne* process, the defendant may be convicted if he falsely described the debt or obligation in the mortgage, and made the mortgage for the purpose of preventing the mortgaged prop-

erty from being taken for his debts, although, in so doing, he acted under the advice of legal counsel. State v. Marsh, 36 New Hamp. 196.

45. **Under the statute of New York.** In New York, to constitute the obtaining of goods by false pretenses, it is not necessary that there should be any false token, or that the false pretenses should be such as that ordinary care and common prudence were insufficient to guard against. The offense may be committed by intentionally and fraudulently prevailing upon the owner to part with his goods, or other things of value, either by falsehood or by the offender's assuming a false character, or by representing himself to be in a situation which he knows he does not occupy. People v. Haynes, 14 Wend. 546; 11 Ib. 557.

46. In New York, to constitute obtaining property by false pretenses, two things are necessary, viz.: a false representation as to an existing fact, and a reliance upon the representation as true. A. agreed to sell to B. one hundred shares of stock, to be delivered and paid for, the next day; before transferring the stock, A. sent for B.'s check, and received for answer that B. had sent his check to be certified, and would send it to A. in ten or fifteen minutes; and A. thereupon transferred the stock to B. *Held* that, as A.'s reliance was on the promise and not upon the representation that the check had been sent to be certified, the case was not within the statute. People v. Tompkins, 1 Parker, 224.

47. The offense of obtaining property by false pretenses is complete within the statute of New York, when one is induced to put his signature to a written instrument, or to part with his property by a false pretense or representation as to an existing fact, willfully and designedly made for the purpose of obtaining such signature or property with the intent to cheat or defraud him; and it is not necessary that the pretense should be such that ordinary care and circumspection could not have prevented it, or that it should be accompanied by any "artful contrivance." It is sufficient if it be such that, if true, it would naturally and according to the motives which influence the honest mind, lead to the result. It is not essential to the offense under the statute, that actual loss or injury should be sustained. Neither is it material where the pretenses were made. The obtaining the signature or property by means of them, with intent to cheat or defraud, completes the crime and determines the place of trial. People v. Sully, 5 Parker, 142; People v. Stone, 9 Wend. 182.

48. In New York, to constitute the obtaining of the signature of a person to a written instrument by false pretenses, within the statute, the instrument must be such as to work prejudice to the property of the person affixing the signature, or of some other person. People v. Galloway, 17 Wend. 540. A writing in the form of a bond, without signature, is not a false writing within the statute of New York. People v. Gates, 13 Wend. 311.

49. Buying or receiving and storing for hire, by false weights or measures, is a misdemeanor at common law, and in New York, being now a felony by statute, the misdemeanor is merged in the felony. People v. Fish, 4 Parker, 206.

50. To render a party making a sale liable under the statute of New York (Laws of 1862, 1863), entitled "an act to prevent and punish the use of false stamps, labels, or trade-marks," the sale must have been made with intent to defraud some person or persons, or some body corporate. Low v. Hall, 47 N. Y. 104.

51. **Under the statute of Massachusetts.** A false pretense under the statute of Massachusetts, is a representation of some fact or circumstance calculated to mislead, which is not true, with a fraudulent intent. Com. v. Drew, 19 Pick. 179. Where the defendant took an assumed name, and delivered spurious quarter lottery tickets to another for sale on commission, declaring that he had in a bank the genuine corresponding whole tickets, and thereby obtained money, it was held to be false pretenses within the statute of 1815, ch. 136. Com. v. Wilgus, 4 Pick. 177.

52. In Massachusetts, the statute against

obtaining money by false pretenses (Gen. Stats. ch. 161, § 54), includes cases where the money is parted with as a charitable donation. Com. v. Whitcomb, 107 Mass. 486.

**53. In Pennsylvania.** A false statement as to the possession of money, on the credit of which goods are obtained, is a false pretense within the Pennsylvania act of 1842. Com. v. Burdick, 2 Barr, 163.

**54.** A conspiracy to cheat by offering to sell forged foreign bank notes, is indictable in Pennsylvania. Twitchell v. Com. 9 Barr, 211. And see Rhoads v. Com. 15 Penn. St. 272. Cheating with false dice is an indictable offense in that State. Resp. v. Teischer, 1 Dall. 335.

**55.** Obtaining a receipt in discharge of a debt which was paid with the worthless note of a broken bank, is not the obtaining money, personal property, or other valuable thing, by false tokens or false pretenses, within the statute of Pennsylvania (of 1842, § 21). Moore v. Com. 8 Barr, 260.

**56. In Ohio and Michigan.** In Michigan, procuring by falsehood the indorsement of a promissory note is not a false pretense within the statute, unless done with the intent to defraud; and in such case, the intent being the gist of the offense, must be shown beyond a reasonable doubt. People v. Getchell, 6 Mich. 496. Whether procuring, by false pretenses, the signature of a party to a negotiable promissory note, which he is ultimately compelled to pay, is an offense within the statute of Ohio—*query*. Dillingham v. State, 5 Ohio, N. S. 280.

**57. In Iowa.** In Iowa, under the statute (Rev. § 4394), an indictment for cheating by false pretenses may be maintained, although no false tokens were used, and the acts imputed to the defendant were of private and not public concern. State v. Reidel, 26 Iowa, 430.

**58.** The obtaining of an indorsement or credit upon a promissory note, is not an obtaining of property, money, or goods by false pretenses, within the meaning of the statute of Iowa. State v. Moore, 15 Iowa, 412.

**59. In North Carolina.** In North Carolina, a fraud on an individual, without false token or any deceitful practice affecting the community at large, and without conspiracy, is not indictable. State v. Justice, 2 Dev. 199.

**60. In South Carolina.** In South Carolina, obtaining horses from an ignorant countryman by threats of a criminal prosecution for horse stealing, and by threatening his life, constitutes the offense of swindling under the act of 1791. State v. Vaughan, 1 Bay, 282.

**61.** Selling a promissory note which the party selling knew had been paid, but which he represented to the purchaser to be still due according to its face, is not an indictable offense in South Carolina. Middleton v. State, Dudley, 275.

**62. Under acts of Congress.** To sustain an indictment under the act of Congress of March 3d, 1823, § 1 (3 U. S. Stat. at Large, 771), for presenting a false paper in support of a claim against the United States, it is not necessary that the claim should be in favor of the person who presents the false paper. U. S. v. Kohnstamm, 5 Blatchf. 222.

**63.** A person who, while engaged in a retail trade, purchases large quantities of goods ostensibly in his regular business, but sends them away and sells them at wholesale at a sacrifice, is guilty of a false pretense under the 44th section of the bankrupt act. U. S. v. Frank, 2 Biss. 263.

**64. To bailee or agent.** The defendant may be convicted, although the money belonged to another, and was in the custody of the prosecutor as bailee. Britt v. State, 9 Humph. 31.

**65.** A false pretense to an agent who communicates it to his principal, who is induced by it to act in the matter, is a false pretense to the principal. And the same is true as to obtaining money by false pretenses from an agent, who pays it by direction of his principal. Com. v. Call, 21 Pick. 59.

**66. By one of several.** When false pretenses are made by one of several, pursuant to an agreement made between them, all are liable. Cowan v. People, 14 Ill. 348.

**67. When completed.** The offense of cheating by false pretences is completed, when the false pretenses are successfully

employed, and the money or property obtained, although the fraud was contrived in another place. People v. Adams, 3 Denio, 190. A single false pretense is sufficient. State v. Dunlap, 24 Maine, 77; and it is not essential that actual loss has been sustained. State v. Pryor, 30 Ind. 350.

2. Affidavit for arrest.

**68. What to contain.** An affidavit for the arrest of a person for fraudulently obtaining goods, must set out all the facts, and they must be averred positively. And where any of the facts relied upon are derived from information, they may be so stated; but the sources and nature of the information must be stated, and good reasons given, for not making a positive statement. Whitlock v. Roth, 10 Barb. 78.

3. Indictment.

**69. Must charge means.** An indictment for false pretenses cannot be predicated upon mere matters of opinion; and it must allege that the money or property was obtained by means of the false representations. State v. Webb, 26 Iowa, 262; State v. Orvis, 13 Ind. 569.

**70.** Where in an indictment for obtaining property by false pretenses, there was no direct averment that the pretenses had any influence upon the mind of the prosecutor, it was held that although it would have been more in accordance with the rules of pleading, to have inserted such an allegation, yet as it was alleged that by the false pretenses the prisoner obtained the property, it was held that the indictment was sufficient. Clark v. People, 2 Lans. 329; disapproving State v. Philbrick, 31 Maine, 401.

**71. By sale or exchange of property.** Where money or other property is obtained by a sale or exchange effected by means of false pretenses, such sale or exchange ought to be set forth in the indictment, and the false pretenses should be alleged to have been made with a view to effect such sale or exchange, and that by reason thereof the party was induced to buy or exchange. State v. Bonnell, 46 Mo. 395; referring to Com. v. Strain, 10 Metc. 521.

**72.** An indictment charged that the defendant presented to one N. certain checks, and represented to him that they were good, and of nearly par value, by means of which pretense he obtained from N. a set of harness. *Held*, bad in not alleging that the checks were delivered to N. or received by him in payment for the harness. Johnson v. State, 11 Ind. 481.

**73.** An indictment for obtaining money by falsely representing a promissory note to be a draft, must state how the instrument was defective. State v. Dyer, 41 Texas, 520.

**74.** An indictment for obtaining by false pretenses, a bank check in exchange for a note is insufficient, which fails to allege that the defendant delivered the note to the complainant, and that he received the same, and that the defendant by said false representations induced the complainant to receive it, and that the latter then and there delivered the check to the defendant. Com. v. Goddard, 4 Allen, 312.

**75.** An indictment for a conspiracy to cheat, by offering to sell forged foreign bank notes of a denomination the circulation of which was forbidden by law, charged that the defendants in pursuance of their conspiracy did "offer to sell, pass, utter and publish to," &c. *Held* sufficient. Twitchell v. Com. 8 Barr. 260.

**76.** Where an indictment charged that the defendant falsely pretended that a certain certificate of shares of stock was genuine, and good as security for a loan of money which F. was induced to make to him thereon; and the certificate, which was set forth, stated that F. was the owner of the stock, it was held that as the certificate, although previously made in the name of the lender, would not become his in fact until the loan was perfected and the certificate delivered to him, the indictment sufficiently showed in what manner F. was defrauded. As the indorsements on the certificate form no part of it, they need not be set out. Com. v. Coe, 115 Mass. 481; s. c. 2 Green's Crim. Reps. 292.

**77.** Where an indictment charged that the defendant, by false pretenses, intended

to cheat and defraud G., and proposed an exchange of his mare for the horse of G., without alleging that such an exchange took place, or that the false pretenses were made with a view or design to effect such exchange, it was held insufficient. State v. Philbrick, 31 Maine, 401.

78. In Connecticut, an information which alleged that A., of, &c., contriving and intending by false pretenses to cheat and defraud B. of his goods, to wit, of one pair of oxen of the value of, &c., falsely represented to B. that he, the said A., owned a farm, and was worth money enough to pay for twenty such yokes of cattle, was held sufficient as a false pretense within the statute, although it was not expressly charged that credit was given to the representation, but only that the oxen were thereby obtained. State v. Penley, 27 Conn. 587.

79. An indictment for fraud, alleging that the goods were "sold to divers persons," was held bad for uncertainty. State v. Woodson, 5 Humph. 55.

**80. By removing and concealing property.** Where an indictment alleged both that the defendant removed and concealed, and aided and abetted in removing and concealing mortgaged property, with the fraudulent intent to place the same beyond the control of the mortgagee, it was held that as under the statute (Gen. Stats. of Mass. ch. 161, § 61) the offense was but a misdemeanor, the averment of aiding and abetting was surplusage. Com. v. Wallace, 108 Mass. 12.

**81. In obtaining signature.** It is sufficient, in an indictment for obtaining the signature of a person to a written instrument by false pretenses, to show that the instrument on its face is one calculated to prejudice the person who has signed it, though void, on account of the fraud. People v. Crissie, 4 Denio, 525.

82. An indictment for obtaining by false pretenses, the signature of a person to a deed of land, must charge that the prosecutor owned, or had some interest in the land described in the deed, or that the deed contained covenants making him liable to an action; and the deed must be set out. Dord v. People, 9 Barb. 671.

83. An indictment for obtaining the signature of a person to a mortgage by false pretenses, must aver a delivery. Fenton v. People, 4 Hill, 126.

84. An indictment for obtaining a signature to a note by false pretenses, charged that the pretenses were made to induce K. to become the security of L. on a six hundred dollar note, but that instead of going security he became a principal, and made a note for six hundred dollars payable to L. *Held*, that the indictment was bad for ambiguity and uncertainty. State v. Locke, 35 Ind. 419.

**85. Charging bankrupt.** It is not sufficient in an indictment under section 44 of the bankrupt act, for fraudulently obtaining goods on credit, to aver that proceedings in bankruptcy were duly commenced. It must be pleaded and proved that a petition in bankruptcy was presented to the court by a certain creditor, naming him, and the amount of the debt of such petitioning creditor, the alleged cause of bankruptcy, and the adjudication of bankruptcy. It must appear affirmatively that the creditor had a right under the law to commence and prosecute proceedings in bankruptcy, and the amount of his debt must appear. It must appear that the bankrupt obtained goods within three months of the bankruptcy by means of a representation which he knew to be false, and that he was carrying on business and dealing in the ordinary course of trade. A description of the goods obtained of the defendant as "a large quantity of boots and shoes," is bad for uncertainty. U. S. v. Prescott, 2 Bis. 325.

**86. Must set out the pretenses.** The indictment must state what the false pretenses were; and they must be proved as laid. Glackan v. Com. 3 Metc. Ky. 232; Cowan v. People, 14 Ill. 348; Com. v. Frey, 50 Penn. St. 245. It is not sufficient to charge the false pretenses in general terms; but they must be stated specifically and with certainty. Burrows v. State, 7 Eng. 65. Where the false pretenses consist of language employed by the defendant, it is suf-

ficient to set it out in the indictment as it was uttered, without undertaking to explain its meaning. State v. Call, 48 New Hamp. 126.

87. An indictment is sufficient which alleges that the defendant falsely pretended that a certain metallic medal was a current gold coin called an eagle, of the value of ten dollars, and thereby induced A. to receive the same as such, and to give in exchange therefor sundry current bank bills and silver coin, amounting together to the sum of nine dollars and seventy cents. Com. v. Nason, 9 Gray, 125.

88. In Massachusetts, an indictment under the statute (R. S. ch. 126, § 32) was held insufficient, which charged that the defendant, intending to cheat and defraud B. of his money and property, designedly and knowingly falsely pretended to him, that a watch which the defendant had, was a gold watch, by means whereof the defendant did designedly and knowingly obtain from B. $35, with intent to cheat and defraud him of the same, whereas, in fact, the watch was not a gold watch, and the defendant knew it was not. Com. v. Strain, 10 Metc. 521.

89. In Massachusetts, an indictment under the foregoing statute was held good which charged that G. designedly and unlawfully pretended to N. that A. wanted to buy cheese of N., and had sent G. to buy it for him, and that a certain paper described, purporting to be a ten dollar bill of the Globe Bank in the city of New York, was a genuine bill and of the value of ten dollars, by means of which false pretenses, said G. illegally obtained from said N. forty pounds of cheese, of the value of four dollars, and bank bills and silver coins, of the value of six dollars, with intent to cheat and defraud, whereas the said A. did not wish to purchase cheese of N., and had not sent G. to him for that purpose, and the said paper was not a genuine bill of the Globe Bank in the city of New York, and was not of the value of ten dollars, but was worthless. Com. v. Hulbert, 12 Metc. 446.

90. An indictment which alleges that A., B. and C., intending to cheat and defraud, conspired to get into their possession certain goods of a specified value, under color and pretense of a purchase of the same upon the credit of C. from such parties as could thereafter be induced by C. to part with goods, under the false and fraudulent pretense thereafter to be made to such parties by C. that C. intended to take such goods to his retail store for the purpose of selling them in the usual and ordinary course of retail trade, is sufficient as an indictment for a conspiracy to obtain goods by false pretenses within the statute of Massachusetts (Gen. Stats. ch. 161, § 64, and Stat. of 1863, ch. 248, § 2). Com. v. Walker, 108 Mass. 309.

91. In Massachusetts, an indictment for obtaining money by false pretenses, which charged that the false pretenses were practiced upon one, and his money obtained with intent to defraud another, was held to be good. Com. v. Call, 21 Pick. 515.

92. An indictment, which alleges that the defendants falsely represented that sheep which they offered to sell were free from disease, and that the lameness which affected some of them was caused by an accidental injury, by means of which the defendants obtained money on the sale of said sheep, and negativing the facts represented, is sufficient, under the statute of New York against cheating by false pretenses. People v. Crissie, 4 Denio, 525.

93. An indictment for obtaining goods under false pretenses set out in substance that the prisoner, with intent feloniously to cheat and defraud one Stork, did knowingly &c. represent to him that a certain instrument in writing for the payment of money, commonly called a bank check, which he then and there delivered to him, purporting to have been drawn by one Smith upon the Ocean Bank of the city of New York, dated &c., for the sum of $140, was a good and genuine check, and that he, the prisoner, had money on deposit in said bank, and said check would be paid on presentation. *Held* good. Smith v. People, 47 N. Y. 303. What an indictment for obtaining goods under false pretenses should contain. Lambert v. People, 9 Cow. 578.

94. Although proof of a false promise will not sustain an indictment for obtaining

property under false pretenses, yet if the pretense and promise blend together and jointly act upon the defrauded person, whereby he is induced to give faith to the pretense, it is otherwise. The following indictment was held sufficient: That the defendant by false pretense, and with intent to defraud H., falsely pretended to H. that he had come to pay him $20 due H. from the defendant, and H. believing the said false pretense, and deceived thereby, was induced by reason thereof to sign a receipt for said $20, which said receipt the defendant took and carried away without the consent of H., and did not pay H. $20 or any other sum, and that the defendant did not come to pay H. $20 or any other sum. State v. Dowe, 27 Iowa, 273, Wright, J., *dissenting.*

**95.** An indictment for cheating by false pretenses, alleged that the defendant, to induce R. to part with a note which R. held against him, pawned a watch as a pledge that he would do a certain thing, falsely representing the watch to be worth a sum exceeding its real value, and also that it was the property of his wife; but did not allege that he represented he was authorized by her to part with it. *Held* bad on demurrer. State v. Estes, 46 Maine, 150.

**96.** In South Carolina, under the statute of 1791, an indictment was held insufficient, which merely alleged that the defendant, falsely and fraudulently pretending that a certain mulatto was a slave, did falsely cheat and defraud one A., by selling said mulatto to him for a slave, when said mulatto was free. State v. Wilson, 2 Const. R. 135.

**97.** An indictment charging that the defendant obtained the property of A. by falsely pretending to him that his goods and chattels were about to be attached, is bad for the reason that it relates to a future transaction. McKenzie v. State, 6 Eng. 594.

**98. Averment of intent.** Although an indictment for obtaining money by false tokens, must describe the offense as to time and place, and allege every material fact, yet the intent need not be averred. State v. Bacon, 7 Vt. 222.

**99.** In an indictment for obtaining a signature to a written instrument by a false pretense with intent to defraud, the fraudulent intent is an essential element of the offense, and must be distinctly charged by an affirmative allegation, and not by way of inference or argument merely. Com. v. Dean, 110 Mass. 64.

**100.** Where the case made by the indictment was, that the prosecutor having taken a promissory note payable to his own order, for a debt due to himself from the defendant, was induced to indorse and deliver it back to the defendant, and there was no averment that the defendant obtained the indorsement of the prosecutor with intent afterward to negotiate it on his own account, it was held that a conviction could not be sustained. People v. Chapman, 4 Parker, 56.

**101.** In New York, an indictment for receiving and storing for hire by false weights and measures, must charge the acts and intents of the prisoner to have been felonious; and it must name the person defrauded, or aver that he was to the jurors unknown. People v. Fish, 4 Parker, 206.

**102. Description of property.** The indictment need not mention all the property which the defendant obtained by the false pretenses. People v. Parish, 4 Denio, 153.

**103.** A description of property obtained by false pretenses, as "a check and order for the payment of money" is sufficient, without setting out the check. Com. v. Coe, 115 Mass. 481.

**104.** An indictment for obtaining money by false pretenses which avers that S. delivered, and the defendant received, forty-six dollars of the money and property of the said S., is sufficient without describing the money. Com. v. Lincoln, 11 Allen, 233.

**105.** Where a statute made the offense consist in the fraudulent obtaining of money, goods or chattels, an indictment was held insufficient, which charged the obtaining by means of a counterfeit letter, one hundred dollars in a note of the Bank of Virginia, on the ground that a bank note was not money within the meaning of the statute. But an indictment was held good which alleged the obtaining from the Bank of Virginia, by similar means, of fifty dollars in

money current in Virginia. Com. v. Swinney, 1 Va. Cas. 146, 150, 151, *note*.

**106.** An indictment for the fraudulent removal and concealment by the defendant of his own personal property, with intent to place it beyond the control of the mortgagee, described the property as "a large quantity of ready made clothing, the whole of the value of five hundred dollars, a large quantity of dry goods, the whole of the value of five hundred dollars, a large quantity of boots and shoes, the whole of the value of five hundred dollars, and a large quantity of hats and caps, the whole of the value of five hundred dollars, which said personal property the jurors cannot more particularly describe." *Held* sufficient. Com. v. Stangford, 112 Mass. 289.

**107.** As promissory notes are not public tokens, an indictment for a cheat at common law, by passing certain "promissory notes" as and for bank notes, without charging that they resembled bank notes, is insufficient. State v. Patillo, 4 Hawks, 348. An indictment which alleges in one count the possession, and in another the uttering, of a forged bank bill, with an intent to defraud, does not charge a common-law cheat. State v. Brown, 4 R. I. 528.

**108.** An indictment for cheating by false tokens, in obtaining property by means of a counterfeit coin, need not aver to what currency the coin counterfeited belonged; nor that the spurious coin was made like the one imitated, the word "*counterfeit*" being sufficient; nor that the property was obtained by means of passing the false coin; nor the value of the thing obtained, or that it was of any value; nor that it was the property of the person from whom it was alleged to have been obtained. State v. Boon, 4 Jones, 463.

**109.** Where an indictment charges that the defendant intended to cheat the prosecutor out of twenty acres of land, the excess in quantity over thirty-five acres, there should be an averment that there was in fact such an excess of twenty acres. State v. Burrows, 11 Ired. 477.

**110.** An indictment for the fraudulent conveyance of real estate without giving notice of an encumbrance thereon, which alleges that the defendant conveyed a certain parcel of land in the city of Salem, county of Essex, without any other terms of description, is bad for uncertainty. Com. v. Brown, 15 Gray, 189.

**111. Averment of ownership.** An indictment for obtaining goods by false pretenses, must contain an averment of ownership, or give a reason for not making the averment. State v. Lathrop, 15 Vt. 279; State v. Smith, 8 Blackf. 489; Leobold v. State, 33 Ind. 484; Thomson v. People, 34 Ill. 60; Washington v. State, 41 Texas, 583, and allege that they were obtained by means of the false representations. Epperson v. State, 42 Texas, 79; State v. Green, 7 Wis. 676.

**112.** An indictment for obtaining money by false pretenses, averred that K. presented a forged writing as true, to S. W., Jr., representing that his mother had signed it, and wished him "to obtain seven dollars from his employers," and give it to K., and that the son believing the representations, procured from his employers the said sum of seven dollars of the proper moneys of S. W., Sr. But the indictment did not show how the moneys so obtained were the property of S. W., the elder. *Held* that the indictment was bad and the prisoner entitled to judgment. People v. Krummer, 4 Parker, 217.

**113.** An indictment for selling property conditionally mortgaged, with intent to defraud, must allege that previous to the sale, the mortgage had become absolute by the happening of the condition. State v. Devereux, 41 Texas, 383.

**114. Allegation of value.** The indictment need not charge that the property was of a particular value. People v. Stetson, 4 Barb. 151. An indictment against A., for obtaining the horse of B. by the false pretense that the mare which he exchanged therefor was his own and was unencumbered, did not charge that the mare was of any value. *Held* not good ground for arrest of judgment. State v. Dorr, 33 Maine, 498.

**115.** In New Hampshire, an indictment for the unlawful and fraudulent sale of mortgaged property contrary to the statute, must allege the value of the property at the

time of the sale. State v. Ladd, 32 New Hamp. 110.

**116.** An indictment which charges that by means of false pretenses, the defendant obtained "sixty-five dollars in money," is sufficiently definite and certain without an additional averment of the value of the money. Oliver v. State, 37 Ala. 134.

**117. Charging several.** Where the first and third counts of an indictment charged false pretenses against A. and B., while the second and fourth counts included also C., the same felony being charged in all of the courts, it was held that the indictment was good. Casily v. State, 32 Ind. 62.

**118. Must negative truth of pretenses.** The indictment must negative the truth of the pretenses. Tyler v. State, 2 Humph. 37. But all of the pretenses charged need not be negatived. It is sufficient to negative such as are relied on by the prosecution. People v. Strong, 9 Wend. 182; People v. Gates, 13 Ib. 311; Com. v. Merrill, 8 Cush. 571.

**119.** Where an indictment alleged that the defendant falsely pretended to A., that B., C. and D. were indebted to the defendant in a certain amount, and that they were bound to pay a certain bill of exchange, then in the defendant's possession and overdue, drawn by the defendant on said B., C. and D., payable to their order ninety days after date, and accepted by them, and which they indorsed to the defendant, and obtained from said A. certain goods, with intent to cheat, &c.; whereas, in fact, the said B. and C. were not then indebted to the defendant, nor were said B., C. and D. bound to pay said bill, it was held that the first pretense was not well negatived, and as to the second, that there ought to have been an allegation that the defendant knew that B., C. and D. were not bound to pay the bill. State v. Smith, 8 Blackf. 489.

**120.** Where an indictment alleges that the prisoner obtained the property upon giving his note, which he falsely and fraudulently represented that he was able to pay, it need not aver that he did not pay the note. Clark v. People, 2 Lans. 329.

**121. Sufficiency of indictment question of law.** It is not error on a trial for obtaining goods under false pretenses for the judge to refuse to charge that the pretense must appear upon the indictment to be such as could not be guarded against by an exercise of common sagacity and prudence; the sufficiency of the indictment being a question of law. Smith v. People, 47 N. Y. 303.

**122. Place of trial.** A. was indicted in New York for obtaining money from commission merchants in that city, by showing them a fictitious receipt, signed by a forwarder in Ohio, falsely acknowledging the delivery to him of a quantity of produce for the use of and subject to the order of the firm. The defendant set up in defense, that he was a citizen of Ohio, had always lived there, and had never been in the State of New York; that the receipt was drawn and signed in Ohio, and the offense was committed by the receipt being presented to the firm in New York by an innocent agent of the defendant. *Held*, that the defendant was properly indicted in New York. Adams v. People, 1 Comst. 173.

### 4. Evidence.

**123. Burden of proof.** On the trial of an indictment for obtaining money under false pretenses, the burden of proof is on the prosecution to show that the pretenses were false, unless the fact lies peculiarly in the knowledge of the accused; and it must be proved not only that false pretenses were made with the design of obtaining the money, but that the money was paid in consequence of the false pretenses. Bowler v. State, 41 Miss. 570.

**124. Best evidence must be produced.** On the trial of an indictment for obtaining a bank check in exchange for a note, by falsely pretending that the note was genuine, the testimony of a witness that he heard the maker of the note say that the defendant had authority to use his name upon the note, and that it was signed by his authority, is mere hearsay and inadmissible. Com. v. Goddard, 2 Allen, 148; s. c. 4 Ib. 312; 14 Gray, 402.

**125.** On the trial of an indictment for obtaining money by false pretenses, by repre-

senting that the defendant had money in a bank in another State, the certificate of protest of the notary public who protested the drafts drawn on the bank is not competent evidence to show that the defendant had no money in the bank. State v. Reidel, 26 Iowa, 430.

**126.** Where the question is, whether a check was drawn on a bank by a person who had no funds therein, and the accused waives the production of the books of the bank, the book-keeper of the bank is a competent witness to show that at the date of the transaction there were no funds in the bank for the payment of the check. Smith v. People, 47 N. Y. 303.

**127.** In New Jersey, an indictment under the statute (Nix. Dig. 170, § 53) for obtaining property by false pretenses is sustained by proof of a verbal pretense made with intent to cheat and defraud, and which induced a person to part with his property or give credit. State v. Duckworth, 3 Dutch. 328.

**128.** On the trial of an indictment for obtaining money under false pretenses, it is competent for the complainant to testify that he relied on the representations of the prisoner. People v. Sully, 5 Parker, 142.

**129.** Under an indictment for swindling in selling a tract of land a second time, it is not necessary to prove that the second purchaser has tested his title by action. State v. Dozier, Dudley, Ga. 155.

**130. All of the pretenses charged need not be proved.** Although when all of the pretenses charged are a substantive part of the offense, all must be proved to be false; yet it is otherwise where one or more of the pretenses are sufficient *per se* to constitute the offense. People v. Haynes, 11 Wend. 557; 14 Ib. 546; Britt v. State, 9 New Hamp. 31; Thomas v. People, 34 N. Y. 351.

**131.** If the jury are satisfied of the existence of a conspiracy, and that a material portion of the representations made in carrying it into effect are false, they may find in the absence of explanation, that the other statements were made for the same purpose, and were also untrue. The conduct and declarations of the several parties, together with proof that one of them, with the prisoner, went through the same performance two days before, for the purpose of getting money from another person, are admissible to show the *quo animo* of the accused in the offense charged. Bielschofsky v. People, 5 N. Y. Supm. N. S. 277.

**132. Variance as to name.** An indictment charged that by means of certain false and fraudulent representations made to B., a member of the firm of B., K. & Co., the defendant procured certain goods. The evidence showed that the style of the firm was B. & K. *Held* that the variance was fatal. Mathews v. State, 33 Texas, 102.

**133.** An indictment charged the defendant with branding a steer, the property of Joseph F. Rowley. The evidence showed that the steer belonged to Napoleon B. Rowley. *Held* that the variance was fatal. Mayes v. State, 33 Texas, 340. An indictment for obtaining goods by false pretenses charged that the defendant falsely pretended that he had an order from a person in New York, whose name he did not mention. The proof was that the defendant stated he had an order from "another party," but that he did not say who the party was, or in what place he resided. *Held* that the variance was fatal. Com. v. Jeffries, 7 Allen, 548.

**134. Amount represented.** Although sums of money, dates, &c., need not usually be averred with accuracy, yet when they constitute a part of the description of the offense, they must be proved as laid. Where therefore an indictment for obtaining money and a signature by false pretenses alleged that the defendant represented that his house and lot were worth $2,600, and it was proved that he stated that they were worth $2,200 or $2,300, it was held that the variance was fatal. Todd v. State, 31 Ind. 514.

**135.** An allegation in an indictment that the prisoner pretended "that he had in Macon seven thousand dollars," is materially variant from a pretense "that he had seven dollars less than seven thousand in a bank in Macon." O'Connor v. State, 30 Ala. 9.

**136.** Where the indictment charged that the defendant represented that a firm, of which he was a member, was then in debt

to the amount of not more than three hundred dollars, and the representation proved was that the firm did not then owe more than four hundred dollars, it was held that the variance was fatal. Com. v. Davidson, 1 Cush. 33.

**137.** But where the indictment charged the obtaining by false pretenses the signature of a party to a promissory note, by pretending that the defendant had money in the hands of a third person, who was absent, it was held that it was not necessary to prove the amount represented to be the identical sum stated in the indictment, provided it was sufficient to meet the payment of the note which the party was induced to sign. People v. Herrick, 13 Wend. 87.

**138. Property represented.** Where under an indictment for obtaining goods by false pretenses, which described the property as "a package of money containing the sum of sixty dollars in bank bills," and the court charged the jury that, "if the package contained anything that passed current at par as money, the offense charged would be sustained," it was held error. State v. Kube, 20 Wis. 217.

**139.** An indictment alleged that the defendant falsely and knowingly presented and pretended to A. that a certain writing, in the form of a bank bill, was a good bank bill for the payment of five dollars; that A., believing the representation, was thereby induced to deliver to the defendant certain goods, and certain genuine bank bills and coins, in exchange for said writing, and that the defendant thereupon delivered said writing to A. for five dollars, whereas said writing was not a good bank bill for five dollars, as the defendant then well knew. *Held* that the indictment was not proved by evidence that the writing was a bill of a bank that had failed. Com. v. Stone, 4 Metc. 43.

**140.** Where an indictment for the fraudulent conveyance of real estate alleged that the defendant, "by a certain deed of warranty, did make a conveyance of a certain parcel of real estate," and the deed offered in evidence was a conveyance of "the right, title, and interest" of the grantor, subject to a mortgage which was set out, and excepted from two covenants, it was held that the variance was fatal. Com. v. Brown, 15 Gray, 189.

**141.** An indictment for cheating by false pretenses alleged that a certificate of stock was not a good, valid, and genuine writing and certificate, but was false, forged, and counterfeit, and of no value. The certificate proved was in fact a certificate issued for one share and afterward altered to one hundred shares. *Held* no variance. Com. v. Coe, 115 Mass. 487.

**142.** An indictment for the fraudulent breach of a trust alleged that the trust consisted in safely keeping lumber for A. The evidence was that the trust consisted in sawing lumber in a mill on A.'s premises, and shipping it to market. *Held* that the variance was fatal. State v. Green, 5 Rich. N. S. 65.

**143. Representation as to indebtedness.** Where an indictment charged that the defendant represented that he was a partner with another person, who had put into the partnership a capital of a thousand dollars, which they then had invested and employed in their partnership business, and that the copartners were worth property to the amount of fifteen hundred dollars, and did not owe more than three hundred dollars, it was held that evidence of the individual indebtedness of the defendant and his partner was not admissible. Com. v. Davidson, 1 Cush. 33.

**144. Where goods are obtained from agent.** An indictment alleging that the defendant obtained goods of partners in trade by false pretenses made to them, is sustained by evidence that the defendant made the false pretenses to their clerk and salesman, who communicated them to one of the partners, and that the goods were delivered to the defendant by reason of the false pretenses. Com. v. Harley, 7 Metc. 462. And see Com. v. Mooar, Thach. Crim. Cas. 410.

**145. Proof of credit.** On the trial of an indictment for obtaining goods by false pretenses, the testimony of the vendor is admissible to show to whom he gave credit;

and it may be left to the jury to determine on the whole evidence, including the entries on the books, whether the sale was on the credit of the defendant or that of the undisclosed principal. Com. v. Jeffries, 7 Allen, 548.

**146.** On the trial of an indictment for cheating by false pretenses in obtaining a loan from F., by means of a forged certificate of stock, the fact that the certificate was offered and received as security for the loan, is evidence from which the jury may find that F. was thereby induced to part with his money, notwithstanding the testimony of F. that he "had every confidence in" the defendant, in reply to the question if he did not rather trust him than any security. Com. v. Coe, 115 Mass. 481.

**147.** Where two are jointly indicted, and there is evidence that one of them, with the knowledge and by the direction of the other, made the false pretenses charged, both may be found guilty without proving that they obtained the goods on their own account, or derived, or expected to derive, any pecuniary benefit therefrom. Com. v. Hurley, 7 Metc. 462.

**148. Guilty knowledge.** On a trial for cheating by false pretenses, in representing that a forged certificate of stock was genuine, evidence of the possession and use by the defendant of other altered and false certificates about the same time, before or afterward, is competent to show that his possession of those for the use of which he was indicted, was not accidental. Com. v. Coe, 115 Mass. 481; s.c. 2 Green's Crim. Reps. 562.

**149.** On the trial of an indictment for cheating by falsely pretending that a bill of an insolvent bank was good, evidence of the depreciated value of the bills of the bank, with proof that the bank has refused to pay its bills, and that they are not current, is competent, and it may be shown that the prisoner had in his possession and passed other similar bills. Com. v. Stone, 4 Metc. 43.

**150.** On the trial of an indictment for concealing the goods of a debtor to prevent their being taken for his debts, for the purpose of showing that the goods concealed were the property of the debtor, it may be proved that a mortgage of the same goods by the debtor to the defendant, previously executed, was fraudulent, although the defendant, in taking such mortgage, committed a distinct offense. State v. Johnson, 33 New Hamp. 441.

**151.** To authorize a conviction under an indictment for fraudulently packing cotton, the guilty knowledge of the defendant must be shown in addition to the proof that it was fraudulently packed at the defendant's gin by his employees. State v. Pitts, 13 Rich. 27.

**152. Guilty intent.** On the trial of an indictment for obtaining goods by false pretenses, evidence that at the time of making the alleged false representations, the defendant was insolvent, is admissible to show fraudulent intent. Com. v. Jeffries, 7 Allen, 548. And a conversation by him prior to the making of the false pretenses charged relative to the subject-matter of them, is admissible for the same purpose. Com. v. Castles, 9 Gray, 121.

**153.** On the trial of an indictment for obtaining property by false pretenses, through representations made by the prisoner to C., that there was no encumbrance on the land, except the mortgage then sold by the prisoner to C., there being in fact a prior mortgage upon it, executed shortly previous, by M. to L., it was held competent to prove that M. told L. when he executed the mortgage to him, in presence of the prisoner, that he need not be in a hurry to get his mortgage recorded; such evidence, in connection with the conduct and acts of the prisoner, being material upon the question of intent. People v. Sully, 5 Parker, 142.

**154.** Where the false representations were that the defendant owed but little, that he was owing C. for a pair of oxen, and was not owing any other large debt, that the sale of his wood and bark he then owned, would more than pay all he owed, and that his note for $250 was good, it was held that the fact that the defendant, three days afterward, mortgaged the greater part of his personal property, was admissible in evidence as bearing on the question of the defendant's

intent in making the representations. State v. Call, 48 New Hamp. 126.

**155.** Where it was shown that the complainant's money was borrowed by a confederate of the prisoner, to stake on a pretended bet with him; that the prisoner, claiming to have won the bet, seized the money and went away with it, and that his confederate then gave the prosecutor a worthless bank check for a large amount, which was refused payment on presentation, it was held that the evidence in relation to the check was admissible, on the question of fraudulent intent. Johnson v. State, 29 Ala. 62.

**156.** If a particular result is designed to be fraudulently accomplished by making the false pretense, which fails, and another thing of value is obtained and accepted with like intent to defraud, the law will impute to the defendant a design, from the beginning, to consummate the latter. Todd v. State, 31 Ind. 514.

**157.** In Alabama, on the trial of an indictment for obtaining goods by false pretenses under the statute (Code, § 3142), the fraudulent intent at the time of taking the property must be proved. O'Connor v. State, 30 Ala. 9.

**158.** It is not a defense under the statute of New Hampshire for concealing the goods of a debtor to prevent their being taken for his debts, that the defendant, prior to the commission of the offense, was summoned as trustee of the debtor in a process of foreign attachment which was pending at the time of the concealment. State v. Johnson, 33 New Hamp. 441.

**159. Testimony for the defense.** On the trial of an indictment for obtaining by false pretenses a signature to a written instrument, proof by the defendant to show his ability to pay must be confined to the time when the signature was obtained. People v. Herrick, 13 Wend. 87.

**160.** An indictment for obtaining goods by false pretenses, charged that the defendant had obtained the goods under pretense of sending them to Charleston, S. C. *Held*, that the testimony of the person usually employed to cart goods for the defendant, that no goods had been carried by him for the defendant to any ship bound for that port was admissible. Com. v. Hershell, Thach. Crim. Cas. 70.

**161.** On the trial of an information for obtaining a yoke of cattle under the false pretense that the defendant owned a farm, it was held that evidence that at the time of the transaction he was in good pecuniary credit and standing was not admissible. State v. Penley, 27 Conn. 587.

**162. To impeach witness.** On the trial of an indictment for obtaining a bank check in exchange for a note, by falsely pretending that the note was genuine, the defendant relied upon the fact that the date of the check was earlier than the date of the note, and that for this reason the former could not have been obtained by means of the latter; and a witness had testified on her cross-examination by the district attorney that the first time she knew of the discrepancy between the dates was at the hearing before the police court. It was held competent for the purpose of discrediting her testimony to prove that she had knowledge of the discrepancy at a much earlier period, and had participated with the defendant in causing it. Com. v. Goddard, 2 Allen, 148; 4 Ib. 312.

**163. Pretense question for jury.** The materiality and influence of the pretense is a question for the jury, unless some inducing circumstance on the face of the indictment shows that the pretense is immaterial. Thomas v. People, 34 N. Y. 351.

**164.** In determining the criminality of the false pretense, the jury may take into consideration the ability or capacity to detect them of the person defrauded. Cowan v. People, 14 Ill. 348.

## Felony.

**What is.** In Indiana, a felony is an offense punishable by confinement in the penitentiary. State v. Smith, 8 Blackf. 489. In New York and Missouri, a felony is an offense for which the accused *may* be imprisoned in the State prison or penitentiary, and not where he *must* be so imprisoned.

People v. Van Steenburgh, 1 Parker, 39; Johnson v. State, 7 Mo. 183.

*See the titles of the several offenses.*

## Fine.

**When it will go to the State.** In New Hampshire, where one-half of a fine goes to the public prosecutor, unless it appears of record who the complainant is, the whole penalty will go to the State. State v. Smith, 49 New Hamp. 155.

## Fire Arms.

**Careless use of.** The statute of Michigan (Comp. L. § 7550), "to prevent the careless use of fire arms," was designed to punish a class of acts done carelessly; and to constitute the offense prohibited by the statute there must have been an absence of malice. People v. Chappell, 27 Mich. 486; s. c. 2 Green's Crim. Reps. 569.

*See* CONCEALED WEAPONS.

## Fishery.

**1. Town no right in.** The inhabitants of a town have no grant of property or right free from legislative control and regulation in the clam fishery within the limits of a town, and a statute regulating the taking of clams from their beds is not unconstitutional. Com. v. Bailey, 13 Allen, 541.

**2. Unlawful taking of fish.** Taking fish by means of numerous single-baited hooks and lines set in as many holes cut through the ice and tended by one person is a violation of a statute which limits the mode of taking fish to the "ordinary process of angling with single bait, hook and line, or artificial fly." State v. Skolfield, 63 Maine, 266.

**3. Complaint.** In a complaint for unlawfully fishing in a pond, the lessees are properly designated as the proprietors, notwithstanding the fact that other persons associated with them for the purpose of cultivating fish, by an independent arrangement among themselves, have an interest in the enterprise. Stocking the pond with a new species of fish, and closing the outlet with a wire screen, are acts sufficient to show an occupation for the purpose of artificially cultivating fishes therein. Com. v. Weatherhead, 110 Mass. 175.

## Forcible Entry and Detainer.

1. WHAT CONSTITUTES.
2. PROCEEDINGS.
3. COMPLAINT.
4. INDICTMENT.
5. EVIDENCE.
6. TRIAL.

### 1. WHAT CONSTITUTES.

**1. Entry when deemed forcible.** The entry to be forcible, ought to be accompanied with some circumstances of actual violence or terror. These circumstances will constitute an entry forcible, though no person be on the premises at the time the entry is made. People v. Field, 52 Barb. 198; 1 Lans. 222. A mere naked trespass to lands or outhouses is not sufficient. People v. Smith, 24 Barb. 16.

**2.** When a person goes on to the land of another in such a way as to give those who are in possession just cause to fear that he will do them some bodily harm if they do not yield to him, his entry will be deemed forcible, no matter what is the character of his demonstration. State v. Pearson, 2 New Hamp. 550.

**3.** In Massachusetts, to constitute the offense, there must be such a demonstration as to excite the fears of the owner and prevent him from claiming or maintaining his rights. Com. v. Dudley, 10 Mass. 403. In Pennsylvania, the possession must have been quiet, peaceable, and actual, and the entry attended with force and intimidation. Com. v. Keeper of Prison, 1 Ashm. 140.

**4.** In North Carolina, to constitute forcible entry and detainer, there must be a show of force, as with weapons, or a multitude of

people, so as to involve a breach of the peace, or directly tend to it, and be calculated to intimidate. State v. Ray, 10 Ired. 39.

5. In South Carolina, to constitute forcible entry, there must be circumstances of terror. Every unlawful entry upon the possession of another is deemed a forcible entry; but it must be an actual and not a mere constructive possession. Two persons cannot be in the actual possession of the same land at the same time; and whenever the unlawful entry of one necessarily dispossesses the other, an indictment for a forcible entry will lie. Although the possession may have been obtained by fraud, yet if maintained by force, the entry will be deemed forcible. State v. Cargill, 2 Brev. 445; Burt v. State, 2 Const. R. 489; s. c. 3 Brev. 413.

6. Where A., having possession of a building and shed attached, locked the door of the shed, in which he had some tools, and leaving a tenant in possession, went away, intending to return, and afterward, the tenant put B. into possession of the main building; it was held that B. was not indictable for a forcible entry in breaking into the shed, and assuming possession of that. State v. Bridgen, 8 Ired. 84.

7. H., being the owner and in possession of certain land, permitted F. to place a building thereon, without anything being said about the time it might remain, or any agreement to pay rent. Afterward, H. conveyed the premises to A. and B., who made an executory contract with the defendant and one C. for the sale and conveyance of the same to them; and the latter took possession for the purpose of erecting a building upon the premises. C. subsequently released to the defendant, who, desiring to erect stores upon the lot, requested F. to remove his building, which he agreed to do, and made preparations therefor, and the defendant with his consent, excavated the earth up to the building. After this F. sold the building to the relator by a written contract stating that the building should remain where it was, F. to retain possession until the money was paid, when it was to be surrendered to the relator. F. remained in possession under the relator several months, when he removed his things and gave the key to the relator, and the latter was in possession of the building, occasionally unlocking and entering therein, until the defendant removed it from the premises into the street. *Held* that there had been no forcible entry in law by the defendant. People v. Field, 52 Barb. 198; 1 Lans. 222.

8. **Detainer when forcible.** The same circumstances of violence or terror that will make an entry forcible, will constitute a forcible detainer. The defendant having entered peaceably, said to the former possessor, "it will not be well for you, if you ever come upon the premises again by day or night." It was held a question for the jury whether this was a threat of personal violence, and therefore a forcible detainer within the statute; and a new trial was refused. Kline v. Rickert, 8 Cow. 226.

9. If a man being in a house, refuse to open the door to one who comes to make an entry, this is not a forcible detainer. So if A. be in possession of a house, or have a lease of it at the will of B., and B. enters into the house and commands A. to go out, and leave him in possession, and A. refuses, this is not a forcible detainer. Com. v. Dudley, 10 Mass. 403. The doctrine of forcible detainer has never been extended to personal property. State v. Marsh, 64 N. C. 378.

2. Proceedings.

10. **Nature.** The proceedings under the statute of New York to prevent forcible entry and detainer are of a mixed nature, being in substance a civil and in form a criminal prosecution. People v. Smith, 24 Barb. 16. In New Hampshire, although the proceeding is in the form of a criminal prosecution, and in certain cases a fine may be imposed, yet it must be viewed in some respects as a private remedy. State v. Harvey, 3 New Hamp. 65.

11. The object of the statute of New York is to prevent all persons, however good their title or right to premises, from forcibly acquiring possession of them; and having peaceably acquired possession, from holding out another who at the time of such

entry or holding out was in peaceable possession. It matters not how invalid the occupant's right to possession may be, if he is in the peaceable and quiet occupancy of premises that occupancy cannot be forcibly invaded. People v. Field, 52 Barb. 198; 1 Lans. 222.

12. Although the main object of the New York statute of forcible entry and detainer is to preserve the public peace and prevent parties from asserting their rights by force or violence, yet by gradual additions the remedy has become in effect a private as well as a public one. But the form of proceeding and the rules of law which govern it remain to a great degree unchanged. Still, to secure conviction, there must be proof of a wrong done to the public. A mere trespass will not sustain the proceeding. There must be an element of force, violence or terror. Wood v. Phillips, 43 N. Y. 152.

13. **Who may maintain.** In New York, a party in the peaceable and actual possession of lands at the time of the forcible entry, or in the constructive possession thereof at the time of a forcible holding out, is entitled to proceed under the statute of forcible entry and detainer, although he is neither seized of a freehold nor possessed of a term for years in the premises. People v. Van Nostrand, 9 Wend. 50; People v. Carter, 29 Barb. 208. Actual occupancy at the time of the entry is not necessary in order to entitle the person injured to proceed under the statute. A building was on the land of the State without objection from any person. One C. had the right to keep it there until the State or its grantee or lessee should require its removal. He did not occupy or use it, but he had previously been in the receipt of the rents and profits, and was about to put it in order to rent it, and he went into it whenever he had occasion to do so. *Held* that C. was in actual possession. People v. Field, 52 Barb. 198; 1 Lans. 222. For all purposes of the statute, the person in possession of a house must be deemed to be in possession of the land. Ib.

14. In New Hampshire, any one who is seized of land in fee for life, or possessed thereof for a term of years, and who is with strong hand and armed power turned out or held out of possession, may maintain a prosecution for forcible entry and detainer, whether the seizin be by right or wrong, or whether the term for years be legal or not. State v. Pearson, 2 New Hamp. 550.

15. In Maine, the complainant holding mortgages of the premises in controversy, purchased at a public sale on execution the respondent's equity of redemption, and entered peaceably into possession. While so in possession, the respondent entered and expelled him by force. *Held* that as the complainant by his purchase acquired all the title of the debtor in the premises, he was entitled to process of forcible entry and detainer. Dyer v. Chick, 52 Maine, 350.

16. Proceedings for a forcible entry and detainer of a church must be in the name of the corporation, and not in the names of the trustees. People agst. Fulton, 11 N. Y. 94.

17. A tenant at will cannot maintain forcible entry and detainer against a stranger for expelling him. Com. v. Bigelow, 3 Pick. 31.

18. **Against whom they will lie.** The defendant need not be a tenant of the plaintiff. It is sufficient if he is a disseizor. Baker v. Cooper, 57 Maine, 388. The proceedings may be maintained against one who was acting as agent of his wife. Bailey v. Bailey, 61 Ib. 361. They are not applicable to the relation of mortgagor and mortgagee. Reed v. Elwell, 46 Ib. 270.

19. In Maine, where an execution in behalf of an insolvent bank had been extended on real estate, and seizin delivered to the receivers, it was held that forcible entry and detainer might be maintained by them against the execution debtor who remained in possession although the time for the redemption of the levy had not expired. Baker v. Cooper, *supra*.

20. An indictment for forcible detainer may be maintained against a third person who enters after judgment against a former trespasser, and the sheriff who has the writ of restitution may turn him out of possession. State v. Gilbert, 2 Bay, 355.

3. Complaint.

**21. What to contain.** A complaint for forcible entry and detainer must contain enough to show that the court has jurisdiction, without a resort to parol testimony. Treat v. Bent, 51 Maine, 478. The statute of New York, in relation to forcible entry and detainer, requires the party to disclose the nature of his right to the possession—how and from whom it was acquired—so that it will appear that his right is valid. Where the complaint alleged that the relator and his grantor had been in the quiet and peaceable possession of the premises for many years, and for more than five years, and had a good legal right and estate to said premises, and still had a legal right to the possession of the same, it was held that the complaint was not in compliance with the statute, but that it was not so defective as to deprive the officer of jurisdiction. People v. Field, 52 Barb. 198; 58 Ib. 270; s. c. 1 Lans. 222.

**22. Verification.** In New York, the verification of the complaint in proceedings of forcible entry and detainer, in the form of verification of pleadings prescribed by the Code, is not sufficient. The affidavit accompanying the complaint must be positive as of the knowledge of the affiant, or if any facts are stated upon information they must be so stated, and the source of the information be given. People v. Whitney, 1 N. Y. Supm. N. S. 533.

**23. Objection.** If the complaint is not sufficiently full and specific, the defendant should raise the question before the judge, and may move at special term to dismiss the proceedings for the defect. People v. Field, 52 Barb. 198; 1 Lans. 222.

**24. Waiver of objection.** Although proceedings in forcible entry and detainer being derived from statute, strict compliance is required, yet an objection to the sufficiency of the complaint may be waived by omitting to make it in proper time. People v. Field, 58 Barb. 270; 1 Lans. 222.

**25.** In proceedings for forcible entry and detainer, the defendant objected to the verification of the complaint as insufficient, on the first opportunity before the county judge. The jury was then impaneled, and the inquisition found and signed, and the defendant traversed it and brought a certiorari. *Held* that there was no waiver of the insufficiency of the affidavit. People v. Whitney, 1 N. Y. Supm. N. S. 533.

4. Indictment.

**26. At common law.** An indictment for forcible entry is sufficient at common law, which alleges that the defendant unlawfully, and with strong hand, did break and enter into a certain house of A., he, the said A., being then and there in peaceable and quiet possession of the same. State v. Whitfield, 8 Ired. 315; Cruser v. State, 3 Harr. 206.

**27. Averment of title.** In New York, an indictment for a forcible entry and detainer, under the statute (Sess. 11, ch. 6), must allege a seizin or possession, and state whether the estate of the relator be a freehold or a term of years, and the averment as to his estate must be proved as laid. Brinkerhoff v. Nelson, 13 Johns. 340; People v. Reed, 11 Wend. 157.

**28.** In North Carolina, under the statute (21 Jac. 1), the indictment must state the kind of term from which the party is expelled, and the term must be subsisting at the time of the trial. State v. Butler, 1 Taylor, 262.

**29. Description of premises.** An indictment for forcible entry and detainer should describe the premises with so much certainty that the sheriff may be at no loss, upon a writ of restitution, to restore the injured party to the possession. Bickley v. Norris, 2 Brev. 252. The premises will be sufficiently described by the term "messuage." State v. Butler, *supra*.

**30.** An indictment which contained the following description of the premises was held sufficient: A certain close of two acres of arable land, situate in S. township, in the county aforesaid, being part of a large tract of land, adjoining lands of A., D. and H. Dean v. Com. 3 Serg. & Rawle, 418.

**31.** A forcible and unlawful entry into a messuage and ten acres of land, in the peaceable possession of a lessee for years, is sufficiently charged, although from a clerical

error the expulsion is alleged as to the messuage only. Com. v. Rogers, 1 Serg. & Rawle, 124.

**32. Traverse.** In New York, the traverse to an indictment for a forcible entry and detainer need not be in writing. Corless v. Anthony, 4 Johns. 198.

### 5. Evidence.

**33. As to premises.** Where, in an information for a forcible entry and detainer, there is a variance between the description of the property as laid, and the evidence, the judgment will not be sustained. Ball v. State, 26 Ind. 155.

**34.** The steward of a school slept in a house situated within the curtilage, but not connected with the dwelling-house, of the school, by any common roof or covering, and for which lodging-rooms the steward paid no rent. *Held* that the house occupied by the steward was not in law his dwelling-house, but was the dwelling-house of the proprietor of the school, and that an indictment could not be maintained against the proprietor, for an entry and expulsion of the steward from such house, provided there was no injury to his person or other breach of the peace. State v. Curtis, 3 Dev. & Batt. 222.

**35. Proof of possession.** On the trial of an indictment for a forcible entry and detainer, the title to the premises is not in issue, but the complainant is entitled to recover if he shows himself to have been in peaceable possession before the defendant's entry. People v. Leonard, 11 Johns. 504. Evidence of actual possession is sufficient to sustain the averment in the inquisition that the complainant was possessed in fee simple. People v. Van Nostrand, 9 Wend. 50.

**36. Proof of entry.** Under an indictment at common law, for a forcible entry, it is sufficient to show that the defendant entered with such force and violence as to exceed a bare trespass. State v. Pollok, 4 Ired. 305.

**37.** An indictment for forcibly entering a field is not sustained by evidence that the defendant peaceably entered the field, and threw stones against the house of the complainant, adjoining the field, the complainant at the time being in the house. State v. Smith, 2 Ired. 127.

**38. Injured party as witness.** In Georgia, on the trial of an indictment for forcible entry and detainer, the injured party is a competent witness. Kersh v. State, 24 Ga. 191. But is otherwise in North Carolina. State v. Fellows, 2 Hayw. 520.

### 6. Trial.

**39. Right of defendant on.** The defendant has a right to produce witnesses, to cross-examine the complainant's witnesses, and sum up the evidence. People v. Reed, 11 Wend. 157.

**40. Inquisition.** If the defendant have no notice of the inquisition, the omission will be fatal. State v. Stokes, Coxe, 392.

**41.** An inquisition for forcible entry and detainer will be sufficient, although the dates are expressed in figures. Coenhoven v. State, Coxe, 258.

**42.** An inquisition of forcible entry and detainer which purports to be taken on the oaths or affirmations of certain persons, is defective, unless it states that those who were affirmed had conscientious scruples against taking an oath. State v. Putnam, Coxe, 260.

**43.** Under an indictment for a forcible entry and detainer, the defendant may be found guilty of a forcible detainer only. Kline v. Rickert, 8 Cow. 226; Corless v. Anthony, 4 Johns. 198. But where the jury find that the defendant unlawfully, and with a strong hand, detained, it cannot be implied that the entry was also unlawful. State v. Godsey, 13 Ired. 348.

**44. Restitution.** In North Carolina, in forcible entry and detainer, a magistrate cannot award restitution, unless the jury find that the complainant had either a freehold or for a term of years. State v. Anders, 8 Ired. 15.

**45.** In South Carolina, the statute of 8 Hen. 6, which authorizes justices of the peace, upon inquiry, to give restitution of possession to tenants of any estate of freehold of lands or tenements, entered upon with force or withheld by force, is in operation. State v. Speirin, 1 Brev. 119.

**46. Damages.** In New York, the justice cannot give to the complainant a gross sum, independently of his costs, as compensation for the injury sustained, but only sufficient to reimburse him for his costs, and for other damages arising from the wrongful entry he must resort to his action of trespass. Fitch v. People, 16 Johns. 141.

**47. Certiorari.** In New York, when proceedings in forcible entry and detainer are brought into the Supreme Court on certiorari, the court has power to examine them, and to quash them if found irregular or insufficient. People v. Smith, 24 Barb. 16.

## Forcible Trespass.

**1. How committed.** A forcible trespass may be committed by acts which tend to a breach of the peace, without the employment of actual force. State v. Armfield, 5 Ired. 207.

**2. When indictable.** At common law, an indictment for forcible trespass may be maintained, if the facts charged amount to more than a bare trespass. State v. Toliver, 5 Ired. 452.

**3.** To render a forcible trespass the subject of indictment, some one must be in the house, or on the premises, to cause the acts complained of to amount to a breach of the peace, or to have a tendency to provoke it. State v. McCauless, 9 Ired. 375; State v. Walker, 10 Ib. 234; State v. Mills, 2 Dev. 420.

**4.** A woman with a family, being in the peaceable possession of a dwelling-house and its appurtenances, four persons entered the door yard with hostile feelings and deportment, indicating an intention to injure and insult her, and refused to go away when she ordered them to do so. *Held* that they were liable to an indictment for a forcible trespass. State v. Toliver, 5 Ired. 452.

**5. Indictment.** An indictment for forcible trespass must allege that it was committed with a strong hand, "*main forte*," which implies greater force than is expressed by the words "*vi et armis*," and the indictment must also state who was present. State v. Ray, 10 Ired. 39; State v. Walker, 10 Ired. 234.

**6.** An indictment for any forcible trespass upon a dwelling-house, less than a violent taking or withholding of the possession of it, must allege that the occupier was in the house or actually present. State v. Wiley, 4 Dev. & Batt. 192.

**7.** An indictment for forcible trespass must charge the actual possession of the prosecutor; but an indictment which alleged his legal possession, and that the defendant with strong hand took it from the prosecutor, was held sufficient. State v. Mills, 2 Dev. 420.

**8.** When the name of the county is mentioned in the margin of the indictment, and it is charged, that the dwelling-house against which the forcible trespass is alleged to have been committed was there situate, it will be deemed to refer to the county mentioned in the margin. State v. Armfield, 5 Ired. 207.

**9.** An indictment for a forcible trespass in taking away goods, need not use the words against his will; it is sufficient if words are used which necessarily convey the same meaning. State v. Armfield, *supra*.

**10. Evidence.** An indictment charging a forcible trespass in taking a slain deer, is not supported by evidence of the forcible taking of the skin of the deer. State v. Hemphill, 3 Dev. & Batt. 109.

*See* TRESPASS.

## Forgery and Counterfeiting.

1. WHAT CONSTITUTES.
2. WHAT MAY BE THE SUBJECT OF.
3. INDICTMENT.
4. PLACE OF TRIAL.
5. EVIDENCE.
6. VERDICT.

### 1. WHAT CONSTITUTES.

**1. Definition.** Forgery is the false making, or materially altering, with intent to defraud, any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability. State v.

Pierce, 8 Iowa, 231; State v. Thompson, 19 Ib. 299; State v. Johnson, 26 Ib. 407; Case of Ames, 2 Maine, 365; Com. v. Chandler, Thach. Crim. Cas. 187; Horne v. State, 5 Ark. 349; State v. Woodard, 20 Iowa, 541; State v. Waters, 2 Const. R. 669. And the uttering of such a paper, knowing it to be false, with intent to defraud, is an offense of the same grade. Com. v. Whiting, Thach. Crim. Cas. 588; State v. Twitty, 2 Hawks, 449. When a genuine instrument is so altered, the forgery may be charged as consisting in the alteration, or the forgery of the entire instrument. People v. Brotherton, 47 Cal. 388; s. c. 2 Green's Crim. Reps. 444.

2. **Acts which are.** The indorsing of the name of another on a negotiable instrument, without his authority, is forgery. Powell v. Com. 11 Gratt. 822. And the same is the case of the fraudulent alteration of the date of a receipt, in order to prejudice the rights of another, and enable the party altering it to obtain a double credit for money paid. State v. Kattlemann, 35 Mo. 105.

3. Where the book-keeper of merchants makes a false entry, with intent to defraud them, it is forgery at common law. Biles v. Com. 32 Penn. St. 529.

4. Forgery may be committed under the statute of New York, either by the false making of an instrument, or by the making of a material alteration, erasure, or insertion in, or addition to, a true instrument, although but in a letter or figure, or by misapplying a genuine signature, as by writing over it, in whole or in part, an instrument for which it was never intended. The prisoner was the agent of an insurance company to effect insurance on persons against accidental loss of life or personal injury while traveling by public conveyance, and to that end to fill up the blank policy tickets intrusted to him. With intent to defraud his principal, he stamped the policy ticket with a false date, and issued it that it might be enforced as a policy upon a person who he knew had been accidentally killed while traveling by public conveyance. *Held*, that he was guilty of forgery. People v. Graham, 6 Parker, 135.

5. Where a person intrusted with bank checks, with directions to fill them up to the use of certain persons, inserted in one of the checks the words "cash or bearer," in place of the words "order of," and drew the money on it for his own use, it was held that he was guilty of forgery. State v. Kroeger, 47 Mo. 552. And the same was held where the alteration of a written instrument consisted in tearing off a condition by which the writing which was non-negotiable, was made negotiable. State v. Stratton, 27 Iowa, 420.

6. An indictment for forgery may be maintained for making and issuing a false instrument, requesting persons to whom goods have been sent by the owner to deliver them to the bearer, the latter having induced the owner so to send the goods by falsely representing that he was directed by those to whom the goods were sent, to buy the same for them. And the indictment may charge that the forgery was committed with intent to defraud the persons to whom the goods were sent, and to whom the order was directed. Harris v. People, 9 Barb. 664. It is forgery within the statute of Tennessee (Code, § 4718), to sign the name of another person to an order for goods, without authority, for the fraudulent purpose of getting the goods on the credit of such person. Hale v. State, 1 Cold. Tenn. 167; overruling Walton v. State, 6 Yerg. 377.

7. Coal being consigned to A., of New York, and carried there, it was claimed by another of the name of A., who lived in the same city, but was not the true consignee, and he, knowing this, obtained an advance of money by indorsing the permit for the delivery of the coal. *Held*, forgery, and not obtaining goods by false pretenses. People v. Peacock, 6 Cow. 72. But see Graves v. Am. Exch. Bank, 17 N. Y. 205, where it was doubted whether it was forgery for a person not the payee of a bill of exchange, but bearing the same name, to indorse and transfer it, knowing that he was not the person intended as payee.

8. A person who takes base pieces of coin, having the impression and appearance of real coin, though of different color, and brightens them so as to give them the re-

semblance of real coin, and render them capable of circulation, is guilty of counterfeiting. Raswick v. Com. 2 Va. Cas. 356.

9. Where the grantor of land prepared the draft of a deed in which he correctly described the premises to be conveyed, which having been examined by the grantor, the grantee afterward fraudulently framed a new deed, embracing in the description the grantor's whole farm, and offered it for execution as the deed before examined, and the grantor executed and delivered the same without examining it, it was held that this was forgery. State v. Shurtliff, 18 Maine, 368.

**10. The uttering.** An assertion or declaration that the forged writing is good, made in the prosecution of a purpose to obtain the money mentioned therein, constitutes an uttering. Chahoon v. Com. 20 Gratt. 733; Sands v. Com. Ib. 800.

11. The bringing of a suit upon forged paper, as counsel, for the purpose of recovering the money purporting to be due by such paper is, in law, an uttering; and if it be done with knowledge of the forgery and intent to defraud, it is an offense within the statute of Virginia. Chahoon v. Com. *supra;* Sands v. Com. Ib.

12. If a forged order be made payable to the defendant, it is not necessary in order to constitute an uttering that there should have been a formal indorsement. A delivery of the order, with the intent to defraud, is sufficient, and a mere failure to comply strictly with the forms of law, cannot be relied on to defeat the charge of criminal intent. People v. Ah Woo, 28 Cal. 205.

13. Presenting a forged draft or order for money, for payment, although payment is refused and the draft returned to the presentor, is an uttering and publishing within the meaning of the statute of Michigan (R. S. ch. 155, § 2). People v. Brigham, 2 Mich. 550.

**14. False instrument need not have been received as genuine.** To constitute an uttering, it is not necessary that the forged instrument should have actually been received as genuine by the party upon whom the attempt to defraud is made. People v. Caton, 25 Mich. 388. On the trial for the forgery of a mortgage, it was proved that the mortgage was put upon record, that it was taken from the register's office by the defendant's daughter, and that afterward, but before discovery of the forgery, and without seeing the instrument, the mortgagor made payments upon it, which the defendant indorsed. *Held* that there was a sufficient uttering. Perkins v. People, 27 Mich. 386. Any delivery of a spurious note to another, for value, for the purpose of being passed or put into circulation as money, is an uttering within the meaning of the act of Congress of June 30th, 1864 (13 Stats. at Large, 221, § 10). U. S. v. Nelson, 1 Abb. 135.

15. The offense of uttering and publishing is not complete until the false writing passes into the hands or possession of some person other than the wrong-doer, his agent or servant. People v. Rathbun, 21 Wend. 509. It is no defense that the counterfeit bills were passed at a gaming table. Com. v. Percival, Thach. Crim. Cas. 293.

**16. Fraudulent intent.** To utter a counterfeit note, and offer it to a person without the intention to defraud him, is not an offense, either at common law or under the statute of Massachusetts of 1804. Com. v. Goodenough, Thach. Crim. Cas. 132.

17. But although the intention to defraud is of the essence of the crime of forgery, yet it is not essential that any person be actually defrauded, or that any act be done toward the attainment of the fruits of the crime, other than the making of the instrument, if from the circumstances of the case the jury can fairly infer that it was the intention of the party to utter the forged instrument. Henderson v. State, 14 Texas, 503.

18. On the trial of an indictment for forging and uttering a deposition used by the prisoner in an action for divorce brought by him, the court was requested to charge that if the defendant believed substantially the deposition, and his object was to obtain an equitable divorce, believing himself entitled thereto, and his sole object was to relieve himself from the inconvenience and odium of living in society separate from his wife,

without the hope of reconciliation, and did not intend to defraud her of money or property, or injure her character, he would not be guilty of forgery, though he manufactured the deposition and uttered the same. *Held* properly refused. State v. Kimball, 50 Maine, 409.

19. **May be by agent.** Forgery may be committed, although the act was not done, either in whole or in part, by the hand of a person charged, but through another, who was an involuntary agent. Com. v. Hill, 11 Mass. 136; State v. Shurtliff, 18 Maine, 368. A person in one county may, by an innocent agent in another county, utter and publish a forged instrument in the latter county so as to be there guilty. Bishop v. State, 30 Ala. 34.

20. **Must be by some one in existence.** A person cannot be convicted under an indictment charging an intent to defraud a person or corporation having no existence. State v. Givens, 5 Ala. 747; *contra*, U. S. v. Turner, 7 Peters, 132; U. S. v. Mitchell, 1 Bald. 366. Therefore the execution and delivery of a note, with intent to defraud, signed in the name of a fictitious firm, of which the defendant purports to be a member, is not forgery. Com. v. Baldwin, 11 Gray, 197.

21. **Several acts.** Having in possession several bank notes of different banks at one time, with intent to pass them, constitutes but one offense, notwithstanding the intention was to defraud the several banks by which they were issued as well as the person taking them. State v. Benham, 7 Conn. 414.

22. The act of possessing several counterfeit bank bills at the same time, constitutes one and the same offense. When therefore, a person had been tried and acquitted for having in his possession one of several counterfeit bank notes of different banks, it was held that he could not be again tried for having each of the other notes. People v. Van Keuren, 5 Parker, 66.

23. But where five drafts were forged, each for the same amount, upon the same sheet of paper, at the same time, by the same person, it was held that although the uttering was one indivisible act, yet that the forging of each draft was a distinct and separate offense. Barton v. State, 23 Wis. 587.

2. What may be the subject of.

24. **Must appear to be the act of another.** A writing, to be the subject of forgery, must in general be or purport to be the act of another, or it must at the time be the property of another; or it must be some writing under which others have acquired some rights or have become liable, and where these rights or liabilities are sought to be affected or changed by the alteration, without their consent. A person cannot alter his own book account before any settlement or adjustment of it, so as to make it forgery. State v. Young, 46 New Hamp. 266.

25. A bill of exchange was drawn by the Bank of Ireland, on the Bank of England, to the order of Mrs. A. Haliday, for £43 7*s.* 6*d.*, and, after several intermediate indorsements, was indorsed to Chas. McIntosh & Co., the possession of which was surreptitiously obtained by Alex. Heilbonn, the prisoner, a clerk for McIntosh & Co., who indorsed the bill thus: "Received for Chas. McIntosh & Co., Alex. Heilbonn, No. 9 Vine street, Regent street, No. 73 Aldermanbury;" whereupon the bill was paid to him. *Held* that such indorsement did not constitute forgery, though it appeared that Heilbonn had no authority to indorse bills of exchange, or to receive the amounts thereof; and the words "Chas. McIntosh & Co." were an imitation of the handwriting of a member of the firm, the rest of the indorsement being in the usual handwriting of Heilbonn. *In re* Heilbonn, 1 Parker, 429.

26. **Must be calculated to injure.** To constitute forgery, the forged instrument must be one which, if genuine, may injure another; and this must appear, either from the description of the instrument, or by the averment of matter *aliunde*. Where from aught that appears in the indictment, the instrument was a *nudum pactum*, forgery

cannot be predicated upon it. People v. Tomlinson, 35 Cal. 503.

**27.** An instrument which is invalid on its face cannot be the subject of forgery, because it has no legal tendency to effect a fraud. If a statute authorizes an instrument not known to the common law, and so prescribes its form as to render any other form null, forgery cannot be committed by making it in a form not provided by statute, even though it is so like the genuine as to be likely to deceive most persons. Cunningham v. People, 11 N. Y. Supm. N. S. 455.

**28.** Falsely subscribing the name of a witness to a bond which is not required to have a subscribing witness, does not vitiate the bond, and is not forgery. State v. Gherkin, 7 Ired. 206.

**29.** Where an order for the delivery of goods was accepted and paid, and returned to the drawer, and the date of it afterward altered by him, such alteration was held not to be forgery at common law, although done with an intent to defraud. People v. Fitch, 1 Wend. 198.

**30.** After notice of execution, and a writ of inquiry served on the attorney, he altered the figures indicating the day appointed for executing the writ, in order to make the notice irregular, and with intent to defraud. *Held* not forgery, either under the statute of New York or at common law. People v. Cady, 6 Hill, 490.

**31.** Although an indictment for forgery may be maintained for altering the words and figures of a bank bill, yet it is doubtful, if it could be, for simply altering the marginal emblems or marks. State v. Waters, 3 Brev. 507.

**32. Need not be such as that, if genuine, it would be binding.** It is not essential that the person in whose name the instrument forged purports to be made, should have the legal capacity to make it; nor that the person to whom it is directed, should be bound to act upon it if genuine, or have a remedy over. The law looks only to the falsity of the instrument, and the fraudulent use of it as genuine. People v. Krummer, 4 Parker, 217. A request to charge the jury, that "no fraud in law could have been committed upon K. at the time of the alleged forgery and uttering, if she was the lawful wife of the accused," was held rightly refused. State v. Kimball, 50 Maine, 409.

**33.** The following instruction was held proper: That if the note was fictitious, and the prisoner knew it, and passed it in absolute payment of a debt, this would be a passing under the statute, although, at the time of the payment, he might have agreed to take it back, if it should prove not to be genuine. Perdue v. State, 2 Humph. 494.

**34.** The offense of disposing and putting away forged bank notes was held to have been committed, though the person to whom they were disposed was an agent for the bank to detect forgeries, and applied to the prisoner to purchase forged bank notes, and had them delivered to him in order to dispose of them. State v. Wilkins, 17 Vt. 151.

**35. Must be likely to deceive.** The jury must be satisfied that the resemblance of the forged to the genuine instrument is such as might deceive a person exercising ordinary caution. U. S. v. Morrow, 4 Wash. C. C. 733.

**36** But a bare possibility of imposing on another is sufficient to constitute forgery. State v. Bennett, 19 La. An. 395. It is not necessary that there should be so perfect a resemblance to the genuine handwriting of the party whose name is forged, as would impose on persons having particular knowledge of the handwriting of such party. Nor is it necessary that the officers of the bank upon which a check purports to be drawn would have probably been misled and deceived by it. Com. v. Stephenson, 11 Cush. 481.

**37.** Where there is a bank of the same name in two different cities, one of which is insolvent and the other good, erasing the name of the city on a note of the former bank, and putting in its place the name of the latter city, is forgery, although the name was pasted over the other name in such a way that it might have been detected by close inspection. State v. Robinson, 1 Harr. 507.

**38.** It does not constitute forgery to obtain by false and fraudulent representations

the consent of the surety to a bond to a material alteration made after the latter had signed the bond, although the surety qualified his consent by making it depend upon the truth of the defendant's representations. State v. Flanders, 38 New Hamp. 324.

39. To constitute the forgery of an order for the delivery of goods within the statute of Georgia, the person whose name is forged need not have goods in the hands of the drawee. Haskins v. State, 11 Ga. 92.

**40. Must be such that it would have been good if genuine.** An instrument to be the subject of an indictment for forgery must either appear on its face to be one which if true would possess some legal validity, or if it do not so appear on the face of the instrument facts must be averred which will enable the court to see that if it were genuine it would possess such validity. State v. Smith, 8 Yerg. 150; People v. Harrison, 8 Barb. 560; People v. Shall, 9 Cow. 778; U. S. v. Mitchell, 11 Bald. 366, *contra*. Where, therefore, an indictment for the forgery of "an accountable receipt for personal property, viz., an elevator ticket for wheat," did not allege that the person whose name was signed to the receipt was an agent of the elevator company, or show any connection between him and the company, it was held insufficient. State v. Wheeler, 19 Minn. 98.

41. Forgery cannot be committed by making or altering a written instrument which does not on its face import any value or obligation. Howell v. State, 37 Texas, 591. Therefore, the forgery of a writing purporting to contain a promise to pay in labor, without consideration, is not indictable. People v. Shall, 9 Cow. 778. So likewise the counterfeiting of foreign coin not made current by law in the United States is not an indictable offense. U. S. v. Gardiner, 10 Pet. 618.

42. An indictment cannot be maintained for forging a certificate or acknowledgment of a deed when the certificate does not state that the grantor acknowledged the execution of the conveyance. People v. Harrison, 8 Barb. 560.

43. A writing which, if genuine, has no legal validity, but is a mere attempt to receive courtesies on a promise of no binding obligation to reciprocate them, cannot be the subject of forgery. Waterman v. People, 67 Ill. 91. Therefore, a false letter of introduction requesting the person to whom it is addressed to let the bearer have money, is not the subject of forgery either at common law or under the statute of Virginia. Foulke's Case, 2 Rob. 836.

44. Where an indictment alleged that the defendant, contriving and intending to deceive one A., and to induce him to employ the defendant and to pay him large wages, exhibited and delivered to the said A. a certain pretended certificate of good character, it was held that it was not forgery. Com. v. Chandler, Thach. Crim. Cas. 187.

45. A writing which states that certain persons are solvent and able to pay a note, to which their names appear as makers, is not such a writing as may be the subject of forgery under the statute of Alabama of 1836. State v. Givens, 5 Ala. 747.

**46. Imitation of instrument having no validity.** Although a writing invalid on its face cannot be the subject of forgery, yet where the invalidity is to be made out by proof of some extrinsic fact, the instrument if good on its face, may be capable of effecting a fraud, and the party making the same may be punished. State v. Pierce, 8 Iowa, 231; State v. Johnson, 26 Ib. 407.

47. If the imitation be calculated to impose upon persons of ordinary observation, and the instrument be *prima facie* fitted to pass as a true one, it will be the subject of forgery, although the imitation be of a bank bill of a denomination which the bank did not pass. State v. Carr, 5 New Hamp. 367; Com. v. Smith, 7 Pick. 137. And see U. S. v. Turner, 7 Pet. 132. In New Jersey, it was held indictable to utter and publish a forged or counterfeit bank note of another State for two dollars, although the passing of any bank note under five dollars was prohibited by statute. State v. Hart, 2 Harr. 327.

48. A bail bond which has been altered in a material part may be the subject of a forgery, notwithstanding some doubts as to the

validity of the bond arising from the recitals in the condition. Com. v. Linton, 2 Va. Cas. 476.

**49. Printed instrument.** Forgery may be committed by counterfeiting an instrument wholly printed or engraved, and on which there is no written signature personally made by those to be bound. Com. v. Ray, 3 Gray, 441. The statute of New York against forgery includes not only written instruments, but also such as are engraved or printed, being or purporting to be the act of another, by the forging of which any person "may be affected, bound or in any way injured in his person or property." People v. Rhoner, 4 Parker, 166.

**50. Instrument without address.** A written instrument, to be the subject of forgery under the statute of New York, need not be addressed to any one. Noakes v. People, 25 N. Y. 380.

**51. Revenue stamp.** The making of a forged instrument with the criminal intent is complete without the affixing of the proper internal revenue stamp. Horton v. State, 32 Texas, 79; State v. Young, 47 New Hamp. 402. The defendant was indicted for "uttering and publishing as true a false and forged promissory note for the payment of money, knowing the same to be false and forged, with intent to injure and defraud." *Held* that the prosecution might be sustained notwithstanding the note never had a revenue stamp attached to it. State v. Mott, 16 Minn. 472. But where an indictment for forging a draft set out the draft in full, and it did not appear that there was any stamp on the draft, it was held on motion in arrest of judgment that a conviction could not be sustained. John v. State, 23 Wis. 504.

**52. Writing made on Sunday.** A forged writing purporting to have been made on Sunday may notwithstanding be the basis of a prosecution for forgery, as it is competent to show that the date is false, and that the writing was in fact made the day previous. Van Sickle v. People, 29 Mich. 61.

**53. Deed of land in another State.** Making a false deed within the State of New York, for lands lying in another State or territory, is forgery. People v. Flanders, 18 Johns. 163.

**54. Instrument for counterfeiting coin.** In Massachusetts, an indictment may be maintained under the statute (R. S. ch. 127, § 18), for knowingly having in possession an instrument adapted and designed for making one side only of a counterfeit coin, with intent to use the same in making such coin. Com. v. Kent, 6 Metc. 221.

**55. Note or order.** The following instrument: "Due J. F. one dollar on settlement this day," is the forgery of a note for the payment of money within the statute of New York. People v. Finch, 5 Johns. 236. But the following: "Pay to A. or bearer, 1500 dollars in B.'s bills or yours," is not a forgery of an order for the payment of money or the delivery of goods. People v. Farrington, 14 Johns. 347. A false writing in these words: "Mr. S.—Sir, Let the bearer trade 13 dollars and 25 cents, and you will oblige," was held to be the forgery of an order for the delivery of goods. People v. Shaw, 5 Johns. 236.

**56.** An order for the delivery of goods may be the subject of forgery, if it be of such a character that another person can by the use of it be deprived of property, although not on its face addressed to any one. People v. Noakes, 5 Parker, 291. An order in the following form: "Mr. A.—Sir, deliver to my son, one pair of walking shoes, and charge the same to me. Yours, B.," is an order for the delivery of goods within the statute of Massachusetts, though B. have no goods in the drawee's hands. Com. v. Fisher, 17 Mass. 46.

**57.** Counterfeiting a railway pass is forgery at common law. Com. v. Ayer, 3 Cush. 150. A county warrant may be the subject of forgery, under the statute of Missouri. State v. Fenley, 18 Mo. 445. An acceptance of an order for the delivery of goods may be the subject of forgery. Com. v. Ayer, *supra*.

**58.** A common receipt for money in full of all demands is a discharge for money within a statute prescribing the punishment for forging "an order, acquittance, or dis-

charge for money or other property." Com. v. Talbot, 2 Allen, 161.

59. A forged instrument was as follows: "Wen. 19th, Mr. Davis, pleas let the boy have $6.00 dolers for me. B. W. Earl." *Held*, an order for the payment of money within the statute of Ohio. Evans v. State, 8 Ohio, 196.

60. The following order was held to be the subject of forgery, although it expressed no consideration: "Mr. A., charge B.'s account to us. C. D." State v. Humphreys, 10 Humph. 442.

61. An order as follows: "Messrs. D. & D., please to let the bearer trade ten dollars out of your store and oblige, yours, &c.," was held a forgery within the statute of Connecticut. State v. Cooper, 5 Conn. 260.

62. In North Carolina, to sustain an indictment for forging an order to deliver goods, there must have been a drawer, a drawee who was bound to deliver the goods, and a person to whom the goods were to be delivered. State v. Lamb, 65 N. C. 419.

63. In South Carolina, a forged note for the delivery of goods was held to be within the act of 1736, although it was in the form of a request, and did not pretend that the person whose name was forged had a right to make such an order, or that the person to whom it was directed was bound to obey it. State v. Holley, 1 Brev. 35.

64. In Virginia, on the trial of an indictment for passing the counterfeit check, or order of a president of a branch of the United States bank, on the cashier of the bank, payable to A., or order, and indorsed by A. to bearer, it was held that whether or not the charter of the Bank of the United States was constitutional, and whether or not the charter authorized the issue of such checks or orders, the offense was felony within the meaning of the statute (1 Rev. Code, c. 154, § 4). Hendrick's case, 8 Leigh, 707.

65. In Illinois, under the 73d section of the Criminal Code, counterfeiting the drafts of canal commissioners is forgery; and so likewise is (under the 77th section), the passing of counterfeit checks or drafts of the commissioners, with an intent to defraud any person or body politic or corporate, knowing the same to be false and counterfeited. Crafts v. State, 2 Scam. 442.

66. Passing a counterfeit United States treasury note as genuine, knowing it to be false, is an indictable cheat at common law. *In re* Truman, 44 Mo. 181.

67. **Indorsements.** In New York, the uttering and publishing of a promissory note with forged indorsements upon it, was held forgery within the statute, although the passing of the note was accompanied with communications which would have exonerated the indorsers, if the indorsements had been genuine. People v. Rathbun, 21 Wend. 509.

68. The forgery of an indorsement of a promissory note, is within the prohibition of the crimes act of Ohio. Poage v. State, 3 Ohio, N. S. 229.

69. An indorsement on a note, of a partial payment by the maker, without signature, in the presence and by the direction of the payee, is a receipt, the alteration of which by the payee is forgery. Kegg v. State, 10 Ohio, 75.

70. Erasing or obliterating a release or acquittance on the back of a note or bond is not forgery under the statute of North Carolina. State v. Thornburgh, 6 Ired. 79. And in Arkansas, it was held that erasing an indorsement from a promissory note, was not forgery but only a misdemeanor. State v. McLean, 1 Ark. 311.

### 3. Indictment.

71. **Must show the forgery of a valid instrument.** The indictment must show the forgery of an instrument which appears on its face naturally calculated to have some effect, or, if it be not sufficient for that purpose, extrinsic matter must be averred so that the court may judicially see its fraudulent tendency. Reed v. State, 28 Ind. 396. It is sufficient, if it appears on the face of the indictment, by proper averments, that the instrument forged is of the kind prohibited by statute, or if it can be collected from the forged writing as set out in the indictment. Com. v. Castles, 9

Gray, 123; State v. Wheeler, 19 Min. 98; s. c. 1 Green's Crim. Reps. 541.

**72.** An indictment for forging a judge's certificate to a fee bill is good, which alleges that the defendant forged the certificate and "caused and procured the same to be forged," and that the forged instrument purported to be the certificate of "A., judge of the ninth judicial circuit," without alleging that A. was judge of that circuit. But if the indictment omit to state in what county or circuit the fee bill accrued, it will be fatally defective. State v. Maupin, 57 Mo. 205.

**73. Need not allege validity of instrument.** An indictment for forgery need not charge the legal validity of the instrument, unless from its terms it may or may not be valid. State v. Dourdon, 2 Dev. 443.

**74.** An indictment which charges that the defendant falsely, fraudulently and feloniously forged and counterfeited a certain deed, purporting to be the act of one T. K., by which a right or interest in real property purported to be transferred and conveyed, is sufficient without alleging that the instrument was under seal. Paige v. People, 6 Parker, 683.

**75.** An indictment for transmitting forged papers to the pension office, in support of a claim for bounty land, need not show that the papers contained all the facts necessary to entitle the party to the bounty land. U. S. v. Wilcox, 4 Blatch. 385.

**76. Instrument need not be named.** The indictment need not give the instruments forged a name, their character being sufficiently shown by the copies set out. U. S. v. Trout, 4 Bis. 105; U. S. v. Williams, Ib. 302. Charging that the accused falsely made, forged, and counterfeited an instrument within the statute, with intent to defraud, setting forth the instrument *in hæc verba* is a sufficient description of the circumstances constituting the offense. Rosekrans v. People, 5 N. Y. Supm. N. S. 467.

**77. Instrument should be set out.** An indictment for forgery should set out the instrument alleged to have been forged, if in existence and under the control of the prosecutor, or state the reason for the omission. Hooper v. State, 8 Humph. 93; State v. Parker, 1 Chip. 298; Coxdale v. State, 1 Head, 139; State v. Jones, 1 McMullan, 236; U. S. v. Britton, 2 Mason, 464; People v. Kingsley, 2 Cow. 522; State v. Potts, 4 Halst. 26; State v. Bonney, 34 Maine, 223; State v. Witham, 47 Ib. 165. Where a genuine instrument is altered, the forgery may be charged as constituted by the alteration, or the forgery of the entire instrument may be charged. State v. Weaver, 13 Ired. 491. In such case, the indictment should recite the instrument in its altered state, according to its tenor, in words and figures. State v. Bryant, 17 New Hamp. 323.

**78.** Where an indictment for forgery alleges that the writing is "in the words and figures following," a strict recital is necessary. Com. v. Bailey, 1 Mass. 62; Com. v. Stevens, Ib. 203. Where the indictment, in setting out the instrument, alleged that it was of the "purport and effect following," instead of using the word "tenor," it was held sufficient. State v. Johnson, 26 Iowa, 407.

**79.** An indictment for the possession of forged United States treasury notes and postal currency, with intent to pass them, must set out exact copies of them, or state some good reason for not doing so; and the number of the forged notes should be mentioned. U. S. v. Fisler, 4 Bis. 59.

**80.** Where an indictment for having in possession counterfeit bank bills, with intent to defraud, described them as thirteen false, &c., bank bills, numbered 1566, 1559, 1570, purporting to have been issued by a corporation duly authorized for that purpose by the State of Illinois, to wit: Purporting to be bank bills of the Bank of Belleville, State of Illinois, each of said bank bills of the denomination of two dollars, it was held not sufficient. State v. Callendine, 8 Iowa, 288.

**81.** An indictment is not sufficient which alleges that the defendant forged a certain writing purporting to be a bond with a condition thereto annexed, signed, sealed, and executed by A., B. and C., and dated Jan. 8th, 1853, with intent to injure and defraud the said A., B. and C., and averring

that the bond could not be more particularly described, because it was in the possession of the defendant. State v. Briggs, 34 Vt. 501.

**82. Foreign language.** Although where an instrument alleged to have been forged, is written in a foreign language, it is better to set out the instrument in the indictment in the language in which it is written, yet it is sufficient to set out a correct translation of it. People v. Ah Woo, 28 Cal. 205. If set out in full, a technical designation of its legal character is immaterial. Ib.

**83. Promissory note.** An indictment charging the forgery of a promissory note payable to the maker's own order, must allege that the note was indorsed by the maker. Com. v. Dallinger, 118 Mass. 439.

**84.** The indictment will be sufficient, although it does not allege that the note purported to be signed by the person whose name was forged, if it set forth the note, giving the name of the maker as part of the description. People v. Badgley, 16 Wend. 53.

**85. Indorsements on note.** An indictment for forging a promissory note need not allude to the indorsement of the note, though it be forged, it being no part of the note. Com. v. Ward, 2 Mass. 397; Buckland's Case, 8 Leigh, 732; Perkins v. Com. 7 Gratt. 651; Hess v. State, 5 Ohio, 5; Miller v. People, 52 N. Y. 304.

**86.** An indictment which charges the forgery of a person's name as an indorsement will be good, although the simulated liability be not of technical indorser. Powell v. Com. 11 Gratt. 822.

**87.** An indictment charging that the defendant forged an indorsement upon a promissory note is good, although the writing became a promissory note only by means of such indorsement; the allegation being taken to have reference to the character of the instrument when indorsed. Com. v. Dallinger, 118 Mass. 439.

**88. Bond.** An indictment is good which charges the forging of a "a certain bond," instead of a certain paper writing purporting to be a bond. State v. Gardiner, 1 Ired. 27.

**89. Deed.** An indictment sufficiently charges the uttering and publishing of a forged deed by alleging that the defendant caused it to be recorded in the office of the clerk of the county as genuine and true. And the same as to the setting up of the forged instrument as genuine and true in a suit in which the prisoner was plaintiff, and the party intended to be defrauded was defendant. Paige v. People, 6 Parker, 683.

**90. Mortgage.** An indictment charging the forgery or alteration of a mortgage, with intent to defraud the mortgagor, must allege that there are in fact such lands as are described in the instrument, and that the mortgagor had an interest or right in the same. People v. Wright, 9 Wend. 193.

**91. Bank bills.** An indictment for uttering a counterfeit bank bill may describe the bill as a promissory note. Com. v. Carey, 2 Pick. 47. In Virginia, under the statute of 1799, a forged bank note of another State may be described as a promissory note for the payment of money. Com. v. Hensley, 2 Va. Cas. 149.

**92.** An indictment for passing counterfeit bank notes is good which describes them as "forged and counterfeit," those words being synonymous, and it is proper to describe them as promissory notes. Hobbs v. State, 9 Mo. 845; Brown v. Com. 8 Mass. 59.

**93.** An indictment for offering a counterfeit bank bill need only set out the material parts of the bill, and allege that the bank is established at a place within the United States, without stating the county or State within which it is situated. State v. Carr, 5 N. H. 367.

**94.** It is not a valid objection to an indictment for forgery, that the last of the five notes described is alleged to be different from the others, while in its recital it corresponds with two of those previously described; the fact that it is another and different bank bill, though of similar form with the preceding, satisfying the terms of the allegation. Com. v. Thomas, 10 Gray, 483.

**95.** An indictment for forging bank bills, with intent to pass the same as true and genuine, need not allege that the bills are

for the payment of money. Townsend v. People, 3 Scam. 326.

**96.** In Alabama, an indictment which charges the forging or counterfeiting of "an instrument purporting to be a bank bill for fifty dollars, purporting to be issued by the Georgia Railroad and Banking Company, an incorporated bank of the State of Georgia," is sufficient under the statute. Johnson v. State, 35 Ala. 370.

**97.** The first count of an indictment charged the defendant with having in his possession counterfeit blanks in the form and similitude of bank bills made for the payment of money. The second count charged that they were in the form and similitude for the payment of property. *Held* but a different description of the same offense, the bills being each for the payment five dollars, or its equivalent in currency; and that there was nothing repugnant in stating that the unfinished bills had the form and similitude of those that were finished. People v. Ah Sam, 41 Cal. 645.

**98.** In New York, an indictment for having in possession a counterfeit bank note, with the intention of passing it, need not set forth the note, or state why it was not done. Tomlinson v. People, 5 Parker, 313. The contrary was held in Massachusetts, under the statute of that State (ch. 120, § 2). Com. v. Houghton, 8 Mass. 107.

**99.** In Alabama, in an indictment for the forgery of a counterfeit bank bill under the Code (§ 3154), it is not necessary to allege that the bank bill was issued to circulate as money, or to set out the bill according to its tenor. Bostick v. State, 24 Ala. 266.

**100.** An indictment for having counterfeit bank notes in possession, and for selling them, need not allege that the sale was for a consideration, or to the injury of any one, or that the notes were indorsed. Hess v. State, 5 Ohio, 5.

**101.** Where, in an indictment for forging bank notes, the notes were attached to the indictment instead of being set forth in it, it was held that the irregularity was cured after verdict by the statute of jeofails. Com. v. Ervin, 2 Va. Cas. 337.

**102. Marginal emblems.** An indictment for uttering as true, a counterfeit bank bill, need not describe the number and check letter, or the words and figures in the margin. Com. v. Bailey, 1 Mass. 62; Com. v. Stevens, Ib. 203; State v. Carr, 5 New Hamp. 367; People v. Franklin, 3 Johns. Cas. 299; Com. v. Taylor, 5 Cush. 605; State v. Flye, 26 Maine, 312; Hampton v. State, 8 Ind. 336.

**103.** On a trial for passing a counterfeit bank bill, the bill given in evidence was objected to on the ground that it contained the word "three" six times on the margin at the top of the bill, and also on the same bill close upon the margin, the words and figures "Capital stock $100,000, secured by pledge of $100,000 Pennsylvania 6 per cent. bonds," which was omitted in the description of the bill in the indictment. *Held* that there was no variance. State v. Wheeler, 35 Vt. 261.

**104.** But where an indictment for uttering and publishing as true, with intent to defraud, a counterfeit bank bill, omitted the words "State of Maine" in the upper margin of the bill, it was held that the variance was fatal. Com. v. Wilson, 2 Gray, 70.

**105.** In setting out a copy of a forged bank bill in an indictment, it is not improper to include the names and place of residence of the engravers as the same appear upon the margin of the bill. Thompson v. State, 9 Ohio, N. S. 354.

**106. Existence of bank.** Where an indictment for forging a bank bill charges a design to defraud, the existence of the bank need not be alleged. Com. v. Carey, 2 Pick. 47. But the contrary was held in Tennessee as to an indictment under the statute (of 1829, ch. 23), for passing counterfeit bank bills, or for keeping and concealing them. Fergus v. State, 6 Yerg. 345.

**107. Incorporation of bank.** An indictment for uttering a counterfeit bank bill must allege that the bank was incorporated by law. Kennedy v. Com. 2 Mete. Ky. 36; *contra*, State v. Hart, 2 Harr. 327; U. S. v. Williams, 4 Bis. 302.

**108.** In Massachusetts, it has been held that an indictment for uttering and passing as true a counterfeit bank bill of the City

Bank must allege that it was the counterfeit of a bill of an incorporated banking company of the State, and that the averment that the City Bank was "a banking company established by said commonwealth," is not sufficient. Com. v. Simonds, 11 Gray, 306.

**109.** An indictment which alleged that the defendant feloniously tendered in payment, to a person named, an altered bank bill "of the Dayton Bank, a bank created by the law of the State of Ohio, the defendant then and there well knowing the same to be altered, with the felonious intent," etc., was held bad for uncertainty. Mount v. Com. 1 Duvall, Ky. 90.

**110.** In California, it has been held that an indictment for having in possession counterfeit bank bills need not charge that the banking house whose bills were imitated was an incorporated company, unless the existence of the corporation is made an issue, it being equally an offense whether the company be actually incorporated or not, providing it is acting as a corporation, and issues bank bills which are current. People v. Ah Sam, 41 Cal. 645.

**111.** In Virginia, an indictment for passing a counterfeit bank bill was held sufficient under the statute (1 Rev. Code, ch. 154, § 4), although it did not allege that the bank was chartered, or that there was any such bank, or that the note was passed "to the prejudice of another's rights," or "for the prisoner's own benefit, or for the benefit of another." Murray's case, 5 Leigh, 720.

**112. Non-existence of bank.** An indictment under a statute which punishes the fraudulent passing of any note purporting to be a bank note, when no such bank exists, must charge: 1st. That there was no such bank in existence as that by which such note purports to have been issued. 2d. That the defendant, at the time of the passage of such pretended bank note, knew that there was no such bank in existence; and 3d. That it was passed with intent to defraud the person to whom it was passed. Williams v. State, 9 Humph. 80.

**113. Having in possession instruments for counterfeiting.** In Arkansas, an indictment under the statute (Dig. p. 354, ch. 51, § 2), for the fraudulent use of an instrument intended for the counterfeiting of coin, the manner of the use must be alleged, as that the defendant used it in making and counterfeiting certain money (specifying it) current in the State. Bell v. State, 5 Eng. 536.

**114.** In Virginia, where an indictment charged that the prisoner "did knowingly have in his custody, without lawful authority or excuse, one die or instrument for the purpose of producing and impressing the stamp and similitude of the current silver coin called a half dollar," without otherwise describing the die or instrument, was held insufficient. Scott's case, 1 Rob. 695.

**115.** An indictment for knowingly having in possession instruments adapted and designed for making counterfeit coin, to wit, Mexican dollars, with intent to use the same, need not state that the defendant was not employed in the Mint of the United States. Harlan v. People, 1 Doug. 207. And the offense may be charged to have been committed against the sovereignty of the people of the State instead of the United States. Ib.

**116. Counterfeit coin.** The indictment need not allege the place of coinage, or the materials of which the false coin is made. Com. v. Stearns, 10 Metc. 256; State v. Griffin, 18 Vt. 198. It is sufficient to describe the counterfeit coin as dollars, whether they be coin of the United States, or of Spain or Mexico. Peck v. State, 2 Humph. 78.

**117.** In Arkansas, an indictment under the statute against passing base or adulterated coin, was held good, which charged that the defendant passed one piece of base and adulterated coin. Gabe v. State, 1 Eng. 519.

**118. Bank check.** A bank check may be described as an order for money, or as a bill of exchange. An indorsement on a bank check, that it is good for a specified sum, signed by the cashier or teller, may be described as an acceptance of an order or bill. State v. Morton, 27 Vt. 310. An indictment for forging a check on a bank, is sufficient, although the drawer of the forged check

was a fictitious person. Thompson v. State, 49 Ala. 16.

**119. Order.** An order for the payment of money drawn by one in his own favor on himself, and by himself accepted and indorsed, may be described as a bill of exchange. Com. v. Butterick, 100 Mass. 12.

**120.** An indictment which describes the forged instrument as a "warrant or order," is not bad as charging the offense disjunctively. State v. Holley, 1 Brev. 35. The words warrant *and* order, describing the instrument forged, are the same as warrant *or* order. State v. Jones, 1 McMullan, 236.

**121.** An indictment for uttering a forged order of a school district, purporting to be signed by the clerk and director of the district, and to be addressed to the treasurer of the district, must allege that the forged order purported to be the order of a corporation duly authorized to issue it. Snow v. State, 14 Wis. 479.

**122.** A written instrument purporting to be an order drawn by "Sister Adeline on George Battiste, for nine dollars," sufficiently describes the instrument alleged to have been forged. McGuire v. State, 37 Ala. 161. An indictment alleged the forgery of a writing which purported to be an order drawn by one Tristram Tupper, and charged that the defendant made it with the intention to defraud Tristram Tupper. The indictment set out was signed T. Tupper. *Held* that the variance was not material. State v. Jones, 1 McMullan, 236.

**123. County warrant.** An indictment for altering or forging a county warrant is sufficient which alleges that the defendant falsely altered and forged the warrant, &c., intending to defraud, setting forth the warrant, without charging, in the words of the statute, that it was an instrument or writing being, or purporting to be, the act of another, whereby a pecuniary demand or obligation was, or purported to be, transferred, created, &c., or by which rights of property were, or purported to be, transferred, or in any manner affected. State v. Fenly, 18 Mo. 445, Scott, J., *dissenting*.

**124. Power of attorney.** An information for uttering a forged power of attorney is sufficient, although it only charges the forgery of the acknowledgment and clerk's certificate. People v. Marion, 29 Mich. 31.

**125. Party injured.** An indictment for passing counterfeit money, must state the name of the person to whom it was passed, with certainty when known, and if not known, it should so state. Buckley v. State, 2 Greene (Iowa), 162. If the indictment allege that counterfeit money was passed to persons to the jury unknown, when the persons are known, the allegation will be improper, and ground for a new trial. Much less can an indictment be sustained when it names the wrong person to whom the money was passed. Rouse v. State, 4 Ga. 136.

**126.** An indictment which charged that a written order was forged and uttered to defraud the Meriden Cutlery Company, was held sufficient, even though in fact there might not be such a company; the averment being sufficiently broad to reach the individual members of the concern, or its agent, or the persons whose names were falsely signed to the order. Noakes v. People, 25 N. Y. 380; s. c. 5 Parker, 291.

**127.** An indictment for forgery averred that the instrument forged purported to be the act of another, to wit, of "The Traveler's Insurance Company of Hartford, Connecticut," and that the intent was to defraud "The Traveler's Insurance Company of Hartford, Connecticut, which was then and there a corporation duly organized," &c. *Held* unobjectionable, the artificial person being described by its corporate name, with the addition of the place in which it was created. People v. Graham, 6 Parker, 135.

**128.** Where the indictment charged the defendant with forging a check, drawn in the name of a copartnership firm, on the president and directors of the Manhattan Company, it was held that it was not necessary to allege the names of all the partners who composed the copartnership or the banking company. People v. Curling, 1 Johns. 320.

**129.** An indictment for passing and uttering as true counterfeit coin in the similitude of the coin of the United States, after naming the person whom the prisoner intended

to defraud, need not specify the name of the person to whom the coin was passed. Act of March 3d, 1824 (4 Stat. 121). U. S. v. Bejandio, 1 Wood C. C. 294.

**130.** Where the offense consists in the fraudulent possession or concealment of a thing, it will be sufficient to allege that the party charged fraudulently possessed or concealed such thing, without charging or proving that any particular person, corporation, or company, was intended to be defrauded. Gabe v. State, 1 Eng. 519.

**131.** An indictment for forging an indorsement on a negotiable note need not name the maker of the note or state where the note is payable. Cocke v. Com. 13 Gratt. 750.

**132.** An indictment for forging a receipt need not allege that the person charged with the offense is indebted to the individual against whom the receipt is forged. Snell v. State, 2 Humph. 347.

**133.** An indictment for passing a counterfeit bank bill need not allege that the person who received the bill knew that it was counterfeit; and it is not clear that the intent to defraud must exist in reference to such person, and may not exist toward third persons. Wilkinson v. State, 10 Ind. 372.

**134. Averment of time.** The time when the coin of which a counterfeit is uttered and published was current in the State, is material, and must be stated in the indictment. Nicholson v. State, 18 Ala. 529.

**135.** An allegation in an indictment that the prisoner, on the fifteenth day of April, had in his possession ten counterfeit bank bills, knowing them to be counterfeit, with the intention to pass the same, is not equivalent to an averment that he had them in his possession at one time. State v. Bonney, 34 Maine, 223.

**136.** Where an indictment alleged that a forgery was committed by the alteration of an order given by the defendant, but did not state that the alteration was made after it was circulated and by him, it was held insufficient. State v. Greenlee, 1 Dev. 523.

**137.** Where a count in the indictment charged the commission of the forgery on a day after the trial, it was held good; and the same was held of a count which did not state in what part of the instrument the forged words were placed. Penn v. McKee, Addis. 33.

**138.** Where an indictment for forgery alleges a single fact with time and place, the words "then and there" subsequently used as to the occurrence of another fact, refer to the same point of time; and when the indictment charges that the defendant had on a day named, one forged bill, and then uttered it, and then knew it to be forged, it is equivalent to averring one act of possession, and a simultaneous uttering and guilty knowledge. Com. v. Butterick, 100 Mass. 12.

**139. Guilty knowledge and intent.** An indictment for aiding to pass forged paper must state that the accused knew that it was forged. Anderson v. State, 7 Ohio, 250. Charging that the defendant secretly kept instruments for counterfeiting sufficiently shows a *scienter*. Sutton v. State, 9 Ib. 133.

**140.** An indictment for forgery must allege that the false making or alteration was with intent to defraud some person or body corporate, and also show that the writing, if genuine, would prejudice the person or body corporate named. Clarke v. State, 8 Ohio, N. S. 630; Com. v. Goodenough, Thach. Crim. Cas. 132; Com. v. Woodbury, Ib. 47; State v. Odel, 3 Brev. 552; s. c. 2 Const. R. 758. But the indictment need not set out all the facts and circumstances which show the intent. People v. Stearns, 21 Wend. 409.

**141.** The indictment need not allege who the party was that the defendant intended to defraud, or the means to be used in the commission of the fraud, or the object to be accomplished by the same. And where the forged instrument was a deposition used by the prisoner on the trial of a libel for divorce, it was held that the indictment need not contain the full contents of the libel or petition. State v. Kimball, 50 Maine, 409.

**142.** In Massachusetts, an indictment for having in possession a counterfeit bank bill was held insufficient under the statute (of 1804, ch. 120), which did not charge that the defendant had the bill in his possession for the purpose of rendering the same cur-

rent as true, or with intent to pass the same, knowing it to be false, forged and counterfeit. Com. v. Arlin, Thach. Crim. Cas. 289.

**143.** Under a statute punishing the having in possession counterfeit money "with intent to utter or pass the same, or render the same current as true," an indictment which charged possession "with intent to utter and pass the same," omitting the words "as true," was held insufficient. People v. Stewart, 4 Mich. 656.

**144.** In Tennessee, an indictment under the statute (of 1829, ch. 23, § 33) is sufficient which charges that the defendant kept the counterfeit bank note with a "fraudulent" intent to pass it, without alleging that it was kept with a "felonious" intent. Perdue v. State, 2 Humph. 494.

**145.** An indictment charged the forging of a certificate of the tenor following: "Boston, Aug. 6th, 1868. St. James Hotel, Franklin Square. I hereby certify that L. W. Hinds & Co. have placed in my hotel a card of advertisements, as per their agreement by contract. J. P. M. Stetson, Proprietor," with intent thereby, then and there, to injure and defraud. *Held*, that, as the fraudulent character of the instrument was not manifest on its face, it should have been made to appear by averments, and that, for the want thereof, judgment must be arrested. Com. v. Hinds, 101 Mass. 209.

**146.** Where it was alleged that H. feloniously and fraudulently forged a certain writing as follows: "Mr. C.: Charge H.'s account to us. A. & B.," with intent to defraud said A. and B., it was held that it should have been charged that H. was indebted to C. State v. Humphrey, 10 Humph. 442. But see *ante*, *sub.* 132.

**147.** Where the intent in forgery is described in the statute by different terms stated disjunctively, it may be described in the indictment by the use of all stated conjunctively. People v. Ah Woo, 28 Cal. 205.

**148.** An indictment for counterfeiting the coin of the United States under the act of Congress of 1825, § 20 (4 Stats. at Large, 121), need not charge an intent to pass the coin as true or to defraud. U. S. v. Peters, 2 Abb. 494.

**149. Descriptive averment.** The words "false, forged, and counterfeit," in an indictment import that the instrument described purports on its face to be, but is not in fact, genuine. U. S. v. Howell, 11 Wall. 432.

**150. Immaterial averments.** The omission, in an indictment for forging a check, of the figures denoting the number of the check, and of the letter C written under the signature, is not a variance. Cross v. People, 47 Ill. 152.

**151.** An indictment for having in possession counterfeit United States treasury notes with intent to pass them, need not allege that they were made in the resemblance of the genuine notes. U. S. v. Trout, 4 Bis. 105.

**152.** An indictment for forgery is not defective in omitting the averment that the instrument was stamped, where a stamp is required. Cross v. People, 47 Ill. 152.

**153.** An indictment for forging a paper made by an agent in the name of his principal need not aver the authority of the agent, or that it was drawn by him; setting out the check *in hac verba* with an allegation that it was made with intent to defraud the party whose name is signed to it, being all that is necessary. Cross v. People, *supra.*

**154.** An indictment for having in possession instruments used in counterfeiting coin need not charge that the offense was to have been committed feloniously. Miller v. State, 2 Scam. 233; Quigley v. People, 2 Ib. 301.

**155.** Where an indictment under a statute, that any one should be deemed guilty of forgery who should falsely make, deface, destroy, alter, &c., any record, deed, &c., or any other instrument in writing whatever, with intention to defraud any person; charged that the defendant did the act unlawfully and feloniously, omitting the word falsely, it was held sufficient. State v. Dark, 8 Blackf. 526.

**156.** An indictment against a justice of the peace for altering a writ issued by him, after service and before the return day, which did not charge the offense as forgery, was held bad. Com. v. Mycall, 2 Mass. 136.

157. An indictment for forgery need not state the names of the persons whom the prisoner procured to forge the instrument, or with whom he acted, and who assisted in the forgery. Huffman v. Com. 6 Rand. 685.

158. **Charging several acts.** Where an indictment charges in the same count two distinct offenses, requiring different punishments, as the forging of a mortgage, and receipt indorsed thereon, the judgment will be arrested. People v. Wright, 9 Wend. 193.

159. If the same person be guilty of making a counterfeit check, and also of attempting to pass it, or of passing it as true or genuine, with the intent to damage or defraud another, he may be indicted and tried for these connected and consecutive acts as constituting one transaction; or he may be indicted and convicted for each distinct offense. People v. Shotwell, 27 Cal. 394; People v. Frank, 28 Ib. 507.

160. An indictment which alleges that the defendant did falsely make *and* counterfeit a certain writing, which is set forth, is not bad for duplicity. State v. Hastings, 53 New Hamp. 452.

161. An indictment for forgery which charges that the defendants forged and caused to be forged, and aided and assisted in forging, is not bad for duplicity. State v. Morton, 27 Vt. 310.

162. The forging of an instrument, and the uttering and publishing it as true, knowing it to be false, may be charged in the same indictment. Haskins v. State, 11 Ga. 92; People v. Rynders, 12 Wend. 425.

163. It is proper for an indictment to charge as one offense the having in possession and uttering and publishing several counterfeit bank bills, and a verdict of guilty may be rendered on the whole charge or part, according to the proof. But when set forth in one count, it is to be treated as one offense. Com. v. Thomas, 10 Gray, 483.

164. An indictment which alleges that the defendant forged and counterfeited gold and silver coin, and had in his possession counterfeit coin, knowing the same to be false and counterfeited, with intent to utter and pass the same as true, is not bad for duplicity. State v. Myers, 10 Iowa, 448.

165. Where, in an indictment for forgery, the instrument alleged to have been forged is set out in each of two counts, it will not be presumed that each is the same instrument without an allegation to that effect. People v. Shotwell, 27 Cal. 394.

166. **Insufficient or improper averments.** Where the indictment describes the meaning of the instrument forged, a defect will not be cured by reciting the instrument *in hæc verba*. State v. Bean, 19 Vt. 530. When the indictment states in what the forgery consisted, it must be averred truly, and be proved as stated. People v. Marion, 28 Mich. 255; s. c. 2 Green's Crim. Reps. 572.

167. Where an indictment described the instrument forged as "purporting to be signed by the president and directors," and then set it out, which it did not appear to have been by order of the president and directors—*Held* that the repugnancy was fatal. State v. Shawley, 5 Hayw. 256.

168. An indictment charged the defendant with forging a bank check. The check which was set out, was not payable to bearer, or to the order of any named person. It was therefore incomplete, and could not have defrauded any one. *Held*, on demurrer, that the indictment was bad. Williams v. State, 51 Ga. 535.

169. An indictment averred that the prisoner feloniously did forge, &c., "a certain instrument in writing commonly called a certificate, the same being a certificate of the acknowledgment, by one L., of a certain mortgage," setting forth the certificate. The certificate, as thus set forth, purported to have been made by K, commissioner of deeds, but it had no venue, and there was nothing on its face to show of what county or city of the State K. was a commissioner. *Held* bad. Vincent v. People, 5 Parker, 88.

170. An indictment for uttering and passing as true an uncurrent and worthless bank bill, "of the tenor following," set forth an instrument similar to an ordinary bank bill, but with no signature of any person as president or cashier. It was then alleged that

"a more particular description of which said bank bill the said jurors have not, and cannot give." *Held* that the indictment was insufficient. Com. v. Chaney, 7 Allen, 537.

**171.** An indictment charged the forgery of an order for the payment of money, of the tenor following: "M., C. & Co. Pay Binam $5 75. J. L. C." *Held*, that as the writing did not purport to be drawn by or on any person, the indictment was bad for uncertainty. Bynam v. State, 17 Ohio, N. S. 142.

**172.** An indictment charged the forgery of an order for the delivery of goods, of the following tenor: "Dayton, Sept. 14, '60. Messrs. Langdon & Bro. Gents. Let the bearer have one of your smallest with load, and charge to me. R. Chambers." *Held* bad for uncertainty. Carberry v. State, 11 Ohio, N. S. 410.

**173.** An indictment which alleges the forging of a receipt against a "book account," is bad for uncertainty. Had the charge been forging an acquittance for goods, it would have been proper. State v. Dalton, 11 Ired. 379.

**174.** Where an indictment charged that an instrument was forged in the name of James C. Fogg, the tenor of which writing obligatory is as follows, that is to say, &c., and the instrument set out purported on its face to be executed by Jas. G. Fogg and Joseph G. Fogg the defendant—it was held, that the charge in the indictment was bad for repugnance. Fogg v. State, 9 Yerg. 392.

**175.** An indictment alleged that the note forged purported to have been made by one Nathaniel Durkie, and then set out the note, from which it appeared that the note was made by N. Durkie. *Held* that the repugnancy was fatal. State v. Houseal, 2 Brev. 219.

**176.** Where an indictment charged the counterfeit coin to be in imitation of coin of "the State of Missouri, called a Mexican dollar," it was held contradictory and repugnant. State v. Shoemaker, 7 Mo. 177.

**177.** In Vermont, an allegation in an indictment, that the coins intended to be counterfeited, "were current silver coins of this State and of the United States," not being equivalent to the words in the statute "which shall be made current by the laws of this, or the United States," it was held, on demurrer, that the indictment was insufficient. State v. Bowman, 6 Vt. 594.

**178.** The averment in an indictment for forging coins "which are current by law and usage in this State," would, by reasonable intendment, refer to the time of presenting the indictment rather than to the time of having in possession, and would therefore be bad, unless it might be rejected as surplusage. State v. Griffin, 18 Vt. 198.

**179. Conclusion.** In South Carolina, an indictment for counterfeiting, which concluded, "contrary to the statute," instead of "contrary to the form of the statute," was held fatally defective. State v. Toadvine, 1 Brev. 16.

### 4. Place of trial.

**180. For counterfeiting U. S. coin.** Although the courts of the United States have exclusive jurisdiction over the offense of counterfeiting the United States coin (Rouse v. State, 4 Ga. 136), yet the possession of tools designed for making counterfeit coin, coupled with the intent to use them for that purpose, is an offense distinct from the act of counterfeiting, and cognizable by the State courts. State v. Brown, 2 Oregon, 221. But as to the concurrent jurisdiction of the State courts, see Harlan v. People, 1 Doug. 207; Com. v. Fuller, 8 Metc. 313; State v. Butman, 1 Brev. 32; Chess v. State, 1 Blatchf. 198; Hendrick's Case, 8 Leigh, 707.

**181.** Forgeries against the laws of the United States must be tried in the district where they are committed. U. S. v. Britton, 2 Mason, 464.

**182. Where the forgery is in one county and the uttering in another county.** In Alabama, where a forgery is committed in one county, and, pursuant to a fraudulent combination there between the prisoner and the forger, the forged instrument is uttered and published in another county, the prisoner is an accessory before the fact to the offense of uttering and publishing (Code of Ala. § 3526), and may be indicted in the

county in which it was committed, although all his acts in relation to it were done in the other county. Scully v. State, 39 Ala. 240.

### 5. Evidence.

**183. Party whose name is forged may be witness.** On a trial for forgery, the person whose name is alleged to have been forged may be a witness to prove that fact. Simons v. State, 7 Ohio, 116; Resp. v. Ross, 2 Yeates, 1; *contra*, State v. A. W. 1 Tyler, 260; State v. Whitten, 1 Hill, S. C. 100.

**184.** When the instrument alleged to have been forged has been secreted by the accused, the person whose name is charged to have been forged, and who has seen and copied the instrument, may prove the instrument. Com. v. Snell, 3 Mass. 82; State v. Phelps, 11 Vt. 116.

**185.** A bank check, in the name of B., was passed by C. to D., who received the money and sent it to C., as his agent. The check was afterward discovered to be a forgery, and the bank got possession of the money before it reached the hands of C. On the trial of an indictment for the forgery, B. was held to be a competent witness to prove the offense. People v. Howell, 4 Johns. 296.

**186.** A judgment having been obtained before a justice of the peace, against A. and his surety B., B. paid a part of the judgment, and took the constable's receipt which he fraudulently altered so as to make the sum larger. Afterward, A. repaid B. what appeared by the receipt to have been paid by him. *Held* on the trial of an indictment against B. for the forgery, A. was a competent witness. State v. Bateman, 3 Ired. 474.

**187. Proof must support charge.** Where a person or thing necessary to be described in an indictment, is described with unnecessary particularity, all the circumstances of the description must be proved. People v. Marion, 28 Mich. 255; s. c. 2 Green's Crim. Reps. 572. Where, therefore, an indictment for passing counterfeit bank bills, charged that the bank was "a corporation duly authorized for that purpose by the State of Massachusetts," it was held that the State must prove the fact as alleged. State v. Newland, 7 Iowa, 242.

**188.** An indictment for forgery, charged the defendant with uttering, as true, to L., a false and forged deed of a piece of land, with intent to defraud him. It was proved that the deed was deposited by the defendant with L. as an equitable mortgage to secure board already had, and not the price of future board, and that the defendant did not board, or at the time of the deposit intend to board longer with L., which the latter well knew. *Held* that the indictment was not sustained. Colvin v. State, 11 Ind. 361.

**189.** An indictment for forging a railroad ticket described the instrument as "purporting to be a ticket or pass issued by," &c., "whereby said corporation promise and assure to the owner and holder thereof a passage in their cars over their railroad, extending," &c., and "as signifying to the holder that it must be used continually after once entering the cars, without stopping at any of the intermediate places on the line of the railroad between said," &c., "unless indorsed by the conductor." The terms and stipulations of the ticket proved were: "good this day only, unless indorsed by the conductor." *Held* that the variance was fatal. Com. v. Ray, 3 Gray, 441.

**190.** In Massachusetts, where an indictment under the statute (Gen. Stats. ch. 162, § 2), alleged that the defendant uttered and published as true, with intent to defraud, a false, forged and counterfeit promissory note, and the evidence was that he uttered and published as true, a counterfeit bank bill upon an incorporated banking company of the State, it was held that the variance was fatal. Com. v. Dole, 2 Allen, 165.

**191.** Where the indictment charges the forging of an accountable receipt "for money and other property," and the instrument produced in evidence, though a receipt, is not an accountable receipt, the variance will be fatal. Com. v. Lawless, 101 Mass. 32.

**192.** An indictment for forging a promissory note without a seal, will not be sup-

ported by evidence tending to prove that defendant forged a note under seal. Hart v. State, 20 Ohio, 49.

**193.** An indictment for the forgery of an order for $48 is not supported by proof of an order for $49. State v. Handy, 20 Maine, 81. Where a receipt set out in an indictment for forgery, purported to have been given to extinguish an order for sixty dollars, and the receipt offered in evidence purported to extinguish an order for sixty-five dollars, it was held that the variance was fatal. Shirley v. State, 1 Oregon, 269.

**194.** To sustain an indictment for having ten counterfeit bills in possession, it must be proved not only that the accused had the ten bills in his possession on the same day, but at the same moment. Edwards v. Com. 19 Pick. 124.

**195.** Evidence of the passing in payment of base metal in the likeness or similitude of gold, will not support an indictment which charges the passing in payment "counterfeit gold coin." Rouse v. State, 4 Ga. 136.

**196.** Where the examining court remanded the prisoner for trial for "feloniously using and employing as true, for his own benefit, a certain counterfeit note, well knowing the same to be counterfeit," it was held that an indictment for "forging" the note could not be sustained. Page's Case, 9 Leigh, 686.

**197.** An indictment for having in possession a counterfeit bank note for the purpose of selling, bartering, or disposing of the same, is not sustained by proof of having in possession such note with intent to pass the same to an innocent person as true and genuine. Hutchins v. State, 13 Ohio, 198.

**198. Proof of part of charge sufficient.** The averment in an indictment that a whole instrument which is set forth, has been forged, is satisfied by proof of a forgery of a material part. Com. v. Butterick, 100 Mass. 12.

**199.** An indictment charged the prisoner with forging and uttering as true a bank check, which was set out in the indictment, and purported to have been drawn on the Bank of Jersey City; and the words "certified by Sparks, Bank, J. C." were written across the face of it. The only writing proved to have been forged was these words. *Held* that the court did not err in refusing to instruct the jury that, as the indictment did not charge the forgery of the certificate, the prisoner could not be convicted. People v. Clements, 26 N. Y. 193, Balcom, J., *dissenting;* s. c. 5 Parker, 337.

**200.** Under an indictment charging the forgery of several indorsements on a promissory note, it is not necessary to prove that all of the indorsements are forgeries. People v. Rathbun, 21 Wend. 509.

**201. A trifling variance not regarded.** Although the description set forth in an indictment for uttering a forged instrument must conform to the instrument given in evidence, yet variances which are merely literal, and leave the sound and sense in substance the same, are not deemed material within the rule. Butler v. State, 22 Ala. 43; U. S. v. Hinman, 1 Bald. 292; Com. v. Whitman, 4 Pick. 233.

**202.** On the trial of an indictment for forging a promissory note, it need not be proved that pictures or devices were made in imitation of those used in the genuine note for ornament or distinction. Such pictures, ornaments, and devices, though they form parts of a bank plate, are no part of the instrument or contract impressed by it. The operative words must resemble and conform to the similar parts of the genuine instrument; but this resemblance and conformity is not exact similitude of appearance and position. People v. Osmer, 4 Parker, 242. Abbreviations in the seal which do not form a complete word may be disregarded. U. S. v. Mason, 12 Blatchf. 497.

**203.** An indictment for passing a forged promissory note as true, purporting to be made by A. payable to B. or order, is supported by proof of the uttering of such note with the indorsement of B.'s name on the back. Com. v. Adams, 7 Metc. 50.

**204.** In Massachusetts, an indictment under the statute (R. S. ch. 127) charged that the defendant "had in his possession a piece of false and counterfeit coin, counterfeited in the similitude of the good and legal silver coin current in this common-

wealth, by the laws and usages thereof, called a dollar, with intent to pass the same as true, knowing the same to be false and counterfeit." *Held*, supported by proof that the defendant had in his possession a coin counterfeited in the similitude of a Mexican dollar, with such intent and knowledge. Com. v. Stearns, 10 Metc. 256.

205. An indictment for forgery described a bank bill "of the tenor following," purporting to be signed by C. R. Drown, "cashier," whereas the bill offered in evidence purported to be signed by C. R. Drown, "cash." Whether the variance was fatal—*query*. In the same indictment the name of the cashier was stated to be *Droun;* whereas, on the bank bill, it was *Drown*. *Held* immaterial. Com. v. Woods, 10 Gray, 477. And see State v. Wheeler, 34 Vt. 261.

206. Where, on the trial of an indictment for passing a counterfeit bank bill, there was a variance as to the signature of the bill between the note set out and that given in evidence, and it appeared that the name was illegible, and that the discrepancy arose from the attempt to make a precise imitation of the name, it was held that the variance was not material. Mathena v. State, 20 Ark. 70.

207. Where an indictment for forgery alleged that an order was drawn upon the "president, directors, and company of the Bank of V.," and it was proved that the order was drawn upon the "Bank of V.," it was held that the variance was not material. State v. Morton, 27 Vt. 310.

208. Under an indictment alleging that the defendant had a counterfeit bank bill at Boston, "with intent then and there to utter and pass the same," it may be proved that he had it with such an intent at a place out of the State, it being immaterial where the defendant intended to pass the bill. Com. v. Price, 10 Gray, 472.

209. In Vermont, under a statute imposing a penalty for having in possession any mould, pattern, die, &c., adapted or designed for coining, it is sufficient to prove that the defendant had in his possession half of a mould. State v. Griffin, 18 Vt. 198.

210. Where an indictment for forgery described the note according to its purport and effect, and not according to its tenor, a variance in the word "promised" and "promise" is not material. Coin v. Parmenter, 5 Pick. 279.

211. The averment in an indictment for forgery, of an intent to defraud an individual, is sustained by proof of an intent to defraud a firm of which such individual is a member. State v. Hastings, 53 New Hamp. 452; Stoughton v. State, 2 Ohio, 562.

212. Where an indictment charged the prisoner with having forged and counterfeited a certain order for the payment of money, purporting to be made and drawn by A. and B., selectmen of the town of C., it was held unnecessary to prove that those men were in fact selectmen of the town. State v. Flye, 26 Maine, 312.

213. **Must be confined to the issue.** On the trial of an indictment for forging and uttering a deposition used by the accused in an action for divorce brought by him, it is not error in the court to refuse to allow him, on cross-examination of the person whose signature to the deposition is alleged to be forged, to show that the facts stated in the deposition are true. State v. Kimball, 50 Maine, 409, Kent, J., *dissenting*. But on a trial for forging a mortgage, it was held competent for the prosecution to show that a deed which was given in evidence by the prisoner, in a suit in chancery relating to the mortgage, had been altered so as to make it correspond with the mortgage. Perkins v. People, 27 Mich. 386; s. c. 2 Green's Crim. Reps. 567.

214. **Instrument must be produced.** The instrument alleged to be forged must be produced, or its absence accounted for. Manaway v. State, 44 Ala. 375; Com. v. Hutchinson, 1 Mass. 7. On the trial of an information for passing counterfeit money, the money must be produced in court, before evidence is given of its being counterfeit. State v. Osborn, 1 Root, 152; State v. Bloget, Ib. 534. But proof that the defendant admitted the crime, or destroyed the money, will excuse its non-production. State v. Ford, 2 Ib. 93.

215. Under an indictment for passing a counterfeit bank bill, to render admissible evidence that the defendant had passed other counterfeit bills of the same denomination, those bills should be produced in court, or, if in the possession of the defendant, he should have had notice to produce them. State v. Cole, 19 Wis. 129.

216. **Existence of bank.** On the trial of an indictment for forging a bank bill, the existence of the bank need not be proved, unless it is charged that the prisoner intended to defraud the bank. Com. v. Smith, 6 Serg. & Rawle, 568; McCartney v. State, 3 Ind. 353; People v. Peabody, 25 Wend. 473. And when the indictment charges that the instrument forged purported to be drawn on a bank, the existence of the bank need not be proved. State v. Pierce, 8 Iowa, 231.

217. On the trial of an indictment for the forgery of a bank note, purporting to have been issued by a certain banking association, it may be proved by parol that there is such an institution in existence, doing business in the State, without offering in evidence the articles of association under which such bank was organized. Dennis v. People, 1 Parker, 469; People v. Chadwick, 2 Ib. 163; Reed v. State, 15 Ohio, 217; State v. Cleaveland, 6 Nev. 181.

218. Where on a trial for passing counterfeit bank bills, the bank officers cannot be produced, the next best evidence is that of persons who know of the existence of the bank, and the character of the bills. Com. v. Riley, Thach. Crim. Cas. 67; State v. Stalmaker, 2 Brev. 1.

219. On the trial of an indictment for passing the counterfeit bank bills of a bank in another State, the incorporation of the bank may be proved by a copy of the act of incorporation, duly certified, or by the production of a sworn copy. Stone v. State, 1 Spencer, 401; or by the statutes in which the charter is printed. Jones v. State, 5 Sneed, 346.

220. An indictment for having in possession, with intent to utter, counterfeit bank bills, knowing the same to be false, which alleges that the bills purported to be issued by the "president, directors, and company of" an incorporated banking company duly established in another State, is supported by proof that the bills were issued by an association formed there under a general banking act of the United States. Com. v. Hall, 97 Mass. 570. See Com. v. Tenney, Ib. 50.

221. On the trial of an indictment for having in possession the false and counterfeit bills of a foreign bank, with intent to pass the same, the prosecution is not bound to prove it to be an incorporated bank. Sasser v. State, 13 Ohio, 453; People v. Davis, 21 Wend. 309.

222. **Name of bank.** Where although in an indictment for having in possession counterfeit bank bills, with intent to pass the same, the bills need not be described, yet if it be alleged that they are the bills of certain named banks, they must be proved as laid. Clark v. Com. 16 B. Mon. 206.

223. Where the indictment charged the counterfeiting a bill of an incorporated bank, incorporated by the name of "The President and Directors of the Bank of South Carolina," and the bill proved was of "The Bank of South Carolina," it was held that the variance was fatal. State v. Waters, 3 Brev. 507.

224. **President of bank.** On the trial of an information for uttering and passing a counterfeit bill, it was held that parol evidence was admissible to show that the person whose name appeared on such bill as president was president of the bank by which the same purported to be issued. State v. Smith, 5 Day, 175.

225. **Counterfeit bank bills.** On the trial of an indictment for passing counterfeit money, the court may permit experts to testify to the false character of the bills, without requiring proof that there was a bank in existence issuing genuine bills, of which those in question might be counterfeits. Jones v. State, 11 Ind. 357; U. S. v. Foye, 1 Curtis, 364.

226. On the trial of an indictment for passing counterfeit bank bills, it is not necessary to prove that they are counterfeit by an officer of the bank. Martin's Case, 2 Leigh, 745. And see Foulker's Case, 2 Rob. 836.

227. Experts who never saw the officers of a bank write are competent witnesses to prove the note counterfeit. Farrington v. State, 10 Ohio, 354; May v. State, 14 Ib. 461.

228. On the trial of an indictment for passing counterfeit bills of a bank out of the State, the testimony of a person who was acquainted with the handwriting of the president and cashier, though he had never seen them write, was admitted to show that their signatures were not genuine. State v. Ravelin, 1 Chip. 295.

229. A person in the exchange business and the teller of a bank, both of whom have a knowledge of counterfeit bank bills and of the genuine notes of a bank which the prisoner is charged with counterfeiting, are competent to testify as experts to the character of the note charged to have been counterfeited; and the fact that they could discover no perceptible difference between it and the genuine notes, and that their opinion against its genuineness was based mainly upon the imperfectness and indistinctness of the engraved impression on it, is no reason for rejecting their evidence. Johnson v. State, 35 Ala. 370.

230. The testimony of persons who are acquainted with the signatures of the president and cashier of a bank, from having seen bills of the bank in circulation, is admissible to prove that a bill which purports to be a bill of the bank is a forgery. State v. Carr, 5 New Hamp. 367; Com. v. Smith, 6 Serg. & Rawle, 568. Where a person had, for several years, been in the habit of receiving and paying away notes of a particular bank, it was held that he was a competent witness to prove the genuineness or forgery of a note on that bank, though he had never seen the president or cashier write, and never had a letter from them. State v. Chandler, 3 Hawks, 393.

231. On a trial for passing a forged bank note, a person was held competent to prove that the note was counterfeit, who had for ten years been employed as cashier of a bank, and in that capacity had received and passed away a great number of the notes of this bank, without ever having had one returned as a counterfeit, and who testified that he believed he could readily distinguish between a genuine and a counterfeit note, not only from the signatures, but also from the paper, engraving, and general appearance of the note. State v. Harris, 5 Ired. 287.

232. On a trial for altering a bank bill, the bank being out of the State, forty miles distant, the forgery was allowed to be proved by two witnesses who had often received and paid out bills purporting to be made by the bank, but neither of whom had ever seen the president or cashier write. Com. v. Carey, 2 Pick. 47.

233. On the trial of an indictment for having in possession a counterfeit bank note, it is not sufficient for witnesses to swear to the identity of the note, unless it has been constantly in their possession, or they put a private mark upon it. Com. v. Kinison, 4 Mass. 646.

234. **Proof of handwriting in general.** On the trial of an information for uttering a forged power of attorney, it is competent to prove that both the power and the deed purporting to have been executed in pursuance of it, are in the handwriting of a confederate of the defendant. People v. Marion, 29 Mich. 31.

235. The methods of proving handwriting are, by the testimony of those: 1st. Who have seen the person write. 2d. Who have received letters of such a nature as render it highly probable that they were written by the person. 3d. Who have inspected and become familiar with authentic documents which bear the signature of the person. State v. Allen, 1 Hawks, 6.

236. In a trial for forgery, a paper was handed to a witness with all the writing but the signature concealed, and the witness asked whether the signature was his. *Held*, that the witness was not bound to answer without first seeing the contents of the paper. Com. v. Whitney, Thach. Crim. Cas. 588.

237. **Comparison of hands.** When a writing has been proved to be genuine, a comparison may be made between it and the writing in dispute by witnesses who

may give their opinions founded on such comparison, and then the writings and the testimony of the witnesses respecting the same are to be submitted to the jury. State v. Hastings, 53 New Hamp. 452; s. c. 2 Green's Crim. Reps. 334. *Contra*, except as to ancient writings. State v. Givens, 5 Ala. 747.

**238.** In general, comparison of hands is not admissible as evidence to prove or disprove the genuineness of a signature or writing; but when the proof is so contradictory as to leave it doubtful, such evidence may be given. People v. Hewit, 2 Parker, 20.

**239.** On the trial of an indictment for forgery, a writing irrelevant to the issue is not admissible in evidence to enable the jury to institute a comparison of handwriting by juxtaposition of the two documents in order to ascertain whether both were written by the same person. State v. Fritz, 23 La. An. 55.

**240.** The handwriting of the supposed maker or indorser of the forged instrument cannot be submitted to the jury for the purpose of enabling them to compare it with that of the forged instrument. Bishop v. State, 30 Ala. 34.

**241. Contents of writing.** Where on a trial for forgery it is proved that the original paper is lost, or destroyed, or in the hands of the defendant, or of an accomplice, or a third person, evidence may be given of its contents without notice to produce it. Pendleton's Case, 4 Leigh, 694; U. S. v. Doebler, 1 Bald. 519; McGinnis v. State, 24 Ind. 500; overruling Armitage v. State, 13 Ib. 441, and Williams v. State, 16 Ib. 461.

**242.** Where the instrument alleged to have been forged is set out verbatim in the indictment, and is proved to have been mutilated, the prosecution may introduce secondary evidence of the contents of the mutilated part, after first proving the existence of the writing before mutilation as set out, and, in connection with such secondary evidence, may then offer in evidence the mutilated writing. Thompson v. State, 30 Ala. 28.

**243.** Secondary evidence of the contents of the instrument alleged to have been forged, which is charged in the indictment to have been destroyed or withheld by the defendants is not admissible on proof that it was last seen on the trial of a *habeas corpus* at the suit of another one of the defendants, in the possession of his attorney, who is not called to answer as to his possession. Morton v. State, 30 Ala. 527.

**244. Name of party.** Under an indictment charging the passing of counterfeit coin to a particular person, the christian name of the individual must be proved as laid. Where he was called Eli Clements in the indictment, and there was no proof that his christian name was Eli, it was held that it was error to charge the jury that they might infer from the testimony that his name was Eli. Gabe v. State, 1 Eng. 519.

**245.** Where an indictment for forging a promissory note, in setting out the note gave the name of the maker as "*Otha Carr*," and the note offered in evidence purported to have been made by "*Oatha Carr*," it was held that the variance was fatal. Brown v. People, 66 Ill. 344.

**246.** A bank note alleged to have been forged was set out in the indictment, and the name of the president of the bank stated to be "*Sedbetter*." The name in the instrument offered in evidence was "*Ledbetter*." *Held* that the variance was fatal. Zellers v. State, 7 Ind. 659.

**247.** Where notes alleged to have been forged, as set out in the indictment were payable to "E. Cymour or bearer," and those offered in evidence were payable to "E. Seymour or bearer," it was held that the variance was fatal. Porter v. State, 15 Ind. 433; s. c. 17 Ib. 415.

**248. Agent or servant.** The charge of attempting to pass a forged instrument will be sustained by proof that the attempt was made through an agent. U. S. v. Morrow, 4 Wash. 733.

**249.** Under an indictment for altering an order in writing for money payable to the defendant, evidence that another did it, the defendant knowing and assenting to it, was held sufficient to warrant a conviction. Com. v. Parmenter, 5 Pick. 279.

**250.** Where a counterfeit bank bill is actually delivered to an agent or servant of

the person defrauded, it may be alleged and proved that the uttering and passing were to the former, although he had no beneficial interest in the transaction, and the evidence would also support an allegation of an intent to defraud the principal. Com. v. Starr, 4 Allen, 301.

**251.** The agent of a company to whom a forged demand against the company was presented, is a competent witness to prove his agency, on a trial for forgery, against the person who attempted to collect the money. Manaway v. State, 44 Ala. 375.

**252. Declarations of party injured.** Where on the trial of an indictment for forging the name of A. to a note and contract, dated respectively the 16th and 17th of April, it was proved that at those dates A. was ill in bed, that he died on the 20th of April, and that he had abandoned all hopes of getting well as early as the 13th—it was held that the defense might show that on the 18th of the same month, A. declared that he had executed the note and contract in question. People v. Blakeley, 4 Parker, 176.

**253. Acts and declarations of defendant.** Where two have confederated to pass counterfeit notes, or any joint concurrent action in passing them is proved, the act of one is evidence against the other. U. S. v. Hinman, 1 Bald. 292.

**254.** On the trial of an indictment for having a counterfeit bank bill with intent to pass the same, knowing it to be counterfeit, the previous declaration of the defendant, that he was accustomed to buy and sell counterfeit money and was familiar with different kinds of forged notes or bills, is admissible as tending to prove guilty knowledge; but not a letter containing counterfeit money received by him through the post office, which he had not opened when arrested. Com. v. Edgerly, 10 Allen, 184.

**255.** On a trial for knowingly having in possession an instrument adapted and designed for coining or making counterfeit coin, with intent to use it, or permit it to be used for that purpose, it was held that the defendant could not prove his declarations to an artificer, at the time he employed him to make such instrument, as to his object in having it made. Com. v. Kent, 6 Mete. 221.

**256. Presumption as to bank.** On a trial for counterfeiting bank bills, proof that the bills of a bank are received by public officers of the State, and that such bills are in general circulation, is sufficient to raise the presumption that the acts required to be done by the bank before its charter should take effect were preformed. State v. Calvin, R. M. Charlt. 151.

**257. Presumption from conduct of defendant.** On the trial of an indictment for having in possession with intent to utter and pass counterfeit notes of the United States, the fact that the prisoner when arrested gave no explanation of the manner in which he came by the notes, is a circumstance proper for the consideration of the jury. U. S. v. Kennedy, 5 Bis. 122.

**258.** On a trial for forgery, proof that the accused employed a fabricated deposition in aid of the instrument is admissible as tending to show his guilt. State v. Williams, 27 Vt. 724.

**259.** Where it was proved that the defendant passed a counterfeit bank bill, and that he gave different accounts as to the person from whom he received it, and did not attempt upon the trial to give any explanation, it was held that the evidence was sufficient to sustain a verdict of guilty. Perdue v. State, 2 Humph. 494.

**260.** Where the defendant in an indictment for uttering and passing as true a counterfeit bank bill, in order to procure delay in his trial, on the ground of the absence of a material witness, made an affidavit in which he attempted to account for the possession of the counterfeit money, and it was proved that at other times he had accounted for its possession in a different manner, it was held that the jury might take his contradictory statements into consideration as indicative of guilt. Com. v. Starr, 4 Allen, 301.

**261.** On a trial for forging a check on a bank, it was not proved that the accused wrote or signed the check; but there were circumstances tending strongly to establish

that he fraudulently uttered it. He left with an expressman a sealed envelope, directed to C. & S., containing the check, and an order to C. & S. to deliver specified gold leaf to the bearer, and to receipt the bill. He also requested the expressman to deliver the letter, and get from C. & S. a box which he was to carry to a hotel. And the prisoner met him there, claimed and received the box, and paid the express charges. *Held*, that there was sufficient evidence to be submitted to the jury. Watson v. People, 64 Barb. 130.

**262.** Under an indictment against several for forging an indorsement on a bank check, it is competent to prove, as tending to show concert, that the defendants agreed to procure money by means of forged paper from banks, without reference to any particular bank. State v. Morton, 27 Vt. 310.

**263.** Where a person draws a bill of exchange on himself, payable to his own order, accepts and indorses it, the presumption is, that the second indorsement was made after the first. Com. v. Butterick, 100 Mass. 12.

**264. Presumption from possession.** The possession by the prisoner, of the forged note described in the indictment, with other similar forged notes, and the plates, implements and materials for forging such notes, is *prima facie* evidence that the prisoner is a forger. Spencer's Case, 2 Leigh, 751; State v. Britt, 3 Dev. 122; Perkins v. Com. 7 Gratt. 651; Com. v. Talbot, 2 Allen, 161.

**265.** On a trial for forging bank bills, proof that the prisoner had in his possession other similar bills about the same time, is admissible, although other indictments are pending against him for these acts. Com. v. Percival, Thach. Crim. Cas. 293; Com. v. Chandler, Ib. 187; State v. Williams, 2 Rich. 418; State v. McAllister, 24 Maine, 139.

**266.** The knowingly and secretly keeping instruments adapted for counterfeiting, raises the presumption that they were intended to be used for that purpose, which the defendant is required to rebut. People v. Page, Idaho, 114.

**267.** On a trial for forgery in obliterating the writing of a check, and substituting therefor other words and figures, it is competent to prove by a witness who is not an expert, that certain effects followed the application of a powder in extracting ink from a paper, which powder was found in the possession of the defendants, and the paper upon which the effect sworn to by the witness was produced may be shown to the jury. People v. Brotherton, 47 Cal. 388; s. c. 2 Green's Crim. Reps. 444.

**268.** To constitute the offense of having in possession counterfeit blank and unfinished bank bills, it is not necessary to prove the intent to fill them up by showing an attempt to do so; the intention being sufficiently manifested by the circumstance of possession. People v. Ah Sam, 41 Cal. 645.

**269.** On the trial of an indictment for having counterfeit coin with intent to pass the same, and with intent to defraud F. and others, the evidence tended to prove that the defendant had a large amount of counterfeit coin in his possession for the purposes of sale, and that F., acting in concert with the police, succeeded in purchasing of the defendant counterfeit coin of the nominal value of several hundred dollars. *Held*, sufficient to sustain a conviction. People v. Farrell, 30 Cal. 316.

**270.** Genuine papers of the same kind as the one alleged to be forged, which were presented with it, and taken from the accused at the same time, are admissible in evidence as part of the *res gestæ*. Manaway v. State, 44 Ala. 375.

**271.** On a trial for forgery, the prosecution, after connecting the prisoner with other persons in the transaction, may prove that different parts of the machine employed in the counterfeiting were found in possession of such other persons. U. S. v. Craig, 4 Wash. C. C. 729.

**272.** On the trial of a person for having in his possession an altered bank bill with intent to pass the same, it was held error in the court to allow the prosecution to prove that the wife of the prisoner, who was arrested about the same time he was, had in her possession engraved figures cut from genuine bills, there being no other evidence of any concert between the prisoner

and his wife, or that they were mutually engaged in altering bank bills, or that either of them had any knowledge of the facts which were proved against the other. People v. Thomas, 3 Parker, 256, Dean, J., *contra*; affi'd 3 N. Y. Ct. of Appeals Decis. 571.

273. **Presumption as to place.** Evidence that the prisoner attempted to pass a forged note in a certain county is presumptive evidence that that was the place of the forgery. Bland v. People, 3 Scam. 364; Spencer's Case, 2 Leigh, 751; Johnson v. State, 35 Ala. 370; State v. Morgan, 2 Dev. & Batt. 348; *contra*, Com. v. Parmenter, 5 Pick. 279.

274. Where a forged instrument purported to have been made in Charleston, S. C., and it was shown that the prisoner at its date was there and had the same in his possession, it was held sufficient to show that it was made there. State v. Jones, 1 McMullan, 236.

275. Where an altered check was produced at Boston, and the prisoner gave no explanation of the time or place of the alteration, it was held that the presumption was that the alteration was made in Massachusetts. U. S. v. Britton, 2 Mason, 464.

276. **Character.** Where on the trial of an indictment for having counterfeit bank bills with the intent to pass them, the accused had not put his character in issue, it was held error to admit in evidence the confession of the prisoner that he had been a convict in a State prison. People v. White, 14 Wend. 111. See Ackley v. People, 9 Barb. 609.

277. **Guilty knowledge and intent.** To sustain an indictment for having a counterfeit bank note in possession, three things must be proved: 1, the possession of the bank bill; 2, the knowledge of its being counterfeit; and 3, the intention to pass it with a view to defraud. Harland v. People, 1 Doug. 207.

278. On a trial for forgery, it is not error in the court to instruct the jury that they will be authorized to infer an intent to defraud from the character of the instrument, if they find that it was forged. State v. Kimball, 50 Maine, 409.

279. An indictment for uttering a forged instrument in writing with intent to defraud may be sustained, although it is proved that the person to whom the forged instrument was addressed was not acquainted with the supposed drawer, and had no account with him, nor any goods in his possession belonging to him. People v. Way, 10 Cal. 336.

280. On the trial of an indictment for uttering counterfeit coin, guilty knowledge must be proved, and the possession by the prisoner of instruments for coining may be shown for this purpose. Wash v. Com. 16 Gratt. 530; State v. Antonio, 3 Brev. 562.

281. But where on trial of an indictment for having in possession counterfeit bank notes with guilty intent, the prosecution were allowed to prove that appliances and materials for the manufacture of counterfeit coin were found in the possession of the defendant, in order to show guilty knowledge and intent, it was held error, the only evidence admissible for this purpose being the possession of other counterfeits similar in kind. Bluff v. State, 10 Ohio, N. S. 547.

282. Under an indictment for having in possession counterfeit money with intent to pass it, the possession must be proved by positive evidence, but the intent may be shown from circumstances. People v. Gardner, 1 Wheeler's Crim. Cas. 23.

283. On the trial of an indictment for having in the defendant's possession a counterfeit bank bill of another State, and uttering and publishing the same as true, the following instruction was held correct: That the indictment would be supported by proof that the defendant being himself apprised that the bill was counterfeit, and knowing that it was the purpose of H., upon obtaining it by purchase, to utter and render it current as true, had it in his possession with intent to sell it to H., and did actually sell it to him, to enable him to dispose of it in violation of law, and participated with him in carrying that purpose into execution. Com. v. Davis, 11 Gray, 4.

284. On the trial of an indictment for uttering and passing as true a counterfeit bank bill, evidence that the defendant had

been employed in the business of printing parts of genuine bank bills is admissible to show knowledge on his part that the bills he passed were counterfeit. And evidence that he swallowed a counterfeit bill when arrested, the morning after the commission of the offense alleged in the indictment, the bill being similar to those passed by him, is also admissible to show guilty knowledge and intent. Com. v. Hall, 4 Allen, 305.

**285.** On a trial for having counterfeit notes in possession, evidence is admissible that other counterfeits were found secreted in the prisoner's house, in possession of his wife. Hess v. State, 5 Ohio, 5. But whether on the trial of a person for passing a counterfeit gold piece, evidence that the defendant had in his possession and attempted to secrete counterfeit bank notes, is admissible on the question of guilty knowledge—*query*. Lane v. State, 16 Ind. 14.

**286.** On the trial of an indictment for passing a forged bank note or check, evidence that the prisoner uttered another forged note or check on the same bank about the same time, is admissible to show guilty knowledge. State v. Robinson, 1 Harr. 507; Mount v. Com. 1 Duvall, 90; Steele v. People, 45 Ill. 152.

**287.** On the trial of an indictment for having in possession with intent to pass, and for passing with intent to defraud, it is competent to prove on the question of guilty knowledge, that the prisoner, on the same day and at the same gambling sitting, passed as genuine spurious, as distinguished from counterfeit bank bills, and that, when arrested, he had several such bills, both signed and unsigned, in his possession. State v. Brown, 4 R. I. 528.

**288.** On the trial of an indictment for passing a counterfeit bank note, after it had been proved that the defendant passed the note, it was held competent to show that he passed other counterfeit notes of the same kind to other persons, the day after he committed the offense charged. Hendrick's Case, 5 Leigh, 707. To show guilty knowledge, it may be proved that the prisoner passed other counterfeit notes at different times, before and subsequent. State v. Mise, 15 Mo. 153; Martin's Case, 2 Leigh, 745; Com. v. Woodbury, Thach. Crim. Cas. 47; Peck v. State, 2 Humph. 78; U. S. v. Doebler, 1 Bald. 519; State v. Van Heuten, 2 Penn. 672; U. S. v. Mitchell, 1 Bald. 366; Powers v. State, 9 Humph. 274; McCartney v. State, 3 Ind. 353; State v. Tuitty, 2 Hawks, 248; Reed v. State, 15 Ohio, 207; State v. Van Houten, Penning. 2d ed. 495; Com. v. Price, 10 Gray, 472.

**289.** But to enable the prosecution to give evidence of other utterings of forged notes or bills subsequent to that charged in the indictment, they must in some way be connected with the principal case, or the notes and bills must be of the same manufacture and be precisely similar. Dibble v. People, 4 Parker, 199; affi'd 3 N. Y. Ct. of Appeals Decis. 518. And see People v. Corbin, 56 N. Y. 363.

**290.** On a trial for passing a counterfeit note of a particular bank, evidence of passing a counterfeit note of another bank at another time is not admissible. U. S. v. Roudenbush, 1 Bald. 514. Therefore, on a trial for forging a bank note of the bank of the State of North Carolina, it was held error to admit evidence of an attempt by the defendant, three years previous, to utter forged bank notes of the Northern Bank of Kentucky. Morris v. State, 8 Sm. & Marsh. 762.

**291.** On the trial of an indictment for uttering forged notes, evidence is admissible to show that the prisoner, at or near the same time, uttered other similar notes, although he admits that he passed such notes, and that, if they were not genuine, he knew the fact, at the same time, however, denying the forgery; the prosecution having a right to make out their own case, without relying on an admission of the defendant. Com. v. Miller, 3 Cush. 243.

**292.** On a prosecution for uttering a forged note, evidence is admissible on the question of guilty knowledge to show that the defendant passed another forged note, although he had been acquitted on an indictment for uttering the latter note, the acquittal only weakening the force of this evidence. State v. Houston, 1 Bailey, 300.

293. On the trial of an information against A. for uttering a counterfeit bank bill, knowing it to be counterfeit, it was proved that A. and B. had entered into a conspiracy to utter counterfeit bills similar to the bill described in the information. *Held* that on the question of guilty knowledge evidence was admissible to prove that, at two different places, a day or two previous to the alleged offense, and at another place soon after its commission, B. uttered other counterfeit bills of the same bank, A. being in company with B. immediately before and after such putting off by B., but not actually present with him at those times. State v. Spalding, 19 Conn. 233.

294. On the trial of an indictment for passing a forged note, knowing it to be forged, evidence that the prisoner tried to hire a person to procure for him counterfeit money, that he inquired whether he had brought him any, and declared that he intended to cultivate the acquaintance of a counterfeiter, and intended to remove to another place, is admissible as tending to prove the scienter. Finn v. Com. 5 Rand. 701.

295. On the trial of an indictment for passing counterfeit money, evidence that about the time of the alleged offense the wife of the defendant sold to the witness other counterfeit money belonging to the defendant, in his absence, and that the defendant was afterward informed of the transaction and sanctioned it, is admissible as tending to show knowledge on the part of the defendant that the bill passed by him was counterfeit. Bersch v. State, 13 Ind. 434.

296. The manner in which the accused read the note to a person to whom he offered it, may be proved to show the *quo animo* with which the note was made and uttered. Butler v. State, 22 Ala. 43.

297. Evidence that the prisoner, when arrested, two or three hours after an alleged attempt on his part to pass a counterfeit bank note, had in his possession a large amount of similar counterfeited notes, which he tried to conceal from the officer, while willingly exhibiting the genuine bank notes in his possession, is admissible against him, as tending to show guilty knowledge and intent. Johnson v. State, 35 Ala. 370.

298. Evidence that genuine notes of the bank, which the prisoner is charged with counterfeiting, were at that time current, is admissible against him, as bearing on the question of fraudulent intent, and tending to show a motive for the commission of the offense. Ib.

299. On the trial of an indictment for the forgery of a deed, it may be proved by the grantor, without notice to produce papers, that the defendant had previously brought to him the draft of a deed which he saw, and read, but did not execute, and which was different from the deed which was afterwards brought to him as the same, and as such executed. State v. Shurtliff, 18 Maine. 368.

300. Where the indictment charges the intent to defraud a particular bank or person, the intent must be proved as laid. Com. v. Whitney, Thach. Crim. Cas. 588; U. S. v. Moses, 4 Wash. 726; State v. Harrison, 69 N. C. 143; s. c. 1 Green's Crim. Reps. 537.

301. **Intoxication of defendant.** Intoxication is not a defense to an indictment for passing counterfeit money if the defendant was possessed of his reason, and was capable of knowing whether the note passed by him was good or bad. U. S. v. Roudenbush, 1 Bald. 514. But the fact that the prisoner was intoxicated when he passed a counterfeit bill is a circumstance proper to be submitted to the jury in determining whether he knew that the bill was counterfeit. Pigman v. State, 14 Ohio, 555.

302. **To be considered by jury.** On the trial of an indictment for passing a forged bank check, no other writing being introduced in evidence, and the indorsement and signature being proved, it was held proper to submit the check to the jury, with or without the aid of experts, to determine whether the whole instrument, with the indorsement was made by one and the same hand. State v. Scott, 45 Mo. 302. And see State v. Flye, 26 Maine, 312.

6. Verdict.

**303. Need not negative mitigating circumstance.** On a trial for uttering and publishing as true a forged instrument, the verdict need not negative the fact that the defendant received the forged instrument from another person, in good faith and for a valuable consideration, although that fact, if found by the jury, would reduce the offense to forgery in the third degree. Scully v. State, 39 Ala. 240.

**304. Bad for uncertainty.** An indictment contained a count for the forgery of a note, and another count for the forgery of an indorsement on the note. The jury rendered the following verdict: "Not guilty on the first count. On the second count, viz., that of uttering a negotiable note, knowing it to be forged, we find the prisoner guilty. *Held* that the verdict was bad for uncertainty. Cocke v. Com. 13 Gratt. 750.

## Former Acquittal or Conviction.

1. General principles.
2. Former acquittal.
3. Former conviction.
4. Plea.
5. Evidence.

1. General principles.

**1. Rights of prisoner.** Where the accused has been acquitted, and his acquittal has not been procured by his own fraud or evil practice, he shall not again be put in jeopardy by a second trial. But in case of conviction, the accused is entitled to a new trial, in the same manner as in civil actions. State v. Brown, 16 Conn. 54; State v. Davis, 4 Blackf. 345; State v. Spear, 6 Mo. 644; Gerard v. People, 3 Scam. 362; State v. Slack, 6 Ala. 676; People v. Allen, 1 Parker, 445; State v. Johnson, 8 Blackf. 533; Case of Serjeant, 2 City Hall Rec. 44. A former acquittal is not, however, a bar to a second prosecution for the same offense, unless the real merits were gone into under the first indictment. Com. v. Curtis, Thach. Crim. Cas. 202. In Arkansas, in cases of misdemeanor punishable by fine only, after trial and acquittal, there may be a second trial for the same offense. Jones v. State, 15 Ark. 261.

**2.** Where persons are indicted for an assault and battery committed upon A., B. or C., the indictment and conviction may be pleaded in bar of a second prosecution; and on the trial of such issue it will be competent for the defendants to show that on the former trial proof of an assault upon such person was given, and that it was the assault for which the jury found their verdict; and such proof will entitle the defendants to acquittal. People v. White, 55 Barb. 606.

**3. What required to constitute a bar.** A former trial is not a bar, unless the first indictment was such that the prisoner might have been convicted upon proof of the facts set forth in the second indictment. Burns v. People, 1 Parker, 182; Price v. State, 19 Ohio, 423; Durham v. People, 4 Scam. 172; State v. Glasgow, Dudley, S. C. 40; Com. v. Wade, 17 Pick. 395; Com. v. Roby, 12 Pick. 496; State v. Birmingham, Busbee, 120; Roberts v. State, 14 Ga. 8. Where the jury could lawfully have found the defendant guilty of a lesser offense, an acquittal of a higher will be a bar to an indictment for the lower. State v. Standifer, 5 Porter, 523.

**4. Pendency of second indictment.** The pendency of an indictment is not a ground for a plea in abatement to another indictment in the same court for the same cause; nor is it a ground for arresting judgment. Com. v. Drew, 3 Cush. 279; Com. v. Murphy, 11 Ib. 472; Com. v. Berry, 5 Gray, 93.

**5. Demurrer to plea to jurisdiction.** On a trial for murder, the prisoner pleaded in bar to the jurisdiction of the court, to which the prosecution demurred and the court sustained the demurrer and ordered the prisoner to plead over to the indictment. *Held* that there had been no trial within the provisions of the State and national constitutions, which protect persons from being twice put in jeopardy for the same offense. Gardiner v. People, 6 Parker, 155.

**6. Impanneling jury without arraignment.** Where there is no arraignment of

the prisoner, nor waiver of it, the impanneling of a jury is a mere irregularity, and the prisoner may be tried on another indictment for the same offense. Bryans v. State, 34 Ga. 323.

7. **Where the offense is against separate jurisdictions.** Although a person cannot be twice punished under the same jurisdiction, yet he may be, where the offense is against two different jurisdictions—as for a violation of the charter of a city and a penal law of the State. Ambrose v. State, 6 Ind. 351; Phillips v. People, 55 Ill. 429.

2. Former acquittal.

8. **Discharge by magistrate.** In Virginia a discharge by an examining court upon an accusation of felony, is not a bar to another prosecution for the same offense, under the statute (Code, ch. 205, § 11), unless the record shows that the discharge was upon the investigation of the facts. McCann v. Com. 14 Gratt. 570.

9. **Quashing indictment.** Where an indictment is quashed by reason of some of the grand jurors who found the bill being incompetent, the prisoner may be tried on another indictment. Brown v. State, 5 Eng. 607.

10. When the indictment is so defective that no judgment can be given upon it, there may be a second prosecution notwithstanding an acquittal. Canter v. People, 2 N. Y. Trans. Appeals, 1.

11. The fact that permission was given to the defendant to withdraw his plea of not guilty and file a plea of misnomer in abatement, and the abatement of the indictment on that ground, will not bar a second prosecution for the same offense. Com. v. Farrell, 105 Mass. 189.

12. But where a prosecuting attorney, having discovered a material omission in an indictment for perjury, supplied it without the leave of the court, and the case went to trial on the indictment as amended, and the defendant was acquitted—*Held* that such acquittal was a bar to a subsequent indictment for the same offense. People v. Cook, 10 Mich. 164.

13. **Suspension of trial.** A former indictment for the same offense, arraignment thereon, plea of not guilty, commencement of the trial by calling one juror, and its suspension against the consent of the prisoner, is not a bar to a second indictment. Ferris v. People, 48 Barb. 17.

14. **Entry of nolle prosequi.** A *nolle prosequi* entered by the prosecution, and a consequent discharge of the prisoner, is not a bar to another indictment for the same offense. Com. v. Wheeler, 2 Mass. 172; Lindsay v. Com. 2 Va. Cas. 345; Wortham v. Com. 5 Rand. 669; Walton v. State, 3 Sneed, 687.

15. But if, after the jury have been charged with the cause, a *nolle prosequi* is entered without the consent of the defendant, and the record shows no necessity for the discharge, the defendant cannot be put on his trial a second time for the same offense. Mount v. State, 14 Ohio, 295; Reynolds v. State, 3 Kelly, 53; U. S. v. Shoemaker, 2 McLean, 114.

16. **Discharge of jury.** The arbitrary discharge of the jury, against the consent of the prisoner, without any cause, and where no circumstances exist calling for the exercise of the discretion of the court, is a bar to his subsequent trial upon the same indictment. Grant v. People, 4 Parker, 527; Ned v. State, 7 Porter, 187; Com. v. Cook, 6 Serg. & Rawle, 577.

17. But the discharge of the jury by the court in a case of manifest necessity, such as the sudden illness of a juror, the illness of the prisoner, or other urgent cause, will not exempt the prisoner from being again put upon trial. U. S. v. Perez, 9 Wheat. 579; U. S. v. Haskell, 4 Wash. C. C. 402; State v. Hall, 4 Halst. 256; U. S. v. Shoemaker, 2 McLean, 114; Com. v. Roby, 12 Pick. 496.

18. **Separation of jury.** Irregularities, whereby a lawful verdict is prevented, are not a bar to a second trial. Consequently, there may be another trial notwithstanding the jury, after the cause was submitted to them, separated without authority, and without having agreed on a verdict. People v. Reagle, 60 Barb. 527; *contra*, State v. Garrigues, 1 Hayw. 276.

19. **Acquittal through error of court.**

An error of the court or jury in regarding as material an immaterial variance between the allegations and the proof, will not render the acquittal less available as a bar to a subsequent prosecution. People v. Hughes, 41 Cal. 234.

**20.** When a verdict of not guilty has been rendered in favor of a party, under a decision of the court that the indictment upon which it is rendered was insufficient to sustain a conviction, yet if that decision was wrong, and in fact a conviction could have been maintained under the indictment, such verdict and judgment, when pleaded, will protect the party against a second conviction for the same offense. Black v. State, 36 Ga. 447, Walker, J., *dissenting*.

**21. Where there is no punishment.** The amendment of a statute reviving the original law for the punishment of murder, does not affect a prisoner who meanwhile had obtained a judgment that the existing law did not authorize any punishment; the effect of such judgment being equivalent to acquittal. Hartung v. People, 26 N. Y. 167; s. c. 28 N. Y. 400.

**22. In case of variance.** A discharge on the ground of a variance between the indictment and proof is not a bar to a trial and conviction upon a subsequent indictment for the same offense. 2 N. Y. R. S. 701, § 24; Canter v. People, 1 N. Y. Ct. of Appeals Decis. 305. But where the defendant was tried and acquitted under an indictment charging him with forgery by the alteration of an order drawn on the firm of J. Irwin & Co., such acquittal was held a bar to a second indictment for the same forgery, which described the firm as "John Irwin & Co." Durham v. People, 4 Scam. 172.

**23. Acquittal of codefendant.** The acquittal of a codefendant is not a bar to a prosecution against the other defendant. State v. McClintock, 1 Iowa, 392.

**24. Acquittal of joint offense.** The acquittal of several defendants charged with committing an offense jointly, will not bar a prosecution against each one charged with part of the same offense separately committed by him. Com. v. McChord, 2 Dana, 242.

**25. Acquittal of part of entire transaction.** A. having stolen a horse, wagon and harness, two indictments were found against him, one for stealing the horse, and the other for stealing the wagon and harness. *Held*, that a trial and acquittal on one of the indictments was a good plea in bar against the other. Fisher v. Com. 1 Bush, Ky. 211.

**26. Acquittal on some of several counts.** Where each count of an indictment charges a distinct and substantive offense, and on the trial the defendant is acquitted of the charge on either count, he cannot be again put in jeopardy upon that charge. Esmon v. State, 1 Swan, 14; Campbell v. State, 9 Yerg. 333.

**27.** Where an indictment charges the same offense in different ways in several counts, and the defendant is acquitted upon some of the counts, and convicted upon others, in case of a new trial he may be tried on all the counts. Lesslie v. State, 18 Ohio, N. S. 390.

**28.** After a trial upon two counts of an indictment, which results in a disagreement of the jury, the defendant may be tried on the whole indictment; and it is discretionary with the prosecution whether he shall be tried again on the whole, or any part of the charge at the same term of the court. The only limitation to this discretion is that the counts upon which the disagreement has taken place, cannot be again put to the same jury. Com. v. Burke, 16 Gray, 32.

**29. In case of distinct offenses.** Where a person at the same time, and in the same transaction, commits two distinct crimes, an acquittal of one will not be a bar to an indictment for the other. State v. Standifer, 5 Porter, 523. Where, therefore, the prisoner was a second time indicted for the same act of shooting that was charged in the first indictment, but a different person was alleged in the second indictment to have been killed, a plea of former acquittal was held bad. Vaughan v. Com. 2 Va. Cas. 273.

**30.** An acquittal under an indictment charging the prisoner with mixing arsenic with flour, and causing it to be administered to A., with intent to kill her, is not a bar to a subsequent indictment, charging the pris-

oner with the same act of mixing the arsenic and causing it to be administered to B., with intent to kill him. People v. Warren, 1 Parker, 338.

31. An acquittal of the charge of larceny of certain goods is not a bar to an indictment for the larceny of certain other goods, although the last mentioned goods are of such a character that the language of the first indictment might describe them, there being no evidence of the identity of the offenses, except the introduction of the former indictment. Com. v. Sutherland, 109 Mass. 342.

32. The defendant was tried and acquitted under an indictment charging him with stealing eight and a half dollars from the dwelling-house of J. W., belonging to J. W. and in his possession. But the defendant was convicted under a second indictment charging him with stealing eight and a half dollars, the property of R. P. from the house of R. P., the money being in the possession of J. W. *Held*, that as the only identity in the two cases was the amount of money stolen and its possession, the conviction was proper. Morgan v. State, 34 Texas, 677.

33. An acquittal of the prisoner on an indictment charging him with having stolen, taken and carried away one bank note of the Planters' Bank of Tennessee, payable on demand at the Merchants' and Traders' Bank of New Orleans, was held not a bar to a second indictment, charging him with having stolen, taken and carried away, one bank note of the Planters' Bank of Tennessee, payable on demand at the Mechanics' and Traders' Bank of New Orleans. Hite v. State, 9 Yerg. 357.

34. A person was indicted for stealing a sheep, the property of A., and acquitted on the ground that the owner of the property was unknown. He was then again indicted for the same offense, the sheep being charged to be the property of some one to the jurors unknown. *Held*, that the former trial was not a bar to a conviction upon the second indictment. State v. Revels, Busbee, 200.

35. An acquittal of a prisoner charged with burning a barn, on account of the misdescription of the name of the owner of the barn, was held not to be a bar to another indictment with a proper description. Com. v. Mortimer, 2 Va. Cas. 325; Com. v. Wade, 17 Pick. 395.

36. Where a person was tried and acquitted for embezzling cloth used in making overcoats, it was held no bar to the trial of a second indictment charging him with embezzling the overcoats which were made of the cloth. Com. v. Clair, 7 Allen, 525.

37. **In case of larceny.** The trial of an indictment at common law for larceny of bonds, and acquittal, is not a bar to the trial of a second indictment for the felonious and fraudulent conversion of the same bonds, it not being alleged or proved that the defendant was not intrusted with the custody of the bonds. Com. v. Tenney, 97 Mass. 50.

38. An acquittal of larceny cannot be pleaded in bar to an indictment for the same offense charged as a conspiracy unlawfully to obtain the goods. State v. Sias, 17 New Hamp. 558.

39. Whether a person who has been tried under an indictment for larceny and receiving stolen goods, and acquitted of the former and convicted of the latter, can be tried again under a subsequent indictment charging him with being an accessory before the fact to the stealing of the same goods—*query*. State v. Larkin, 49 New Hamp. 36.

40. An acquittal for stealing goods will not bar a subsequent prosecution for obtaining the same goods by false pretenses, although the evidence is the same in each case. Dominick v. State, 40 Ala. 680.

41. **In case of forgery.** An acquittal under an indictment for forging and uttering a false order was held not to be a bar to a subsequent indictment for fraudulently obtaining store goods by means of such forged order. Com. v. Quann, 2 Va. Cas. 89.

42. An acquittal for the forgery of a certificate of deposit of money in a bank, is not a bar to a subsequent indictment for an attempt to obtain money from another bank by a forged letter inclosing the certificate of deposit, and requesting the amount to be sent to the writer of the letter. People v. Ward, 15 Wend. 231. But where a person

having been tried and acquitted for having in possession a counterfeit plate, pleaded the acquittal in bar of second indictment charging him with the possession of another counterfeit plate, and it appeared that both involved but a single act of possession, a *nolle prosequi* was entered on the second indictment. U. S. v. Miner, 11 Blatchf. 511; s. c. 2 Green's Crim. Reps. 246.

**43.** A. was indicted for forging the following instrument and uttering it to B. as the act of B.'s mother: "I have bought of A. two frocks for $7; ask your employers for the money and let him have it." (Signed) "Mrs. B." *Held*, that an acquittal was a bar to an indictment afterward found for obtaining the money from B. by the false pretense that the instrument was true. People v. Krummer, 4 Parker, 217.

**44. In case of seduction.** An acquittal for seduction is a bar to a second indictment for fornication growing out of the same act. Dinkey v. Com. 17 Penn. St. 126.

3. Former conviction.

**45. Where the proceedings were illegal.** A former conviction to be an available defense to another prosecution, must have been lawful. If the court had not jurisdiction, or the proceedings were illegal, or the indictment invalid, the conviction will be treated as a nullity. State v. Spencer, 10 Humph. 431; State v. Ray, Rice, 1; Com. v. Goddard, 13 Mass. 455; State v. Odell, 4 Blackf. 156; Com. v. Peters, 12 Metc. 387; People v. Barrett, 1 Johns. 66; Com. v. Roby, 12 Pick. 496.

**46.** A person convicted at a court not duly authorized by law, may be lawfully tried, precisely as if no such proceeding had ever taken place. Dunn v. State, 2 Ark. 229; State v. Payne, 4 Mo. 376; Rector v. State, 1 Eng. 187.

**47.** In Tennessee, under the statute (of Jan. 11, 1848), a former trial and conviction for an assault and battery before a justice of the peace, was held to be a bar to a subsequent indictment for the same offense, even if the act were unconstitutional. McGinnis v. State, 9 Humph. 43. But if an illegal fine was imposed, the defendant might be indicted for the same offense. State v. Atkinson, 9 Humph. 677.

**48.** If a person be tried on a charge of larceny, and convicted, and perform the sentence, such conviction and performance of the sentence, will bar an indictment for the same offense, although the proceedings were erroneous, and might have been set aside. Com. v. Loud, 3 Metc. 328.

**49. Conviction obtained by fraud.** Where a person having been summoned to attend before the grand jury, to testify against another for selling spirituous liquors, the day before he was so to appear, went before a justice of the peace, and made a complaint for the same offense, upon which the defendant pleaded guilty and was fined by the justice after hearing the evidence; it was held that these proceedings before the justice, being a fraud, were not a bar to an indictment for the same offense. State v. Lowry, 1 Swan, 34.

**50.** In North Carolina, an indictment for assault and battery having been found in the Superior Court against the defendant, pending the same, and before his arrest, he caused himself to be indicted for the same offense in the County Court, and there voluntarily submitted and was fined; it was held that the conviction in the County Court was a bar to the indictment in the Superior Court. State v. Casey, Busbee, 209. But in Massachusetts, it has been held that if a person is convicted for assault and battery before a justice of the peace on his own confession, and fined, it is no bar to an indictment for the same offense. Com. v. Alderman, 4 Mass. 477. And the same in New Hampshire, State v. Little, 1 New Hamp. 257; and Virginia, Com. v. Jackson, 2 Va. Cas. 501. Likewise in Tennessee, State v. Colvin, 11 Humph. 599. But see Com. v. Dascom, 111 Mass. 404.

**51.** In Missouri, the defendant having committed an assault and battery went before a justice and instituted proceedings against himself, and was fined three dollars and costs. Afterward the injured party caused him to be prosecuted for the same offense. *Held* that the former conviction was not a bar, it being apparent that the

first prosecution was a mere sham. State v. Cole, 48 Mo. 70.

**52. Improper dismissal of indictment.** The prisoner having been tried and convicted of forgery, took exceptions to the charge of the judge to the jury. The matter was then continued, and marked "low" upon the docket of that term. At the succeeding term the defendant, by leave of court, withdrew his exceptions, and the attorney of the State suggesting he would not further prosecute the indictment, the court ordered it dismissed. At a subsequent term of the court the defendant was again indicted for forgery, and the allegations were in all respects similar to those in the former indictment. *Held* that the plea of *autefois convict* was good. State v. Elden, 41 Maine, 165.

**53. Insufficient verdict.** Where the verdict is insufficient to sustain a conviction, the former trial cannot be opposed in bar of a second prosecution. State v. Ritchie, 3 La. An. 715. The prisoner having been found "guilty of forging a receipt for the use of H. P., under an indictment charging it to have been for the use of H. B.," the verdict was abandoned. *Held* on a second indictment charging as the jury found on the first, that the former discharge could not be pleaded in bar. State v. Huffman, Addis. 140.

**54. Arrest of judgment.** If after conviction the judgment is arrested, the proceeding set aside, and the prisoner discharged, he cannot be considered to have been legally in jeopardy, and cannot plead the conviction in bar to a subsequent indictment. Gerard v. People, 3 Scam. 362.

**55.** But if after a conviction on a valid indictment, judgment is erroneously arrested, it is a bar to a subsequent prosecution. The judgment of discharge so made may, however, be reversed on appeal, and in that case the former judgment will be enforced against the prisoner. State v. Norvell, 2 Yerg. 24.

**56. Improper reversal of judgment.** Where the judgment is reversed on the ground alone that a wrong judgment was given upon a lawful and regular trial and conviction, the prisoner cannot constitutionally be tried again. Shepherd v. People, 25 N. Y. 406, Davies, Smith and Gould, JJ., *dissenting*. But see Ratzky v. People, 29 N. Y. 124, and McKee v. People, 32 Ib. 239, referring to a special statute where this is now permitted.

**57.** Where on a trial in the Court of Sessions, the offense charged in the indictment was an assault and battery with a deadly weapon with intent to kill, and the jury found the prisoner "guilty of the crime of assault and battery with intent to kill," and the judgment was reversed by the Supreme Court on the ground that the verdict was for simple assault and battery, it was held that the latter court could neither give a new judgment nor send the case back for a proper judgment, but that the reversal was final. O'Leary v. People, 4 Parker, 187.

**58. Where there are several indictments.** Where commissioners are liable to indictment for not keeping the streets of a town in repair, if two or more of the streets of the town are out of repair at the same time, and several indictments are found therefor, a conviction on one of such indictments is a bar to the rest. State v. Commissioners, 2 Murphy, 371.

**59.** Two indictments having been found against a person for passing counterfeit bank bills, he demanded his trial on both, but was tried only on one, convicted and sentenced to be hanged, but was pardoned by the governor, and again arrested on the second indictment. *Held* that the prisoner was entitled to his discharge. State v. Stalnaker, 2 Brev. 44.

**60.** A conviction on one of several informations for having several forged bills in possession is a bar to a subsequent information founded on the possession of any part of the same parcel of bills. State v. Benham, 7 Conn. 414.

**61. Must be for same offense.** A conviction or acquittal, to be a bar to another prosecution, must be for the same offense. Where a person was convicted for advising the slave of another person to run away, it was held no bar to another indictment for a similar offense committed at the same time,

but with reference to another slave. Smith v. Com. 7 Gratt. 593.

**62.** Where there has been a conviction for burglary, a plea of *autrefois convict* is a good answer and defense to a subsequent indictment committed at the same time and by means of the burglary, it being all the same felony, and the lesser being merged and satisfied in the conviction and punishment of the greater. People v. Smith, 57 Barb. 46; State v. Lewis, 2 Hawks, 98. But in such case, an acquittal of the larceny will not operate in bar of another trial for the burglary. Copenhaven v. State, 15 Ga. 264.

**63.** Where a person was convicted of arson, it was held that such conviction was a bar to an indictment for murder, which was a consequence of the arson. State v. Cooper, 1 Green, 361.

**64.** Where two persons are injured by the same assault and battery, and the defendant has been legally convicted for the assault and battery committed on one of them, it will be a bar to an indictment for the assault and battery committed on the other. State v. Damon, 2 Tyler, 387.

**65.** A fine for a breach of the peace is a bar to a subsequent indictment against the same party for an assault and battery, in which the breach of the peace for which he was so fined had been committed. Com. v. Miller, 5 Dana, 320.

**66.** A conviction for an affray, is a bar to a subsequent prosecution for an assault and battery founded on the same transaction. Fritz v. State, 40 Ind. 18.

**67.** A conviction upon an indictment for an attempt to commit a rape is a bar to an indictment for rape. State v. Shepard, 7 Conn. 56.

**68.** A conviction for a riot at a religious meeting will bar an indictment for disturbing the meeting by the same acts. State v. Townsend, 2 Harring. 543.

**69.** A conviction for horse racing may be pleaded in bar to an indictment for betting on the same race. Fiddler v. State, 7 Humph. 508.

**70. Conviction of lesser offense.** Where a prisoner, in committing a felony not capital, at the same time intentionally commits a capital felony, if the State thinks proper to prosecute for the lesser offense, a conviction thereof will operate as a bar to an indictment for the capital offense. State v. Cooper, 1 Green, 362.

**71.** Where a person has been tried for murder, and convicted of a lesser grade of homicide, he cannot be again tried for the higher crime. State v. Martin, 30 Wis. 216. Therefore where a person having been put upon his trial for murder is found guilty of murder in the second degree, and a new trial granted, he cannot be tried again for murder in the first degree, but only for murder in the second degree. State v. Ross, 29 Mo. 32, Scott, J., *dissenting;* Clem v. State, 42 Ind. 420; s. c. 2 Green's Crim. Reps. 687.

**72.** The defendant having been found guilty of manslaughter under an indictment for murder, the verdict was on his motion set aside. *Held* that although the prisoner could not on a second trial be compelled to answer to the charge of murder, yet that he might be tried and convicted under the same indictment of manslaughter. People v. Gilmore, 4 Cal. 376; Slaughter v. State, 6 Humph. 410; State v. Desmond, 5 La. An. 398; State v. Brette, 6 Ib. 658. On such second trial, it is proper for the court to instruct the jury that if they believe from the evidence that the defendant was guilty of murder, that will not justify them in acquitting him of manslaughter. Barnett v. People, 54 Ill. 325.

**73.** In Ohio, where on a trial for murder, the defendant is found guilty of an inferior degree of homicide, the legal effect of granting a new trial is to set aside the whole verdict, and leave the case for retrial upon the same issues on which it was first tried. State v. Behimer, 20 Ohio, N. S. 572. The practice is the same in Kansas. State v. McCord, 8 Kansas, 232; s. c. 1 Green's Crim. Reps. 406.

**74. Where the same act constitutes distinct offenses.** A person may be twice punished for the same act, when the act is of such a character as to constitute two distinct crimes; as for keeping a drinking house and tippling shop, and also for being

a common seller of intoxicating liquors, although the same illegal acts contribute to make up each offense. State v. Inness, 53 Maine, 536. In Maine, a conviction for being a common seller of spirituous liquors is not a defense to a complaint for a single act of sale, though such act be within the time embraced in the indictment. State v. Maher, 35 Maine, 225; State v. Coombs, 32 Ib. 529. The contrary has been held in Vermont. State v. Nutt, 28 Vt. 598. In Massachusetts, a person may be tried for maintaining a tenement for the illegal keeping and sale of intoxicating liquors, although he has previously been tried and convicted for keeping the liquors with intent to sell them. Com. v. McShane, 110 Mass. 502; s. c. 2 Green's Crim. Reps. 279.

**75.** Neither a conviction nor pardon for a particular offense is a bar to a trial for any other distinct offense. Hawkins v. State, 1 Porter, 475. In South Carolina it was held that a conviction for a subsequent offense which was pardoned by the governor, was not a bar to the prosecution of any other offense not mentioned in the pardon. State v. McCarty, 1 Bay, 334.

**76.** A conviction for assault and battery will not bar a trial for an assault with intention to do great bodily injury. State v. Foster, 33 Iowa, 525. Or for an assault with a deadly weapon. Severin v. People, 37 Ill. 414. And see Freeland v. People, 16 Ib. 380. So a conviction for assault and battery with intention to murder is not a bar to an indictment for murder. Com. v. Roby, 12 Pick. 496. And a conviction for assault and battery is not a bar to a subsequent indictment for manslaughter, when the person assaulted afterward dies of the wounds caused by the blows. Burns v. People, 1 Parker, 182.

**77.** Where the commission of an assault and battery is incidental to a riot, a conviction for the one will not bar a prosecution for the other. Wininger v. State, 13 Ind. 540; Scott v. U. S. 1 Morris, 142. But A., having been convicted under an indictment for an assault and battery upon B., a second indictment was found against him and others for riot and beating the said B. *Held* that the former conviction was a bar to the second indictment. Com. v. Kinney, 2 Va. Cas. 139.

**78.** A conviction for an affray will bar a prosecution for an assault and battery committed during the affray. Fritz v. State, 40 Ind. 18; s. c. 1 Green's Crim. Reps. 554. But where on the trial of an indictment for assault and battery it appeared that the defendant with others had been convicted of an affray, and that the assault and battery was committed on a female while endeavoring to rescue her son from the violence of the affrayers, it was held that the conviction for the affray was not a bar to the present prosecution. State v. Parish, 8 Rich. 322.

**79.** A fine imposed for contempt in committing an assault and battery in the presence of the court, is not a ground for a plea of former conviction to an indictment for the same assault and battery. State v. Yancey, 1 Car. Law Rep. 519.

**80.** A conviction or acquittal of larceny is not a bar to a subsequent prosecution for receiving, concealing, and aiding in the concealment of the stolen goods. Foster v. State, 39 Ala. 229.

**81.** A conviction for larceny in a building cannot be pleaded in bar to a charge of burglariously breaking and entering the building; the former being a distinct offense, although the theft ensued upon the breaking. Wilson v. State, 24 Conn. 57; People v. McCloskey, 5 Parker, 57.

**82.** A conviction upon an indictment for lewd and lascivious cohabitation, is not a bar to a trial for adultery. Maurice v. Com. 108 Mass. 433.

**83. Need not be judgment.** There need not be a judgment in order to render the prisoner's plea in bar an answer to a second indictment for the same offense, the verdict being sufficient for that purpose. Mount v. State, 14 Ohio, 295; State v. Norvell, 2 Yerg. 24.

**84.** But in Massachusetts, a verdict against the defendant, on which no judgment has been rendered, on the trial of an indictment for a nuisance under the statute (of 1855, ch. 405), in maintaining a building for the unlawful sale of spirituous liquors, is not a bar to the trial of an indictment for being a com-

mon seller of spirituous liquors at the same time and place. Com. v. Lahy, 8 Gray, 459.

**85. Improper or insufficient verdict.** Where the defendant may be convicted upon the indictment, of either robbery in the first degree or grand larceny, but is convicted of robbery in the second degree, the verdict operates as an acquittal. State v. Brannon, 55 Mo. 63; s. c. 2 Green's Crim. Reps. 608; State v. Pitts, 57 Mo. 85.

**86.** Where a judgment of conviction is reversed on the motion of the prisoner, he may be tried again, although the ground of reversal is the insufficiency of the verdict, and although he has already suffered a portion of the prescribed term of imprisonment. Turner v. State, 40 Ala. 21; Waller v. State, Ib. 325; Jeffries v. State, Ib. 381.

### 4. Plea.

**87. At common law.** By the common law, the plea of *autrefois convict* implies merely a regular trial, and verdict of guilty, or a confession upon a sufficient indictment. Shepherd v. People, 25 N. Y. 406.

**88. What to contain.** A plea of former acquittal or conviction, must set out in full the former indictment and conviction or acquittal, allege the identity of the prisoner and of the offenses charged in the two indictments, and show that the court had jurisdiction at the time of the former trial, and that the merits of the charge were then investigated. Henry v. State, 33 Ala. 389; Foster v. State, 29 Ib. 229; Lyman v. State, 47 Ib. 686; State v. Hodgkins, 42 New Hamp. 474; Crocker v. State, 47 Ga. 568; Wortham v. Com. 5 Rand. 669; McQuoid v. People, 3 Gilman, 76; Clem v. State, 42 Ind. 420; s. c. 2 Green's Crim. Reps. 687.

**89.** In considering the identity of the offenses, it must appear by the plea, that the offense charged in both cases was the same in law and fact. The plea will be vicious if the offenses charged in the two indictments be distinct in point of law, however nearly they may be connected in fact. An acquittal for a felony is no bar to an indictment for a misdemeanor; and an acquittal for a misdemeanor is no bar to an indictment for a felony. Therefore, a plea to an indictment for rape, that the defendant has already been convicted of assault and battery for the same offense, is bad. People v. Saunders, 4 Parker, 196.

**90. Demurrer to.** When the attorney for the prosecution demurs to a plea of former acquittal or conviction, he thereby admits the existence of the record of such former acquittal or conviction. Com. v. Myers, 1 Va. Cas. 188. When a demurrer to a plea of former conviction is sustained, the judgment should be that the defendant answer over. He may then plead a better plea of former conviction, or not guilty, or both. Fulkner v. State, 3 Heisk. 33; s. c. 1 Green's Crim. Reps. 664.

**91. Trial.** Where a person is detained on an indictment for the murder of his wife, the effect of a former trial and conviction for her abduction can be considered only by the court that shall try him for the murder, and cannot be determined on *habeas corpus*. People v. Ruloff, 3 Parker, 126.

**92.** Where the prisoner pleads a former conviction and also not guilty, he cannot be tried on the last plea until the first has been decided against him. Com. v. Merrill, 8 Allen, 545; Com. v. Bakeman, 105 Mass. 53.

**93.** The issue joined upon a special plea of a former trial cannot be tried by the court without a jury by consent of the prisoner. Grant v. People, 4 Parker, 527.

**94.** Although when there is a plea of former conviction, and also of the general issue, the trial of both at the same time is irregular, yet when it is by agreement of the parties, the defendant is bound by the result. Com. v. Dascom, 111 Mass. 404.

### 5. Evidence.

**95. Burden of proof.** It is incumbent on the defendant to maintain by evidence, his plea of a previous conviction, and to establish the identity of the offense charged with that of which he is convicted. Com. v. Daley, 4 Gray, 209. A former acquittal cannot be proved under the general issue. Com. v. Chesley, 107 Mass. 223. It has been held otherwise as to a former conviction. Danneburg v. State, 20 Ind. 181; Lee v. State, 42 Ib. 152.

**96. Judgment.** A previous judgment is conclusive evidence between the State and the defendant of all the facts necessarily adjudicated by it, although it be founded upon a plea of guilty, or of *nolo contendere*. State v. Lang, 63 Maine, 215.

**97. Oral testimony.** Where the record of former conviction did not clearly identify the offense for which the prisoner had been convicted with that with which he was afterward charged, it was held that oral testimony was admissible to show whether the acts were identical. Duncan v. Com. 6 Dana, 295. And see Goudy v. State, 4 Blackf. 548.

**98.** On the trial of an indictment for selling spirituous liquors without a license on the 10th of March and 10th of April, 1860, the defendant pleaded in bar a conviction of having "violated the excise law" on the 16th of April, 1857, and on the 1st day of April, 1860, and on divers other days between those times and the 9th of May, 1860. The only proof in support of the plea was the record of the former conviction. *Held*, that as the defendant had not shown by proof *aliunde* that the offenses mentioned in the record of conviction produced in evidence were the same offenses set forth in the indictment, the record was not a bar. People v. Cramer, 5 Parker, 171.

# Fornication.

*See* Adultery; Bastardy; Rape; Seduction.

# Fraud.

*See* False pretenses.

# Fugitives from Justice.

1. From foreign country.
2. From other State.

## 1. From foreign country.

**1. Who is.** A person who has been merely charged or accused before a magistrate in France authorized to arrest, is not one accused *mis en accusation* within the terms of the treaty of 1843, between the United States and France, and he cannot be demanded by the French government nor surrendered by that of the United States. *In re* Metzger, 1 Barb. 248; 1 Parker, 108.

**2. Right to demand surrender.** The United States have never recognized the right of foreign nations to demand the surrender of fugitives from justice, independently of treaty stipulations. Matter of Fetter, 3 Zabr. 311; Case of Ferreira Dos Santos, 2 Brock. 493.

**3. Extradition treaties.** A treaty *in futuro* is in the nature of a contract, and the courts cannot regard it until legislative action shall be had on the subject. *In re* Metzger, *supra*.

**4.** Construction of extradition treaties and conventions between the United States and foreign governments, as touching the question of the jurisdiction of the United States over crimes committed in foreign countries. *In re* Stupp, 12 Blatchf. 501; s. c. 2 Green's Crim. Reps. 182.

**5.** Extradition treaties considered on the question whether they include surrender for crimes committed prior to such treaties. *In re* Giacomo, 12 Blatchf. 391.

**6. Jurisdiction in proceedings for extradition.** Authority to issue warrants for the arrest of fugitives, under the tenth article of the treaty between the United States and Great Britain, concluded on the ninth day of August, 1842, and under other treaties between this government and foreign governments, is conferred by act of Congress (of Aug. 12th, 1848, ch. 167), upon the several judges of the State courts, and upon the justices of the Supreme Court and the District Courts of the United States, and the commissioners appointed by the courts of the United States. *In re* Heilbonn, 1 Parker, 429.

**7.** A United States commissioner has authority, under the act of Congress of 1848, ch. 167, to entertain a complaint for the extradition of a person charged with crime in a foreign country, without being specially

authorized or appointed by the court to do so. *In re* Kane, 14 How. U. S. 103. per McLean, Wayne, Catron and Grier, JJ.; *contra*, Taney, C. J., Daniel and Nelson, JJ.

**8.** The judges and commissioners upon whom the act of Congress of 1848, ch. 167, confers jurisdiction in proceedings for the extradition of persons charged with crime in a foreign country, have authority to entertain a complaint made for that purpose by a consul of Great Britain, without a previous requisition by his government upon the President of the United States. Ib. per McLean, Wayne, Catron, and Grier, JJ.; *contra*, Taney, C. J., Daniel and Nelson, JJ. But see Case of Ferreira Dos Santos, 2 Brock. 493.

**9. Authority cannot be exercised by State.** The United States government has exclusive authority to regulate and control the surrender of fugitives from justice from foreign countries; and therefore the statute of a State providing for such surrender is unconstitutional. People v. Curtis, 50 N. Y. 321; Holmes v. Jennison, 14 Pet. 540; *Ex parte* Holmes, 12 Vt. 631.

**10.** A fugitive from a foreign country cannot be arrested by a State magistrate, on the accusation of a private person, of having committed murder, in order to give the executive of the United States an opportunity to surrender him. Com. v. Deacon, 10 Serg. & Rawle, 125.

**11. What necessary to give jurisdiction.** Before the court can entertain jurisdiction of proceedings for the apprehension and committal of an alleged fugitive from justice, whose extradition is demanded, there must have been a requisition by the foreign government upon the government of the United States, and the authority of the latter obtained to arrest the fugitive. Matter of Farez, 7 Abb. N. S. 84.

**12.** Whether a United States commissioner can entertain proceedings for the arrest of a fugitive from justice from a foreign country for the purpose of his extradition under a treaty, until a mandate has been granted by the government of the United States—*query*. *In re* Macdonnell, 11 Blatchf. 79; s. c. 1 Green's Crim. Reps. 151.

**13. Complaint.** The complaint upon which a warrant of arrest is asked should set forth briefly and clearly the substance of the offense charged. The complaint need not be drawn with the precision of an indictment; but it should set forth the substantial and material features of the indictment. *In re* Henrich, 5 Blatchf. 414, per Shipman, J. See *In re* Farez, 7 Ib. 345; Ib. 34.

**14. Warrant.** A warrant issued by a United States commissioner for the arrest of a person charged with crime, in order that he may be surrendered to a foreign government, is void unless it shows on its face that the commissioner has jurisdiction to issue it, and also that a requisition has been made by the foreign government on the United States, and the authority of the latter obtained to make the arrest. *In re* Farez, 7 Blatchf. 34. A general averment of the commissioner's authority is sufficient. Ib. 345. In describing the offense, the warrant may pursue the language of the treaty. *In re* Macdonnell, 11 Blatchf. 79; s. c. 2 Green's Crim. Reps. 151.

**15.** The warrant continues in force after the examination had before the commissioner has been set aside for error. *In re* Farez, 7 Blatchf. 491; *In re* Macdonnell, 11 Ib. 170; s. c. 2 Green's Crim. Reps. 166.

**16. Evidence.** The evidence to detain a fugitive from justice in order to surrender him to a foreign government, must be such as would be sufficient to commit the accused for trial, if the offense had been committed here. Matter of Washburn, 3 Wheeler's Crim. Cas. 473.

**17.** In proceedings under the act of Congress of 1848, ch. 167, for the extradition of a person charged with a crime in Great Britain, proof that the person who as justice of the peace took the affidavits of the commission of the crime, and issued the warrant in Great Britain for the arrest of the accused, was accustomed to act as justice of the peace, was held to be sufficient *prima facie* evidence of his authority to take the affidavits and issue the warrant. *In re* Kane, 14 How. U. S. 103. Per McLean, Wayne, Catron, and Grier, JJ.; *contra*, Taney, C. J., Daniel, and Nelson, JJ.

**18. Adjournment.** In extradition cases, the commissioner while hearing the evidence may adjourn the proceedings for the production of further testimony. *In re* Macdonnell, 11 Blatchf. 79; s. c. 2 Green's Crim. Reps. 151.

**19. Review of decision.** The action of a United States commissioner committing a fugitive from justice for surrender under an extradition treaty, may be reviewed by the court on a writ of habeas corpus, and a writ of certiorari; and the court will consider the evidence on which he rendered his decision. *In re* Henrich, 5 Blatchf. 414. But his decision will not be reversed except in a case which would justify a court in granting a new trial for a verdict against evidence. Ib. As to the power of the court to revise the decision of the commissioner, see, however, *In re* Stupp, 12 Blatchf. 501; s. c. 2 Green's Crim. Reps. 182; *In re* Macdonnell, 11 Ib. 170; s. c. 2 Green's Crim. Reps. 166.

**20.** The decisions of the commissioner on questions of evidence, cannot be reviewed on habeas corpus during the progress of the proceedings before him. *In re* Macdonnell, 11 Blatchf. 79; s. c. 2 Green's Crim. Reps. 151.

**21.** Proceedings and practice in the surrender of fugitives from justice under extradition treaties. *In re* Henrich, 5 Blatchf. 414; *In re* Farez, 7 Ib. 345; *Ex parte* Ross, 2 Bond, 252.

2. From other State.

**22. Who deemed.** A person may be a fugitive from justice from another State, who goes into such State, commits a crime there, and then returns home. Kingbury's Case, 106 Mass. 223.

**23. U. S. Constitution.** The clause of the Constitution of the United States, which directs the surrender of a fugitive from justice upon the demand of the executive of the State from which he escaped, contains no grant of power, but is the mere regulation of an existing right. Matter of Fetter, 3 Zabr. 311.

**24.** The provisions of the statute of Massachusetts (R. S. ch. 142, § 8) for the arrest of persons charged with the commission of offenses in other States, are not contrary to the Constitution or laws of the United States. Com. v. Tracy, 5 Metc. 536.

**25. Need not have been requisition.** A fugitive from justice from either of the States may, under the provision of the Constitution of the United States (art. 4, sec. 2) be arrested and detained for the purpose of his surrender before a requisition is actually made upon the executive therefor. Matter of Fetter, 3 Zabr. 311; State v. Bugine, 4 Harring. 572.

**26.** A criminal fugitive from Alabama may be arrested in Louisiana, or any other State to which he may escape, through the agency of the judicial tribunals of the latter State, without the order of its governor, or the demand of the governor of Alabama. Morrell v. Quarles, 35 Ala. 544.

**27. Arrest after letting to bail.** Where a requisition was made by the governor of Iowa upon the governor of Massachusetts, for the surrender of a fugitive from justice, and the governor of the latter State issued a warrant for his arrest to an agent of Iowa, and another warrant to a sheriff, it was held that an arrest by the sheriff, and a letting of the fugitive to bail on *habeas corpus*, did not affect the right of the agent to make an arrest. Com. v. Hall, 9 Gray, 262.

**28. Must be charge pending.** To enable a magistrate to arrest and examine an alleged fugitive from justice from another State, it must be shown by a complaint in writing on oath, that a crime has been committed, that the accused has been charged in the other State with the commission of such a crime, and that he has fled therefrom, and is found here. An affidavit from which it can only be inferred that a crime has been committed, is not sufficient. Matter of Leland, 7 Abb. N. S. 64.

**29.** A mere requisition by the governor of one State upon the governor of another State for the arrest and surrender of a person accused of crime, without any authentication of the charge, is not sufficient to justify such arrest and imprisonment. Matter of Rutter, 7 Abb. N. S. 67. But see Kingsbury's Case, 106 Mass. 223.

**30.** In Iowa, to authorize the arrest of a

fugitive from justice from another State, under the statute (Revision, § 4523), there must be a charge pending against the accused in such other State; and a recognizance for his appearance, when there is no charge pending against him, is void. State v. Hufford, 28 Iowa, 391. It is the same in California. *Ex parte* White, 40 Cal. 434. And see *Ex parte* Cubreth, Ib. 436.

**31. Evidence required for issuing warrant.** To authorize a magistrate to issue a warrant for the arrest and examination of an alleged fugitive of justice from another State, it must be made to appear to him, by a complaint in writing on oath, that a crime has been committed in the foreign State, that the accused has been charged in such State with the commission of such crime, and that he has fled from the State, and is here. These facts are to be distinctly alleged. It is not sufficient that they may be inferred from what is stated. Matter of Hayward, 1 Sandf. 701.

**32.** An affidavit that A. has been charged in Pennsylvania, on the oath of B., with felony, viz., with cheating and defrauding B. and others, residents of that State, and that he is a fugitive from justice from that State, is not sufficient to authorize the arrest of A. here, for the reason that the affidavit does not show that the alleged crime was committed in Pennsylvania, or that A. fled from that State. Ib.

**33.** It would be judicious in the magistrate in all such cases to require an authenticated copy of the charge or complaint made in the foreign State. Ib.

**34.** In Indiana, to confer jurisdiction upon a magistrate under the statute (R. S. 1843) relative to fugitives from justice, it must be proved that the person sought to be apprehended, fled from the State in which he committed the crime, in order to escape punishment for it. Degant v. Michael, 2 Carter, 396.

**35. Warrant.** Warrants issued by the governor for the arrest of fugitives from justice, must be under the great seal of the State, and if the impression of the seal is illegible, the warrant will be void. Vallad v. Sheriff, 11 Mo. 24.

**36.** A warrant from the governor of a State commissioning an agent to bring a criminal from the State to which he has fled into the State having jurisdiction of the offense, reciting that he has made a lawful requisition for the surrender of the fugitive, is *prima facie* evidence that all legal requisites have been complied with, necessary for the protection of the agent. The word "take" in such a warrant is synonymous with "arrest." Com. v. Hall, 9 Gray, 262.

**37. Review.** The correct mode of reviewing the decision of a State judge made in such case is by appeal to the Supreme Court of the State; from there to the Court of Appeals; and thence to the Supreme Court of the United States. In re Heilbonn, 1 Parker, 429.

**38. Stay of proceedings.** Where the fugitive is remanded, the court will not grant a stay of proceedings on the prosecution of a writ of error. Matter of Clark, 9 Wend. 212.

**39.** Proceedings and practice in the demand and surrender of a fugitive from justice escaping into another State. People v. Brady, 56 N. Y. 182.

**40. Reward.** One who asks and receives from a sheriff a warrant and special authority to arrest a fugitive from justice, and who executes the warrant, and delivers the accused to the sheriff, is not entitled to the reward offered by the governor for the arrest of such fugitive. Malpass v. Caldwell, 70 N. C. 130.

*See* HABEAS CORPUS.

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# Gaming.

1. WHAT CONSTITUTES.
2. INDICTMENT.
3. EVIDENCE.

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1. WHAT CONSTITUTES.

**1. In general.** A contest pursuant to a bet or wager which is to be determined by the result, is gaming. State v. Smith, 1 Meigs, 99; Bagley v. State, 1 Humph. 486.

**2.** To throw dice, or play at any game of chance or skill, on the issue of which money

or property depends, is illegal gaming. Com. v. Gourdier, 14 Gray, 390; Com. v. Taylor, Ib. 26.

3. In New Hampshire, where the indictment charged that the defendant kept a gaming place "for money, hire, gain, and reward," and the evidence showed that it was customary for the party losing to pay for the use of the table one shilling a game, it was held that this was a gaming for money within the statute. State v. Leighton, 3 Foster, 167.

4. In Illinois, though the articles played for may be intrinsically valueless, yet if they are understood to represent value, and are such that the winner can in fact, without any violation of the law, obtain value for them, they are within the statute against gaming. Gibbons v. People, 33 Ill. 442.

5. In Missouri, the keeping of a lotto table, at which the game is played for money, is an indictable offense. Lowry v. State, 1 Mo. 722. In Arkansas, the same has been held as to the game known as "*keno*." Portis v. State, 27 Ark. 360; s. c. 1 Green's Crim. Reps. 325. But the latter game is not a lottery within the meaning of the internal revenue laws. U. S. v. Hornibrook, 2 Dillon, 229; s. c. 1 Green's Crim. Reps. 328.

6. Throwing dice to determine who shall pay for whisky or treats is gaming within the meaning of the statute of Kentucky. McDaniel v. Com. 6 Bush, Ky. 326.

7. A pack of cards is not a gambling device within the meaning of the statute of Kansas. State v. Hardin, 1 Kansas, 474.

8. A "gift enterprise" is gaming within the statute of Tennessee. Bell v. State, 5 Sneed, 507. And the same is true as to betting on the result of a cock fight. Johnson v. State, 4 Ib. 614.

9. In Tennessee, the sale of packages of prize candy is indictable as gaming. Eubanks v. State, 3 Heisk. 488; s. c. 1 Green's Crim. Reps. 323.

10. In Indiana, it is an indictable offense to win any sum of money, however small, at a game of cards. State v. Albertson, 2 Blackf. 251.

11. In Massachusetts, playing at bowls is unlawful under the statute (R. S. ch. 50, § 17). Com. v. Stowell, 9 Metc. 572; Com. v. Drew, 3 Cush. 279.

12. In New Jersey, bowling alleys connected with hotels are unlawful, though the players only risk the price of the game. State v. Records, 4 Har. 554.

13. In Massachusetts, cock fighting has been held unlawful, both under the statute and at common law. Com. v. Tilton, 8 Metc. 232.

14. **Playing once is gaming.** The offense of gaming may be committed by playing a single game. Cameron v. State, 15 Ala. 383; Swallow v. State, 20 Ib. 30; Buck v. State, 1 McCook, 61. But see West v. Com. 3 J. J. Marsh. 641.

15. **Setting up table.** The setting up of a gaming table consists in providing the essentials for the game, and in proposing to play. There need not be a table in the literal sense, or money or property staked on the game; but credit may be substituted. A game must however be played, and something be bet. Com. v. Burns, 4 J. J. Marsh. 177.

16. In Virginia, where a billiard table was kept for a stipulated compensation per game, it was held that the owner was liable to indictment, although he did not play on it himself for money, or permit others to do so. Ward's Case, 3 Leigh, 743.

17. In Kentucky, the setting up of a gaming table, at which money or any other thing shall be bet, is a specific offense, and the keeping of such table may, if there be betting against it, be another offense, and keeping a bank, and either inducing or permitting any person to bet against it, a third offense. Com. v. Burns, 4 J. J. Marsh. 177.

18. To constitute a violation of the statute of Alabama (Clay's Dig. 434, § 19), against keeping a billiard table in connection with a house where spirituous liquors are retailed, the billiard table need not be kept in the same room or under the same roof where the liquors are sold. It is sufficient if the one is contiguous to the other and forms a part of the same establishment. Smith v. State, 22 Ala. 54. In North Carolina, under the the statute against gaming (R. S. ch. 34, § 69), the place of gaming and the place of

retailing must be the same house, or at least part of the same establishment. State v. Black, 9 Ired. 378.

19. **Keeping gaming house.** The keeping of a common gaming house is an indictable offense at common law. People v. Jackson, 3 Denio, 101; Vanderworker v. State, 8 Eng. 700.

20. Keeping a house in which cards or dominoes are habitually played for something to eat and drink in such house, constitutes the keeping of a common gaming house at common law and the law of New Hampshire. Lord v. State, 16 New Hamp. 325.

21. Keeping a gaming house may be a continuous act, and all the time during which a house is thus kept, prior to the prosecution for the keeping, constitutes one offense, which can be punished only in one prosecution. State v. Lindley, 14 Ind. 430.

22. Under the statute of Maine (ch. 35, § 7), which punishes—1st, the keeping of a house, shop or other place, resorted to for the purpose of gaming; and 2d, the permitting a person to play at cards, dice, billiards, or other game for money or other things, in any house, shop, or place under his control, a person may permit another to play at such games for money, in a place under his control, and yet not keep a house or place resorted to for that purpose; or he may own and control a house or place resorted to for the purpose of gaming, without being the keeper of the house or place, within the meaning of the statute. State v. Currier, 23 Maine, 43.

23. In Massachusetts, where a person rented a shed, across a passage-way between the shed and his store, and received the rent knowing that the shed was used for gaming, it was held that he occupied the shed within the meaning of Stat. 1798, ch. 20, § 2. Com. v. Dean, 1 Pick. 387.

24. On the trial of an indictment for keeping a common gaming house, the following instruction was held proper: "If the jury believe from the evidence, beyond a reasonable doubt, that the room in question was a common gaming house, as charged in the indictment, and that the defendant was present, and in any way or manner aided, or abetted, or assisted in keeping, operating and running such gaming room as charged in the indictment, then the jury should find the defendant guilty, although he was not the actual owner or proprietor thereof. Stevens v. People, 67 Ill. 587.

25. A statute forbade the keeping of a room to be used or occupied for gambling, or the permitting of the same to be so used or occupied. The proof showed that on several occasions the accused had permitted property to be gambled for in his room. *Held*, that to bring the defendant within the statute, the room need not have been principally used for gambling, but that it was sufficient if he had occasionally permitted gambling therein. Hutchins v. People, 39 N. Y. 454.

26. A tavern-keeper is a housekeeper within the meaning of the statute of Maryland (Act of 1823, ch. 16, § 11), providing that no housekeeper shall sell any strong liquor on Sunday, or suffer any drunkenness, gaming or unlawful recreations in his house. State v. Fearson, 2 Md. 310.

27. In New York, it is not an indictable offense to keep a room for the sale of tickets in a lottery. People v. Jackson, 3 Denio, 101.

28. Where a lease restricts the tenant to the use of the rooms let, as sleeping apartments, the landlord does not retain such a control of them as to make it his duty to prevent illegal gaming in them. Robinson v. State, 24 Texas, 152.

29. **Betting.** In order to constitute a wager, both parties must incur a risk. Quarles v. State, 5 Humph. 561. A bet is a wager, and the betting is complete when the offer to bet is completed. The placing of money on a gaming table is an offer to bet, and if no objection be made by the player or owner of the table or bank, it is an acceptance of the offer, and the offense of betting is complete, although the game be never finished, and the stake be neither lost nor won. State v. Welch, 7 Port. 453.

30. Where a horse, worth eighty dollars, was sold to the defendant for sixty-five dollars, payment to be made when Gen. Taylor should be elected President of the United States, which was afterward paid by

the defendant, it was held a wager within the statute of Indiana. Parson v. State, 2 Carter, 499.

31. In Indiana, betting on an election is an indictable offense. Parsons v. State, 2 Carter, 499. In Ohio, the statute against gaming applies to betting on elections. Veach v. Elliott, 1 McCook, 139. In Tennessee, by the statute of 1823, ch. 25, § 2, betting on an election is a misdemeanor. State v. Smith, 1 Meigs, 99.

32. In Tennessee, a race must have been run, in order to make a betting on it the offense of gaming. Fiddler v. State, 7 Humph. 508. Therefore, an indictment alleging that the defendant bet upon a horse race, does not charge any offense, the words not necessarily importing that the race was run. Dobbins v. State, 2 Humph. 424.

33. In Kentucky, betting is unlawful, whatever may be the occasion, and the money or thing staked for the bet is forfeited. Vicaro v. Com. 5 Dana, 505.

34. In Missouri, under the statute of 1845, betting on any gambling device, is an indictable offense; and each act of betting on such device, though at the same sitting, is a separate offense. State v. Bates, 10 Mo. 166; Forney v. State, 13 Ib. 455.

35. In Alabama, betting at billiards or pool, is not an indictable offense. State v. Moseley, 14 Ala. 390; State v. Allaire, Ib. 435.

36. **Inciting others to bet.** In Tennessee, a person who incites others to play for money, or who plays knowing that others are betting, is guilty of gaming under the statute, although he does not bet himself. Howlet v. State, 5 Yerg. 145. In Mississippi, where a person procured others to bet for him, it was held that he was equally guilty as though he had bet himself. Williams v. State, 12 Smed. & Marsh. 58. In Missouri, allowing cards to be used where money is bet, is gambling, within the statute. State v. Purdom, 3 Mo. 83; and see Hinkle v. Com. 4 Dana, 519.

37. **Horse racing.** To constitute a horse race, there need not be a bet or wager, or a distance to be run agreed upon, or judges appointed to decide the race. Watson v. State, 3 Ind. 123.

38. In Tennessee, under the statute (of 1833, ch. 10, § 2), a person is indictable for running a horse race along a public road, although no bet may have been made on the race. State v. Fiddler, 7 Humph. 502.

39. In Indiana, the permitting one's horse to be run in a race, and the acting as rider in such race, were held to be separate offenses under the statute. State v. Ness, 1 Carter, 64.

40. In Tennessee, turf racing is excepted from the statute (of 1820, ch. 5), against gaming; but not match races for short distances, run at distilleries, grog shops, and musters. State v. Posey, 1 Humph. 384.

41. As to what constitutes a race course, within the meaning of the statute of Virginia against unlawful gaming, see Wilson's Case, 9 Leigh, 648.

42. In Iowa, horse racing is not a game of chance, within the meaning of the statute against gambling. Harless v. U. S. 1 Morris, 169.

43. **What not deemed gaming.** Playing a game of chance without betting thereon, and without any intent or purpose that others shall do so, is not gaming within the statute of Georgia. Johnson v. State, 8 Ga. 451.

44. In Massachusetts, the playing at billiards, cards or dice, is only unlawful when done at licensed houses, or at places opened and kept for the purpose, for hire, gain, or reward, as places of common resort. Com. v. Goding, 3 Metc. 130.

45. In New York, it was held that playing the rub, to determine which party should pay for the use of a billiard table, was not gaming. People agst. Sergeant, 8 Cow. 139.

46. As "shuffle-board" is not a game of chance, but one of skill, the keeping of such a table is not indictable under the statute of North Carolina against gaming. State v. Bishop, 8 Ired. 266. And the same is true of the game of ten pins. State v. Gupton, Ib. 271.

47. **Offense with reference to place.** Any place which is temporarily made public by the assemblage of people is a public place within the meaning of the statute of Ala-

bama against gaming. Campbell v. State, 17 Ala. 369.

48. A neighborhood road is "a public place" within the statute of Alabama against gaming, if the gaming take place near an assemblage of persons, some of whom watch the playing, and others pass about. Mills v. State, 20 Ala. 86.

49. To make a separate building an appurtenance to a tavern within the statute of Virginia against gaming (1 R. C. ch. 147, § 16), it must be occupied in connection with the tavern for the accommodation of guests. Sander's Case, 5 Leigh, 751.

50. Where, at a public muster at a tavern, persons were engaged in gaming in a barn two hundred yards distant from the house, in a separate inclosure, though on the same premises, the barn being sixty or seventy yards in the rear of another barn, in which liquor was sold by the tavern-keeper, it was held that the first mentioned barn was a public place within the meaning of the statute of Virginia against unlawful gaming. Tanner's case, 8 Leigh, 741.

51. In Alabama, a lawyer's office, though "a public house" within the statute against gaming (Code, § 3243), is not "a public place." McCauley v. State, 26 Ala. 135; Smith v. State, 37 Ib. 472. On a trial for gaming, it was proved that the playing took place in the night, during the session of the Circuit Court, in a lawyer's office, and by permission of a person who occupied the room as a sleeping apartment; that the doors were locked, and the curtains drawn over the windows. The court charged that this was a public place. *Held* error. Burdine v. State, 25 Ib. 60.

52. A broker's office is a public house within the statute of Alabama against gaming, and where such office consists of a front and back room, connected by a door, and the front room is used by the broker for his business, the back room is also within the statute, although used and occupied as a bedroom by a member of the broker's family. Wilson v. State, 31 Ala. 371.

53. In Alabama, a justice's office is a "public house" within the statute against gaming. Where the house consists of a front and back room, which are connected by an open space used as a door, and the front room is occupied for a magistrate's office, the back room is within the statute against gaming, although only used by the partners of a dissolved firm for the occasional settlement of their accounts. Burnett v. State, 30 Ala. 19.

54. A barber's shop is a public house within the statute of Alabama against gaming; and where a two-storied house is occupied by a barber, who uses the two rooms on the ground floor as his shop, the back room on the second floor is also within the statute, although approached only by a flight of steps on the outside of the house, and used by the barber only in trying experiments in the daguerrean art. Moore v. State, 30 Ala. 550; s. p. Cochran v. State, Ib. 542.

55. A building in which the business of saddle and harness making is carried on is a "public house" within the statute of Alabama against gaming (Code, § 3243); and where such building consists of two stories, the lower of which is used by the owner for the purpose of carrying on his said business, a back room in the second story, reached only by outside stairs, and used by the owner as a bedroom for one of his workmen, is also within the statute. Bentley v. State, 32 Ala. 596.

56. In Alabama, a storehouse in the country is a public house within the meaning of the statute against gaming (Code, § 3243), although it consists of two rooms one above the other, both of which the owner uses, the lower room as his store and the upper room as an appendage thereto. Brown v. State, 27 Ala. 47.

57. A room on the second floor of a two-story house, which is approached only by means of steps on the outside, and in which one of the proprietors of the house sleeps, the lower room being used for retailing spirituous liquors, is within the statute of Alabama against gaming at any storehouse for retailing spirituous liquors, or house or place where spirituous liquors are retailed or given away. Johnson v. State, 19 Ala. 527.

58. A room in a warehouse for storing cotton on the bank of a navigable river, used by the clerk for a sleeping room as well as for the transaction of business, is a "*public house*" within the statutes of Alabama (Code, § 3243) against gaming, but not a "public place." Windham v. State, 26 Ala. 69.

59. A storehouse in which dry goods only are sold is a public house within the statute of Alabama against gaming, although the playing is by night with closed doors and windows, and with no person other than the players present. Skinner v. State, 30 Ala. 524. A navigable river is not a highway within the foregoing statute. Glass v. State, Ib. 529.

60. In Virginia, where it was proved that the parties charged were in a storehouse in a village late at night, after the close of business, and that the door was locked, it was held that it was a public place within the meaning of the statute against gaming. Com. v. Feazle, 8 Gratt. 585.

61. In Alabama, a country storehouse is a public house within the statute against gaming (Code, § 3243) when it consists of two rooms under the control of the same person, the front room being used as a dry goods store, while the other, a shed room, is attached to it, and communicates with it by a door, and the presumption that the two rooms are an entirety is not repelled by proving that the back room was used as a bedroom by one of the proprietors of the store, who was an unmarried man; that no goods were kept or sold there, no accounts settled there, and that witness never had seen any of the customers of the store use it for any purpose. Huffman v. State, 29 Ala. 40; s. c. 28 Ib. 48, and 30 Ib. 532.

62. A house occupied by the keeper of a public toll bridge, containing two rooms which communicate with each other by a door, is *prima facie* an entirety, and if the front room is so used as to make it a "public house" within the statute of Alabama against gaming, the back room is also within the statute, though used only as a bedroom by the keeper of the bridge, an unmarried man. If such house is merely the private residence of the keeper of the bridge, it is not within the statute, although settlements for toll are made therein. But if the front room is used for the business of the bridge, such as keeping the books, settling accounts, etc., it then becomes a "public house" within the meaning of the statute. Arnold v. State, 29 Ala. 46.

63. In the same State, an unoccupied storehouse fronting on a public street, if habitually resorted to by persons for the purpose of playing cards, is within the statute against playing cards at an outhouse where people resort. Swallow v. State, 20 Ala. 30.

64. In Alabama, when the gaming is at a "public house," or at any one of the other places specifically enumerated in the Code, even if great secrecy be employed and but few be present, it is a violation of the statute. Windham v. State, 26 Ala. 69.

65. **What not deemed a public place.** In Alabama, a doctor's office is not a public place within the statute against gaming, when the playing is at night, the doors closed, and curtains down at the windows, although the room is next to a merchant's counting-room, with a door communicating between them, and the person who occupies it as a sleeping apartment is in the habit of inviting his friends to come to his room for the purpose of playing. Sherrod v. State, 25 Ala. 78; Clarke v. State, 12 Ib. 492. But held otherwise as to a steamboat. Coleman v. State, 13 Ib. 602.

66. A back room used by the register in chancery as a sleeping apartment, the front room being his office, and communicating with it by a door, is not a public place within the statute of Alabama against gaming, it being proved that the house was surrounded in the rear by a high fence; that the playing occurred at night, when the doors were locked and the windows closed; that the eight persons present came by invitation of the occupier of the room, and that they entered through a back door. Roquèmore v. State, 19 Ala. 528.

67. An apartment on the second floor of a house rented and occupied by the defendant as a bedroom, is not within the statute of

Alabama against gaming (Code, § 3243), from the mere fact that the lower story is used by another person for the sale of spirituous liquors. Dale v. State, 27 Ala. 31.

**68.** The fact that the defendant, with two or three other persons, on one occasion went to an outhouse and played cards, does not constitute such house "an outhouse where people resort" within the statute of Alabama against gaming. Cain v. State, 30 Ala. 534. A backhouse or privy belonging to a country schoolhouse is not, during the vacation, either a public house, a public place, or an outhouse where people resort, within the foregoing statute. McDaniel v. State, 35 Ala. 390.

**69.** On the trial of an indictment for playing cards "at a public place," it was proved that the defendants, five in number, went into a piece of dense woods, to a deep hollow, about four hundred yards from a country storehouse where a large number of people had assembled, and there engaged in a game of cards; that three other persons joined them and took part in the game, one of whom testified that when he went into the woods he did not know where the defendants were, but hunted them up; that he had never known cards to be played at that place before, but that during the previous year, persons had played "in the piece of woods," fifty or one hundred yards from "said hollow." *Held* that the playing was not at a public place. Bythwood v. State, 20 Ala. N. S. 47.

**70.** A spot concealed from view by bushes and briars, on land owned by a county for supporting its poor, is not a public place within the statute of Virginia, against gaming. Com. v. Vandine, 6 Gratt. 689.

**71. Power and duty of grand jury.** In Tennessee, the statute of 1824, ch. 5, § 2, makes it the duty of grand jurors to inquire after all persons engaged in unlawful gaming, and gives them power to summon before them for examination, any one who they believe has knowledge of the commission of such offenses. McGowan v. State, 9 Yerg. 184; State v. Smith, Meigs, 99; Fugate v. State, 2 Humph. 397; State v. Parish, 8 Ib. 80.

**72. Construction of statutes.** In Mississippi, the statutes against gaming, being remedial and not penal, are to be construed strictly. Cain v. State, 13 Smed. & Marsh. 456.

2. Indictment.

**73. Parties.** In Ohio, an indictment for gaming must name the parties, or state that they are unknown; and also state whether the game was for money or other valuable thing. Davis v. State, 7 Ohio, 204.

**74.** In Indiana, an indictment of a person for suffering his building to be used for gaming must state the names of the persons who were allowed to gamble, or give a good reason for the omission; and the objection is properly made by motion in arrest. State v. Noland, 29 Ind. 212; Ball v. State, 7 Blackf. 242. So likewise, an indictment for gaming must give the name of the person with whom the defendant played, or state that his name is unknown. Butler v. State, 5 Ib. 280. In Iowa, an indictment for suffering gaming need not state the names of the persons who played, name the sums of money wagered, or describe the property lost or won. Romp v. State, 3 Greene, 276.

**75.** In Arkansas, an indictment for betting at a game of cards under the statute (Dig. p. 367, § 8), must state the names of the persons who played the game, if known; and the proof must correspond with the allegation, and show that all the persons charged were engaged in the game. Parrott v. State, 5 Eng. 574. But an indictment under the first section of the statute (Dig. p. 365), need not allege that the defendant bet with any particular person. Drew v. State, 5 Eng. 82.

**76.** In Kansas, an indictment for keeping a gambling house need not state the names of the persons who were permitted to bet or play; and if it be alleged that the names are unknown, such an allegation is surplusage and need not be proved. Rice v. State, 3 Kansas, 141.

**77.** Persons who keep a common gaming house may be indicted jointly or separately. Com. v. Hyde, Thach. Crim. Cas. 19; Ward v. State, 22 Ala. 16. In Virginia, several

persons may be charged in the same indictment with different violations of the statute against gaming. Com. v. McGuire, 1 Va. Cas. 119.

**78. Name of game.** An indictment charging that the defendant "did play at cards for money," was held sufficient. Johnston v. State, 7 Smed. & Marsh. 58. And the same was held of an indictment which charged that the defendant played "at a game of cards or dice," instead of "at a game *with* cards or dice." Cochran v. State, 30 Ala. 542.

**79.** In Kentucky, it was held that an indictment for gaming need not give the name of the game, or state how much money was won or lost, nor who won or lost money. Monte v. Com. 3 J. J. Marsh. 132; Com. v. Crupper, 3 Dana, 466. In Indiana, it has been held that although the indictment need not give the name of the game, yet that it ought to state whether cards, dice, &c., were used, in order to identify the transaction. Webster v. State, 8 Blackf. 400. See State v. Dole, 3 Ib. 294; State v. Ross, 7 Ib. 322.

**80.** In Tennessee, an indictment under the statute of 1824, ch. 5, need not describe the game played, nor the person with whom the bet was made, nor state what money or amount was bet on the game. State v. McBride, 8 Humph. 66; nor give the name of any person who played. Dormer v. State, 2 Carter, 308. But where the indictment charges the defendant with gambling for "a valuable thing," the thing gambled for must be described. Anthony v. State, 4 Humph. 83.

**81.** An indictment charged that A. and B. played at a game with cards, without alleging that the played together. *Held* insufficient. Lewellin v. State, 18 Texas, 538; Parker v. State, 26 Ib. 206; State v. Roderica, 35 Ib. 507; Herron v. State, 36 Ib. 285.

**82. Averment of the keeping, or permitting a house to be kept for gaming.** In Missouri, an indictment under the statute (1 R. C. 1855, p. 626), for permitting a gambling device to be used for the purpose of gaming in the house of defendant, need not aver an actual playing for money or property. State v. Scaggs, 33 Mo. 92. In Indiana, the same is true of an indictment under the statute of 1838, charging that the defendant kept a room to be used and occupied for gaming. State v. Miller, 5 Blackf. 502.

**83.** In Texas, where an indictment charged the defendant with keeping a ten-pin alley without having paid the license, it was held that it need not be alleged that the alley was kept for play, or that playing took place, or was permitted therein. Needham v. State, 1 Texas, 139.

**84.** In Arkansas, it was held that a general charge that the defendant kept and maintained a common gaming house, was sufficient, without the further allegation of what was transacted there. Vanderworker v. State, 8 Eng. 700.

**85.** In New York, an indictment which alleges that the defendant kept a common gaming house, without stating what was transacted there, is insufficient. Where it was charged that the defendant kept a certain common gaming house in which he sold and furnished tickets in lotteries unauthorized by law, to divers persons, it was held that the indictment did not state an indictable offense. People v. Jackson, 3 Denio, 101.

**86.** Where an indictment averred that the tenement therein named was used for illegal gaming, but did not charge the defendant as a keeper of a "common gaming house," it was held insufficient. Com. v. Stahl, 7 Allen, 304.

**87.** An indictment alleging that the defendant kept a house in which unlawful games at cards were played and permitted, is bad in not charging in direct terms that the gaming was permitted by the defendant. Com. v. Crupper, 3 Dana, 466.

**88.** An indictment for gaming, charged that the defendant "unlawfully kept and suffered a certain building, room, and tenement, to be used for gaming, and then and there unlawfully suffered A. B. and divers other persons to the grand jurors unknown, to play at a certain game called billiards, for money and other articles of value." It was proved that the defendant kept a billiard room in which players were charged twenty-

five cents a game for the use of the tables, the loser paying the sum thus charged. A witness testified as follows: "I played one game and lost it, and paid the defendant for the table. Have seen the defendant in the saloon frequently, and have seen his clerk there. Saw games played, and the loser always paid the bill for the table. I could not swear positively that the defendant always knew the terms upon which the games were played, but think he had a good opportunity to know that the loser paid for the table." *Held*, that the indictment was not bad for duplicity, and that the defendant was properly convicted. Crawford v. State, 33 Ind. 304.

**89. Averment of betting.** An indictment for gaming, which charges that money was won and lost, is sufficient without alleging that it was bet. Buford v. Com. 14 B. Mon. 24.

**90.** An indictment alleging that the defendant did bet at a certain gaming bank then and there exhibited and kept, called monte, is sufficiently certain. McKissick v. State, 2 Texas, 356.

**91.** In Arkansas, an indictment under the statute (Dig. 307, § 8), need not allege the amount of money bet, nor with whom defendant bet, but it must give the names of the players, if known. Moffat v. State, 6 Eng. 169; Backman v. State, 8 Ib. 703.

**92.** An indictment for betting on an election must state the object for which the election bet on was held. Bellair v. State, 6 Blackf. 104.

**93.** An indictment charged that the defendant and another person bet on the result of the Presidential election, "goods, wares, and merchandise, being valuable things." *Held* bad for uncertainty. State v. Kilgore, 6 Humph. 44.

**94.** An indictment for betting on the result of an election need not allege that the defendant bet upon the success of any particular candidate. State v. Cross, 2 Humph. 301.

**95. Time.** The day named in an indictment for gaming is not material, provided it be previous to the finding of the indictment. State v. Little, 6 Blackf. 267. But the day charged must be a time within which the law authorizes a prosecution to be commenced. Anthony v. State, 4 Humph. 83.

**96. Averment of place.** In Virginia, where the defendants were charged with playing an unlawful game at the house of A., in B., in the county of C., it was held that the presentment was fatally defective in not alleging that the house was a public house. Herd's Case, 4 Leigh, 674. And a grocery where gaming is alleged to have taken place must be charged to be a public place, or place of public resort. Robert's Case, 10 Ib. 686.

**97.** In the same State, an indictment which charged the defendant with unlawful gaming at the house of A., the same being a house of entertainment, was held sufficient. Linkor's Case, 9 Leigh, 608. But an indictment which omitted to allege that the place where the game was played was a public house was held fatally defective. Herd's Case, 4 Ib. 674. And see Robert's Case, 10 Ib. 686.

**98.** In an indictment for permitting cards to be played at a house for retailing spirituous liquors, the words "Occidental saloon" do not describe a public house. State v. Mansker, 36 Texas, 364.

**99.** In New Hampshire, in an indictment for keeping a gaming-house it is not necessary to describe the house or place, or to name the persons who played at it, or the games played, or the amount of the stakes. State v. Prescott, 33 New Hamp. 212.

**100.** In Alabama, an indictment which charged the playing at cards in an outhouse where people resorted, in a storehouse for retailing spirituous liquors, and in a public place, was held sufficient without stating to whom the outhouse or storehouse belonged, or describing the place. State v. Atkyns, 1 Ala. 180.

**101.** In Texas, an indictment for playing cards at a public place need not allege the ownership of the place. Wilson v. State, 5 Texas, 21.

**102.** An indictment for betting on a game need not allege that the game was played

in the county where the bet was made. State v. Kyle, 10 Mo. 389.

**103.** An indictment for permitting a horse to be run in a race along a public highway need not state the termini of the highway. State v. Armstrong. 3 Ind. 139; State v. Burgett, 1 Carter, 479.

**104. Charging several acts.** An indictment is not double which states several distinct acts of gaming. State v. Prescott, 33 New Hamp. 212. The setting up of a gaming table, the keeping of such table, and the inducing of a person to bet on it, when done by the same person at the same time, may be charged in the indictment as one offense. Hinkle v. Com. 4 Dana, 519.

**105.** An indictment which charged unlawful gaming by playing at cards, and betting on the sides and hands of those that then and there played, was held not bad for duplicity. Com. v. Tiernans, 4 Gratt. 545.

**106.** An indictment which charges that the defendant kept and suffered his house to be used for gaming is not bad for duplicity. Dormer v. State, 2 Carter, 308.

**107.** An indictment which alleges the keeping of a faro bank, and inducing persons to play therewith for money, charges but one offense. State v. Ames, 10 Mo. 743.

### 3. Evidence.

**108. Bill of particulars.** A person indicted as a common gambler is not entitled to a bill of particulars of the facts expected to be proved. Com. v. Moore, 2 Dana, 402.

**109. Time.** In Indiana, where a presentment under the statute (R. S. of 1838, 218), was made for unlawful gaming at cards at a place stated, within six months next preceding, and the process summoned the defendant to answer the presentment for unlawful gaming at cards generally, it was held that the process was void. Blanton v. State, 5 Blackf. 560.

**110.** But in Alabama, where the indictment charged that the gaming was committed within six months before the commencement of the prosecution, and the jury found the defendant guilty, and that the gaming took place more than six months before the time laid, it was held that the variance was not material. Cameron v. State, 15 Ala. 383.

**111. Place.** Under an indictment for gaming, which alleges that the defendant played cards "at a storehouse then and there for retailing spirituous liquors," he cannot be convicted, upon proof that the playing took place "near a house formerly used for retailing, but which was not then so used." Logan v. State, 24 Ala. 182.

**112.** An indictment charged the defendant in different counts, with playing cards "at a highway," "at a house where spirituous liquors were retailed" "at a public place" and "at a public house." It was proved that the playing was in a hollow more than a hundred yards from a house where spirituous liquors were retailed, and where persons had been drinking; that the persons playing could not be seen from the grocery, nor from the public road; and that there never had been any playing at that place before or since. *Held* that the evidence did not support the indictment. Smith v. State, 23 Ala. 39.

**113.** An indictment for gaming alleged that the defendant played cards, to wit, the the game of all fours, of loo, and of whist, at a public house, to wit, at the storehouse of A. *Held* that to support the indictment, it must be proved that the defendant played at some one of the games mentioned therein, and that if the playing was at the storehouse of A., in the night, after the business of the day was over, the storehouse was not then *prima facie* a public house, though it was so when open to the public in the day time. Windsor's Case, 4 Leigh, 680. And see Feazle's Case, 8 Gratt. 585.

**114.** Where an indictment for gaming charged that the offense was committed at the booth of S., and it was proved to have been committed at the booth of C., it was held that the evidence did not support the charge. Com. v. Butts, 2 Va. Cas. 18.

**115.** Proof that a race was run along a road leading from one town to another in a certain county, was held *prima facie* evidence that the road was a public highway. Watson v. State, 3 Ind. 123.

**116. Proof of betting.** Under an indict-

ment alleging that several persons bet at a faro bank, the evidence must show that all the persons named were concerned in the betting. Johnson v. State, 8 Eng. 684.

**117.** An indictment charged that the defendant and four other persons bet together, and against each other, at a game of cards, and in a second count, that the said defendant and the said other persons bet together at a game of cards. *Held* that the indictment was not supported by proof that the four persons named played cards, that the defendant stood by and bet with one of them, and that three of the players bet with each other, but that the fourth player did not bet. Hany v. State, 4 Eng. 193.

**118.** Where the indictment charged the playing at a game of cards at a public place, upon which money was bet, and it was proved that property was bet, it was held that the variance was material. Hall v. State, 8 Texas, 171. On the other hand, evidence that the defendant bet money on a game of cards will not support an indictment charging him with betting property. Horton v. State, 8 Eng. 62.

**119.** An indictment for betting money will not be supported by proof of the betting of United States treasury warrants. Williams v. State, 12 Smed. & Marsh. 58.

**120.** An indictment which alleged that the defendant unlawfully bet and played at a game of cards called faro, for money, was held not supported by proof that he bet bank notes. Johnston v. State, 1 Mart. & Yerg. 129.

**121.** But proof of the betting of checks or counters of a faro bank which the parties agree shall represent bank notes or money, and for which money or bank notes are paid by them, will support the charge of keeping a faro table at which money or bank notes are bet. Ashbuck v. Com. 7 B. Mon. 44.

**122. Persons playing.** An allegation in an indictment, that the names of the persons who played the game are unknown, is material, and must be sustained by the proof. Barkman v. State, 8 Eng. 703.

**123.** An indictment charged that the defendant by playing at cards, won from A. and B. a certain article. It was proved that the article was won by defendant and another as partners, from A. and B. as partners. *Held* that the variance was fatal. Wilcox v. State, 7 Blackf. 456.

**124.** But where an indictment charged a tavern keeper with permitting the game of loo to be played in his tavern by certain persons named, it was held sufficient to prove that he permitted that game to be played therein by other persons than those named. Price's Case, 8 Leigh, 757.

**125.** An indictment for gaming may be sustained against one, though others are also charged in the indictment who were not connected in gaming with him. Brown v. State, 5 Yerg. 367.

**126. Game played.** The defendant was convicted under an indictment charging him with betting at a game of cards called pocre, upon proof that the game on which he bet was called *drawn pocre*, and differed in some respects from pocre. Barkman v. State, 8 Eng. 703.

**127.** Under an indictment for gaming, the defendant may be convicted on proof "that he and another put up money and threw dice for it, three times each, the one throwing the highest number taking the money;" although it appear "that the mode of procedure and of throwing the dice was the same as in the case of raffling for property." Jones v. State, 26 Ala. 155.

**128.** To justify a conviction under an indictment for gaming on proof that the defendant played a game of *euchre* with dominoes, the jury must determine—1st, whether that game when played with dominoes, is substantially the same as when played with cards; and 2d, whether dominoes had become, at the time of the defendant's playing, a device or substitute for cards in playing euchre, or were in fact so used in that particular game. Harris v. State, 31 Ala. 362.

**129.** A person cannot be convicted on proof that the defendant played euchre with dominoes, where it is shown that euchre with dominoes is an older game than euchre with cards, and that both cards and dominoes are still in common use in playing euchre, unless it appear that dominoes were

used in that particular game as a substitute for cards, although the players themselves did not so intend. Harris v. State, 33 Ala. 373.

**130.** Under an indictment for keeping a gaming house, it is unnecessary to prove the allegations that evil disposed and vicious persons frequented the house, or specific acts of "cursing, swearing, quarreling, and drinking." Lord v. State, 16 New Hamp. 325.

**131.** In Alabama, on the trial of an indictment for betting at a game of pool at a public place, contrary to the statute (Code, § 3243), the defendant may be convicted on proof of his playing pool at a table regularly licensed for billiards; such a license not authorizing the use of the table for the game of pool. Rodgers v. State, 26 Ala. 76.

**132.** An indictment for permitting a faro bank to be kept and exhibited by the defendant in his house, is not supported by evidence that the house was owned by the defendant, and that the faro bank was kept and exhibited in it, without also showing that the defendant permitted it. Harris v. State, 5 Texas, 11.

**133.** The allegation in an indictment for racing as to the kind of animal that was suffered to be run, is material, and must be proved as laid. Thrasher v. State, 6 Blackf. 460.

**134.** Upon the trial of an indictment charging the defendant as a common gambler, evidence that "he was and is by reputation a common gambler," is not admissible; but facts must be proved. A single instance of unlawful gaming, with other circumstances, might warrant a conviction. Com. v. Hopkins, 2 Dana, 418.

**135. Money won or lost.** Under an indictment for winning a certain sum of money, it is sufficient to prove the winning of a smaller sum. Parsons v. State, 2 Carter, 499.

**136.** An indictment which charges the defendant with winning $5, by a wager, is not supported by proof that he won a promissory note for $5. Tate v. State, 5 Blackf. 174.

**137.** An information charging the defendant with having lost upon a game of cards is not sustained by proof that he and another person jointly lost. Jackson v. State, 4 Ind. 560.

**138.** On the trial of an indictment for gaming, it was held erroneous to charge the jury that it was not necessary for the prosecution to prove that the defendant either won or lost of or to all the persons named in the indictment, but that it was sufficient to prove a winning or losing from or to, one or more of them. Isely v. State, 8 Blackf. 403.

## Grand Jury.

**1. How constituted.** At common law a grand jury may consist of any number between twelve and twenty-three. State v. Davis, 2 Ired. 153.

**2. Who may be grand juror.** A person competent to serve as a traverse juror is competent to serve as a grand juror. In Maine, by statute (R. S. ch. 106, § 3), certain persons, including all officers of the United States, are exempted from serving as jurors, and the statute directs that their names shall not be placed on the lists. *Held* that they were not disqualified. State v. Quimby, 51 Maine, 395; State v. Wright, 53 Ib. 328.

**3.** A grand juror, who had formed an unqualified opinion of the defendant's guilt, previous to the finding of the indictment, is incompetent to sit, although such opinion was derived from evidence given in the grand jury room in the finding of an indictment against the defendant for the same offense, which was quashed. State v. Gillick, 7 Iowa, 287.

**4.** Quakers are not incompetent to serve as grand jurors. Com. v. Smith, 9 Mass. 107.

**5. Summoning.** In Maine, grand jurors by statute (R. S. ch. 135, § 10), are drawn and summoned by writs of *venire facias*, under seal of the court signed by the clerk. A grand jury not legally constituted cannot be made such by consent; and *a fortiori* it cannot become so by any omission to make objections. State v. Lightbody, 38 Maine, 200.

6. The statute of New York (of 1851, p. 825, ch. 444), is so far directory that an omission by the county judge to make the specified designations respecting juries, does not render his appointment of the times and places for holding Courts of Sessions, without such designations, irregular or invalid. It is only when the order designates a term at which no grand jury is required to attend, that it is unlawful or irregular to draw or summon one for such term. People v. Cyphers, 5 Parker, 666; affi'd 31 N. Y. 373.

7. A grand jury having been impaneled, sworn and charged, at the commencement of the term, were discharged by order of the court. Afterward, by another order of the court, during the same term, the same persons were reassembled and resumed the duties of the grand jury for that term. *Held* that there was no error. Wilson v. State, 32 Texas, 112.

8. Where, on a trial for murder, it appeared that the officer had neglected to make a proper return to a *venire* which he served for one of the grand jurors who found the bill, it was held that being still in office he could amend his return after the conviction of the prisoner. Com. v. Parker, 2 Pick. 550.

9. **Proof of organization.** The record must affirmatively show the organization of the grand jury; and the mere indorsement on an indictment, "A true bill, J. R. Dillard, foreman of the grand jury," is not sufficient. Parmer v. State, 41 Ala. 416.

10. It is not customary to insert the names of the grand jurors in the record of each case. Turns v. Com. 6 Metc. 225. The names of the grand jurors must appear in some part of the record. Mahan v. State, 10 Ohio, 232. But the *venire facias* need not be spread upon the minutes of the court. It is sufficient if the record shows the return of the *venire* and the selection of the grand jury. Conner v. State, 4 Yerg. 137. The record must show that the grand jury was sworn. Abram v. State, 25 Miss. 589.

11. In Indiana, unless the record of the board of county commissioners shows that the grand jurors who found the indictment were selected according to the statute, the indictment will be quashed. State v. Conner, 5 Blackf. 325.

12. **Two grand juries.** Under the New York code, two grand juries may sit in the same county at the same time. Allen v. People, 57 Barb. 338.

13. **Amendment of panel.** The panel of the grand jury, returned by the sheriff, may be amended by order of the court, or a new one substituted, at any time during the day on which it is returned, before the presentment of any bills of indictment. State v. Rickey, 4 Halst. 293.

14. **Objection to.** A person accused of crime may, before he is indicted, challenge any one of the persons returned on the grand jury. Hudson v. State, 1 Blackf. 317; Jones v. State, 2 Ib. 475; Com. v. Clark, 2 Brown, 233.

15. The objection that the grand jury has not been drawn, summoned and impaneled according to law, must be made by plea in abatement at the court at which the indictment is found. State v. Greenwood, 5 Porter, 474; State v. Leaben, 4 Dev. 305; State v. Freeman, 6 Blackf. 248; Barney v. State, 12 Smed. & Marsh. 68. It is too late to raise the objection in the appellate court. Bass v. State, 37 Ala. 469; Floyd v. State, 30 Ib. 511. But see Ballair v. State, 6 Blackf. 104.

16. After an indictment has been filed and accepted in court, it is too late to take exception to the personal qualifications of the grand jurors. Boyington v. State, 2 Porter, 100; Barney v. State, 17 Smed. & Marsh. 68. See State v. Brown, 5 Eng. 78; State v. Hawkins, 5 Eng. 71.

17. Irregularities in selecting and impaneling grand jurors, which do not go to their incompetency, can only be objected to by way of challenge. But their individual incompetency may be pleaded in abatement to the indictment. Huling v. State, 17 Ohio, N. S. 583.

18. If any error or irregularity has occurred in the organization of the grand jury, the objection should be taken upon a motion to quash the indictment, or perhaps by plea. After pleading in bar to the charge, it would be too late to raise the

question. People v. McCann, 3 Parker, 272, per Harris, J.; referring to People v. Robinson, 2 Ib. 308; Horton v. State, 47 Ala. 58; Com. v. Chauncey, 2 Ashm. 90.

19. In New York, where the prisoner interposed a special plea, founded upon the alleged illegal organization of the grand jury, after the plea of not guilty had been entered and several jurors impaneled and sworn, it was held that the refusal of the court to entertain it was in its discretion, and not the subject of exception. People v. Allen, 43 N. Y. 28.

20. It may be objected to a grand juror that he has formed and expressed an opinion as to the guilt of the prisoner, or has shown feelings of hostility toward him. But the objection must be made before the indictment is found. People v. Jewett, 3 Wend. 314; *contra*, State v. Hughes, 1 Ala. 655; State v. Clarissa, 11 Ala. 57.

21. A grand juror will not be set aside for the reason that he has been the prosecutor of a person accused of a capital crime, whose case may probably be brought before the grand jury. Case of Tucker, 8 Mass. 286.

22. **How sworn.** The form of oath to grand juries should be substantially followed. The usual practice is to swear the foreman first, and then to swear the others, four at a time. Brown v. State, 5 Eng. 607.

23. Where one of the grand jurors, being detained, was not present when the rest of the grand jurors were sworn, it was held that he might be sworn afterward. Wadlin's Case, 11 Mass. 142. And see Brown v. State, *supra*.

24. **Power.** In Pennsylvania, the grand jury can act upon and present offenses of public notoriety, and such as are within their own knowledge, such as are given to them in charge by the court, and such as are sent up to them by the district attorney. They cannot indict, in any other cases, without a previous prosecution before a magistrate. McCullough v. Com. 67 Penn. St. 30.

25. **Duty.** It is the duty of the grand jury to inquire into all offenses committed in their county, whether the offenders are or are not under arrest. Ward v. State, 2 Mo. 120; People v. Hyler, 2 Parker, 566; State v. Jackson, 32 Maine, 40.

26. **Testimony before.** Witnesses before a grand jury should be so sworn that, if their evidence is false, they may be prosecuted for perjury. But the same nicety in regard to evidence is not required as on the trial. State v. Fasset, 16 Conn. 457.

27. To justify the finding of an indictment, the testimony before the grand jury must be such that, if unexplained, it would sustain a conviction. People v. Hyler, 2 Parker, 570.

28. **Disclosing testimony.** A grand juror may be compelled to testify, when necessary for the purposes of justice, what the witnesses before the grand jury testified to, either to contradict witnesses, or otherwise. State v. Wood, 53 New Hamp. 484; s. c. 2 Green's Crim. Reps. 346.

29. But no evidence before the grand jury can be used for the purpose of invalidating the indictment. State v. Fassett, 16 Conn. 457. Where the defendant filed a plea in abatement, that the pretended indictment was not the act of the grand jury, and the court allowed the foreman and six of the grand jurors to testify that no indictment was in fact found, and to explain how the mistake occurred, it was held error. State v. Oxford, 30 Texas, 428.

30. A witness is not permitted to disclose evidence before a grand jury; and a question which may be answered in such a manner as to make such disclosure, is improper. State v. Knight, 43 Maine, 11.

31. Although a witness called by the prosecution, and who denies his knowledge of alleged facts, testifies with reluctance, and manifests a disposition to conceal what he knows, yet he cannot be asked on direct examination whether he did not swear to those facts before the grand jury. Com. v. Welsh, 4 Gray, 535.

32. **Discharge of grand jurors.** At the term of the court at which the indictment was preferred, after the grand jury had been impanneled, the court, upon the application of two of the grand jurors, discharged them that they might attend to their private business. *Held* not a good objection to the

indictment. Denning v. State, 22 Ark. 131.

33. After the grand jury had been charged, one of their number, upon his application, was discharged by the court, and a substitute ordered to be summoned from the bystanders. *Held* that the placing of this person on the grand jury, and his participation in their deliberations, vitiated the whole body. Portis v. State, 23 Miss. 578.

*See* INDICTMENT; TRIAL.

## Habeas Corpus.

**1. When demandable as a right.** A prisoner is entitled to a writ of *habeas corpus* as a matter of right, except when he is committed or detained under a final judgment. If the officer to whom the writ is presented for allowance decides that the prisoner is not entitled to it, such decision is a proper subject of review. People v. Mayer, 16 Barb. 362. But the inquiry cannot go behind the sentence of a court of competent jurisdiction. Johnson v. U. S. 3 McLean, 89.

**2. When not proper remedy.** Persons out on bail are not entitled to a writ of *habeas corpus* directed to their bail. Territory v. Cutler, McCahon's Kansas, 152.

3. In New Jersey, it was held that a writ of *habeas corpus* was not the proper remedy for a guardian to obtain the custody of his ward, where the ward was under fourteen, and chose to remain with his mother. State v. Cheeseman, 2 South. 445.

4. Formal defects in process cannot be corrected by *habeas corpus*. The remedy is either by motion to set the process aside, or by certiorari. Miles v. Brown, 3 Barb. 37.

5. It is not the province of the writ of *habeas corpus* to review errors in the adjudication of an inferior tribunal, or the sufficiency of errors before it, but only to ascertain whether there was jurisdiction to pronounce the sentence of commitment, and whether the commitment is in due form. People v. McCormack, 4 Parker, 9; Matter of Prime, 1 Barb. 340; Stoner v. State, 4 Mo. 614.

6. Although the writ of *habeas corpus* may sometimes be employed as a writ of error, yet it cannot be used as a writ of *quo warranto* in order to decide a question of usurpation of office. Matter of Wakker, 3 Barb. 162.

7. Where a person in prison under sentence is needed for trial on another charge, a *habeas corpus* should be issued, directed to the keeper of the prison, stating the object for which he is wanted, and commanding the keeper to produce him in court. When the prisoner is brought into court, he continues in the custody of the keeper, until it is otherwise ordered; and, at the close of the trial, the court may order that he remain in such custody under the original sentence. Such order, being directory and not primitive, may be embodied in the sentence and judgment. State v. Wilson, 38 Conn. 126.

8. A writ of *habeas corpus* is not the proper remedy for a person imprisoned on a *ca. sa.* irregularly issued; but he should make application to the court by motion and affidavit. Yates' Case, 4 Johns. 317.

**9. Application for.** In Alabama, an application for a writ of *habeas corpus* must be by petition, signed by the applicant, or by some person in his behalf, and the petition must be verified to the effect that the statements therein contained are true as to the best of his knowledge, information and belief. Gibson v. State, 44 Ala. 17.

10. An affidavit that the affiant is unlawfully detained will be sufficient to entitle him to a writ of *habeas corpus*, without other allegation. White v. State, 1 Smed. & Marsh. 149.

11. To authorize an application for a writ of *habeas corpus* to an officer of an adjoining county, under the statute of New York (3 R. S. 5th ed. 883, §§ 37, 38), there must be sufficient evidence that there is no officer in the county where the prisoner is detained who has power to grant the writ, or that the officer is absent, or has refused to grant it, or is incapable of acting for some cause specially set forth. An affidavit which does not state that there is no officer in the county to grant the writ, but only that the defend-

ant can find none, is insufficient. The affidavit should relate to the day the application is made, and not to a previous date. People v. Burtnett, 5 Parker, 113.

12. Where a person detained under a writ of *ne exeat* petitions for a writ of *habeas corpus*, a copy not only of the writ, but of the bill upon which it is founded, and the judge's order directing the writ of *ne exeat* to issue, must accompany the petition, or a sufficient excuse be shown for the omission. *Ex parte* Royster, 1 Eng. 28.

13. **Notice of petition.** Notice of the petition for a *habeas corpus* must be given to the person who is interested in continuing the imprisonment, although he do not reside in the county. People v. Pelham, 14 Wend. 48.

14. **U. S. Supreme Court.** Where a person is unlawfully held under a judgment of a Federal court, the Supreme Court (under proceedings by *habeas corpus* and *certiorari*) will examine the record, and, upon ascertaining the fact, will discharge him. *Ex parte* Lange, 18 Wallace, 163; s. c. 2 Green's Crim. Reps. 103.

15. The Supreme Court of the United States may issue a writ of *habeas corpus* to discharge a person who stands committed by a commissioner of the U. S. Circuit as a fugitive from justice in Great Britain, after the Circuit Court has ordered that the writ shall be dismissed and the prisoner remanded. *In re* Kane, 14 How. U. S. 103, Curtis, J., *dissenting*.

16. The Supreme Court of the United States has not jurisdiction of a writ of *habeas corpus* under the seal of the Circuit Court issued and tested by an associate judge of the Supreme Court, returnable before him at chambers, and adjourned by him into the Supreme Court in bank. *In re* Kane, *supra*.

17. **U. S. Circuit Court.** The Circuit Court of the United States may bring before it by *habeas corpus* one of its deputy marshals arrested and put in jail under State process while executing a U. S. writ, and inquire into the ground of his commitment, and if illegal, direct his discharge. The court will not only hear evidence to disprove the truth of the affidavits upon which the State authorities proceeded, but will consider the affidavits independently of such evidence; and if, in the judgment of the court, they do not contain a *prima facie* cause for arrest, will discharge the prisoner, without hearing any counter evidence. In general, moreover, the court will discharge him, unless there is an oath of merits by the plaintiff, or an affidavit of circumstances from others to supply its place. *Ex parte* Jenkins, 2 Wall. Jr. 521.

18. The act of Congress of March 2d, 1833, gives relief by *habeas corpus* to one in State custody, not only when he is held under a law of the State which seeks to punish him for executing a law or process of the United States, but also when he is in such custody under a general law of the State which applies to all persons equally, where it appears that he is justified for the act done, because it was done in pursuance of a law of the United States, or of the process of a United States court or judge. U. S. v. Jailer of Fayette County, 2 Abb. 265.

19. **Jurisdiction of State court where party is held by Federal authority.** A State court will not grant a writ of *habeas corpus* to a person committed under an act of Congress. State v. Paine, T. U. P. Charlt. 142.

20. A regular demand under the act of Congress and warrant of the governor, to surrender a fugitive, cannot be inquired into on *habeas corpus*. State v. Buzine, 4 Harring. 572.

21. Where a writ of *habeas corpus* issued by a State court is served on a United States marshal having a prisoner in custody, the marshal should make known to the court, by a proper return, the authority by which he holds the prisoner in custody. And if the State authorities should attempt to control the marshal in the custody of his prisoner, it would be his duty to resist it, and to call to his aid any force that might be necessary. U. S. v. Booth, 21 How. U. S. 506.

22. A State court or judge may entertain proceedings by *habeas corpus* where persons are detained by officials of the United States

under claim of enlistment and desertion, or other alleged authority of the government, and may direct the discharge of such persons when the detention is unlawful. Matter of Reynolds, 6 Parker, 276.

23. A *habeas corpus* was allowed by a New York Supreme Court commissioner, directed to the commander of the navy of the United States on Lake Ontario, and to the general commanding the troops of the United States at Sackett's Harbor, and to each and every subordinate officer under said commandants, or either of them, ordering them to bring the body of Samuel Stacy, Jr., &c., immediately, &c., together with the cause, &c., before the commissioner, &c. The following return was indorsed on the writ: "I, Morgan Lewis, general of division in the army of the United States, do return to the within writ, that the within named Samuel Stacy, Jun'r, is not in my custody." *Held* that the return was evasive and insufficient; that it should have been that the prisoner was not in his custody, possession, or power. And upon its being shown by affidavits that the person was in fact in the custody of the subordinate officer, acting under the order of General Lewis, and that the return was intentionally evaded, the court directed an attachment against General Lewis for contempt. Matter of Stacy, 10 Johns. 327.

24. To deprive the State courts of jurisdiction on *habeas corpus* within State territory ceded to the United States, such jurisdiction must have been expressly surrendered by the State. Matter of Carleton, 7 Cow. 471.

25. When the inquiry on *habeas corpus* involves a question of conflict between State and Federal process, counsel have no right to appear in defense of the State process without being duly authorized to do so. *Ex parte* Jenkins, 2 Wall. Jr. 521.

26. **Where party is detained under State process.** In New York, the right to discharge a prisoner indicted and imprisoned for an offense not cognizable by a Court of Sessions, on the ground that he has not been tried within the time prescribed by law, is not confined to the Court of Oyer and Terminer, but the application may be made to any court having jurisdiction to issue a writ of *habeas corpus*. People v. Jefferds, 5 Parker, 518.

27. In New York, where the chancellor committed an officer of the Court of Chancery for malpractice and contempt, and a judge of the Supreme Court, in vacation, on *habeas corpus*, discharged the prisoner, and the chancellor afterward recommitted him for the same cause, it was held that the chancellor was not liable to the penalty given by the fifth section of the *habeas corpus* act (2 R. S. 571, §§ 59, 60, sess. 24, ch. 65). Yates v. Lansing, Jr., 9 Johns. 395.

28. In Alabama, a court, under the constitutional provision which gives it "a general superintendence and control of inferior jurisdictions," may grant a writ of *habeas corpus*, upon the refusal of a judge of the Circuit Court or chancellor. *Ex parte* Chaney, 8 Ala. 424.

29. In Missouri, a judge of the Circuit Court may, during term time or vacation, issue a writ of *habeas corpus*, and if he improperly discharge the prisoner, the jailer or other officer who has him in custody will not be liable. Martin v. State, 12 Miss. 471.

30. Whether the court may, by a writ of *habeas corpus* to the executive officer of another court, take a prisoner from the custody of the latter—*query*. Sims' Case, 7 Cush. 285.

31. **When granted.** In Georgia, where prisoners had been in jail two terms, were ready for trial at each term, and at the second term petitioned to be brought to trial, it was held that they were properly discharged on *habeas corpus*. State v. Segar, T. U. P. Charlt. 24.

32. In New York, a writ of *habeas corpus ad testificandum*, may be allowed to bring up a prisoner charged in execution upon a *ca. sa.* to testify in relation to his own application for a discharge as an insolvent. Wattles v. Marsh, 5 Cow. 176.

33. **When refused.** A person committed upon an indictment for murder cannot be discharged upon *habeas corpus* by proving his innocence, however conclusive the proof may be, but must abide the event of a trial by jury. Where the application to be ad-

mitted to bail is made before indictment, the inquiry as to guilt or innocence must be confined to the proof on which the commitment was ordered. People v. McLeod, 1 Hill, 377; People v. Ruloff, 5 Parker, 77.

34. A writ of *habeas corpus* refused where it appeared that the petitioner was in the custody of the sheriff under a commitment from the District Court, after conviction for felony. *Ex parte* Ezell, 40 Texas, 451.

35. The protection of the English *habeas corpus* act (31 Car. II, ch. 2), against unlawful impeachment, extended only to the release of the prisoner on bail, when the offense was bailable. People v. McLeod, 1 Hill, 377.

36. Where the petition of a writ of *habeas corpus* shows that the petitioner, if brought before the court, could not be discharged, the writ will not be granted. Sims' Case, 7 Cush. 285.

37. The inquiry on *habeas corpus* cannot go behind the sentence of a court of competent jurisdiction. Johnson v. U. S. 3 McLean, 89; *Ex parte* Ball, 2 Gratt. 588; People v. Shea, 3 Parker, 562.

**38. Form.** Forms of writs of *habeas corpus* and *certiorari*, allowance, and return. People v. Tompkins, 1 Parker, 224.

**39. Service.** A writ of *habeas corpus* was applied for, and issued in open court, and read to the relator, who was present with and had the custody of the prisoner. *Held*, that the failure of the relator to ask for the writ for the purpose of making his return was an acceptance of service and waiver of the delivery of the writ to him. People v. Bradley, 60 Ill. 390.

**40. Return.** The material facts of the return, which are not denied by the prisoner, must be taken as true. *In re* Da Costa, 1 Parker, 129.

**41. Rule to appear.** A rule to appear upon a *habeas corpus* cannot be taken before the return day, though the writ be actually returned before that time. Jones agst. Spicer, 6 Cow. 391.

**42. Certiorari for removal.** The prosecuting attorney is the proper person to obtain a *certiorari* for the removal into the Supreme Court of proceedings commenced by *habeas corpus*. People v. Hicks, 15 Barb. 153.

**43. Duty of court to inquire into legality of detention.** Where, on *habeas corpus*, it appears that the prisoner is detained on a warrant committing him for examination as an alleged fugitive from justice from another State, the fact that his examination is not finished is no ground for the officer issuing the writ to omit to inquire into the legality of his detention. Matter of Hayward, 1 Sandf. 701.

**44. Nature and extent of inquiry.** On *habeas corpus*, a court or judge before whom a prisoner is brought who was arrested as a fugitive from justice, by a warrant from the executive of one State, on the requisition of the executive of another State, the only inquiry is whether the warrant on which he is arrested recites that the prisoner has been demanded by the executive of the State from which he is charged to have fled, and that a copy of the indictment, or an affidavit charging him with having committed treason, felony, or other crime, certified by the executive demanding him as authentic, has been presented. Matter of Clark, 9 Wend. 212.

45. Where, on the return to a writ of *habeas corpus*, it appeared that the prisoner was detained under a warrant issued by a magistrate upon a complaint on oath, it was held proper for the court to go behind the warrant and inquire into the legality of the imprisonment. People v. Tompkins, 1 Parker, 224; *In re* Heilbonn, 1b. 429.

46. Upon a *habeas corpus*, the court will not inquire into the regularity of the proceedings before the judge who issued the warrant on which the defendant was imprisoned, but only as to his colorable authority. Matter of Prime, 1 Barb. 340.

47. Where a United States officer has been indicted and arrested under State process for riot, assault and battery, and assault with intent to kill, the court, on *habeas corpus*, will look beyond the indictment, and entertain evidence going to show that the alleged offense was committed in the proper execution of an order, process, or decree

of a Federal court. *Ex parte* Jenkins, 2 Wall. Jr. 521.

48. In New York, it has been held that although the court will not go behind the indictment, yet that on a commitment before indictment, the question of guilt or innocence may be inquired into on the return to the writ of *habeas corpus*, the proceedings being in the nature of an appeal from the decision of the committing magistrate. People v. Martin, 1 Parker, 187; People v. Tompkins, Ib. 224.

49. Where the return to a *habeas corpus* states that the prisoner is detained by virtue of process, the validity and existence of the process are the only facts which can be investigated. If the warrant is sufficient on its face, the prisoner cannot be discharged. The sufficiency of the evidence on which it issued cannot be inquired into. Bennac v. People, 4 Barb. 31.

50. In Indiana, it has been held that the judge who issues the writ, may, if the authority by which the prisoner is detained is defective, hear evidence as to his guilt, and remand, recognize, or discharge him. State v. Best, 7 Blackf. 611.

**51. When evidence must be produced.** To authorize the remand of a prisoner held on an irregular commitment, and brought before the judge on *habeas corpus*, the testimony must be produced on the return of the writ, or at the hearing. It is too late to present it on a subsequent day when the judge decides to discharge the prisoner. Matter of Hayward, 1 Sandf. 701; Matter of Fetter, 3 Zabr. 311.

**52. Evidence for prisoner.** When a party imprisoned is brought before a judge on a writ of *habeas corpus*, he may inquire into the jurisdiction of the tribunal by which he was committed, and if he can show that such tribunal had no jurisdiction to try, convict, or commit, he is entitled to his discharge. People v. Rawson, 61 Barb. 619.

53. On a traverse to a return on a writ of *habeas corpus*, the process by which the prisoner is held being regular on its face, the burden of proof is on the prisoner. Matter of Hayward, *supra*.

54. The inquiry on the traverse of the return to a *habeas corpus* being summary, the prisoner may show the grounds of his arrest and detention by the best testimony at hand or which he can procure with reasonable diligence, without reference to the ordinary rules of evidence. Matter of Hayward, 1 Sandf. 701; Matter of Fetter, 3 Zabr. 311.

55. By the return to a writ of *habeas corpus*, it appeared that the prisoner was convicted at a Court of Special Sessions, held by three justices. It was alleged on behalf of the prisoner, by way of a traverse of this return, that the said court was in fact held by two of the police justices only, one of them not being in fact present when the prisoner was arraigned, tried, or sentenced. *Held* that evidence *aliunde* was admissible to prove such allegations. People v. Divine, 5 Parker, 62.

56. In a proceeding by *habeas corpus* in the United States District Court, the petitioner is a competent witness as to a question of fact. Matter of Reynolds, 6 Parker, 276.

**57. Evidence as to legality of detention.** The justice who issued the warrant, and the clerk of his court, may be witnesses to prove on what papers the warrant issued. Matter of Fetter, 3 Zabr. 311.

58. Where a person committed by a magistrate, is brought up on *habeas corpus*, for inquiry into the cause of detention, additional evidence may be submitted to the judge to show that the prisoner is legally detained. People v. Richardson, 4 Parker, 656.

**59. Discharge of prisoner.** Where there are two grounds of detention, one good, and the other bad, the court may on *habeas corpus*, discharge the prisoner as to the void cause, and remand him as to the other. *Ex parte* Badgley, 14 Wend. 472.

60. An order of a commissioner or other officer, discharging a prisoner from custody on *habeas corpus*, is good until reversed, if he have jurisdiction; otherwise the order may be treated as void. Spalding v. People, 7 Hill, 301.

**61. Effect of decision.** The decision of an officer having power to issue and decide upon a writ of *habeas corpus*, upon any sub-

sequent application, is conclusive between the same parties when the subject-matter is the same, and there are no new facts. *In re* Da Costa, 1 Parker, 129; People v. Burtnett, 5 Ib. 113.

62. But a prior decision under a previous writ of *habeas corpus*, is not conclusive, where the first decision cannot be reviewed by writ of error. Matter of Reynolds, 6 Parker, 276.

63. Where a commissioner of the Supreme Court has jurisdiction of the subject-matter, and of the parties, his decision cannot be impeached collaterally. Therefore, the discharge of the prisoner is a protection to the sheriff who had him in custody, although the discharge was erroneously granted. Wiles v. Brown, 3 Barb. 37.

## Hawkers and Peddlers.

*See* PEDDLERS.

## Homicide.

1. MURDER.
- (*a*) *What constitutes.*
- (*b*) *Indictment.*
- (*c*) *Evidence in general.*
- (*d*) *Presumptions.*
- (*e*) *Admissions and declarations of defendant.*
- (*f*) *Admissions and declarations of co-defendant.*
- (*g*) *Declarations of person killed.*
- (*h*) *Dying declarations.*
- (*i*) *Character of person killed.*
- (*j*) *Character of defendant.*
- (*k*) *Burden of proof.*
- (*l*) *Weight and sufficiency of proof.*
- (*m*) *Charge of court.*
- (*n*) *Verdict.*
- (*o*) *Sentence.*

2. MANSLAUGHTER.
- (*a*) *What constitutes.*
- (*b*) *Indictment.*
- (*c*) *Trial.*
- (*d*) *Evidence.*
- (*e*) *Verdict.*

3. JUSTIFIABLE HOMICIDE.
- (*a*) *In self-defense.*
- (*b*) *In protecting property.*
- (*c*) *In prevention of felony.*
- (*d*) *In case of shipwreck.*
- (*e*) *In case of accident.*
- (*f*) *Evidence.*

### 1. MURDER.

#### (*a*) *What constitutes.*

**1. Definition.** Murder is the killing of a reasonable being, with malice aforethought express or implied by law. State v. Zellers, 2 Halst. 220; U. S. v. Magill, 1 Wash. C. C. 463; Com. v. York, 9 Metc. 93; Com v. Webster, 5 Cush. 295. The statute of Mississippi, in defining the offense, uses the words "premeditated design," instead of "malice aforethought." McDaniel v. State, 8 Smed. & Marsh. 401.

2. An instruction that "murder is the unlawful killing of one person by another, with malice either express or implied," is erroneous. The killing should be charged as having been done "unlawfully and with malice aforethought." Perry v. State, 43 Ala. 21.

3. That part of the common-law definition of murder embraced in the expression "the king's peace," has reference to the state and condition of the deceased; that is, as to whether or not he was entitled to the protection of the English laws; a subject, or an alien; enemy or traitor in arms; or more anciently, an infidel, or guilty of præmunire. State v. Dunkley, 3 Ired. 116.

**4. May be in heat of passion.** A homicide may be murder, although done in the heat of passion. And the same is true, though the passion be aroused by just cause, if the killing be done after sufficient time has elapsed for reason to resume its sway. Smith v. State, 49 Ga. 482.

5. Where a father was told in the evening, that his son, a small boy, had been wantonly whipped by a man whom he met the following evening, and with his fist and feet beat and stamped, while he was unresisting, with so much violence that the man died the next night, it was held murder. McWhirter's Case, 3 Gratt. 594.

6. The intentional killing of another without provocation, and not in sudden combat, is none the less murder because the offender was in a state of passion. People v. Sullivan, 3 Seld. 396.

7. No words applied by one man to another will justify the use of a deadly weapon; nor can they be the lawful occasion of that "heat" which will reduce the act of killing from murder to manslaughter. U.S. v. Carr, 1 Woods. 480.

8. No provocation however great, will extenuate a homicide, when, from the weapon used, or the nature of the attack, an intention to kill, or to do some great bodily harm is manifest. State v. Cheatwood, 2 Hill, S. C. 459; Com. v. Webster, 5 Cush. 295; People v. Austin, 1 Parker, 154; State v. Johnson, 1 Ired. 354; Felix v. State, 18 Ala. 720.

9. If, after angry words, the prisoner took up an axe and approached the deceased with the design to take away his life, or to do him some great bodily harm, and the deceased had sufficient reason to believe that such was the intention of the prisoner, he had a right to strike in self-defense, although the prisoner was not yet within striking distance; and such striking by the deceased will not amount to a legal provocation to mitigate the killing to manslaughter. State v. Baker, 1 Jones, 267.

10. In North Carolina, it has been held that no provocation short of a battery, or assault at least, will extenuate a killing to manslaughter. State v. Barfield, 8 Ired. 344; State v. Tackett, 1 Hawks, 210. And the same in Indiana, when the homicide has been effected with a deadly weapon. Beauchamp v. State, 6 Blackf. 299.

11. Moderate provocation, given by a woman or child to a man of average strength, even though it amounts to a blow, will not reduce a homicide from murder to manslaughter. Com. v. Mosler, 4 Barr, 264. And see State v. Merrill, 2 Dev. 269.

12. To kill an alien enemy after he has laid down his arms, and especially when he is confined in prison, is murder. State v. Gut, 13 Minn. 341.

13. **Intoxication no defense.** It is no defense to an indictment for murder, that the accused was intoxicated when he committed the act. People v. Robinson, 1 Parker, 649; unless his habits of drunkenness have caused an habitual madness. Hale v. State, 11 Humph. 154; Pirtle v. State, 9 Ib. 663; Cluck v. State, 40 Ind. 263; s. c. 1 Green's Crim. Reps. 734. But see *post*, *sub.* 226.

14. **Need not be enmity.** To constitute murder, it is not necessary that the perpetrator should have enmity toward the deceased. It is sufficient if there be either deliberate malice, or circumstances of cruelty and malignity. Nor is it necessary that the party should himself inflict the mortal wound, if present aiding and abetting the act. U. S. v. Ross, 1 Gallison, 624; State v. Jarrett, 1 Ired. 76.

15. The following instruction was held not unexceptionable: That the unlawful killing of a human being, without express malice, and under such circumstances as would not make the offense murder in the first degree, and not under sudden provocation and in the heat of passion, or under such circumstances as would reduce the offense to manslaughter, would be murder in the second degree, and it would not be necessary that the jury shall more particularly consider under what circumstances malice aforethought would be implied. State v. Conley, 39 Maine, 78.

16. **May be committed by infant.** Although an infant between seven and fourteen years of age, is *prima facie* incapable of committing crime, yet if the evidence shows beyond a reasonable doubt, that he understood the nature and consequences of his act, and the act indicates intelligent design and malice, he may be convicted of murder. Godfrey v. State, 31 Ala. 323.

17. **Must be intent to kill.** In general, an intent to kill is essential to constitute murder, except where the accused is at the moment engaged in perpetrating a felony. People v. Austin, 1 Parker, 154.

18. **The intent to kill may be formed on the instant.** If there be sufficient deliberation to form a design to take life,

and to put that design into execution by destroying life, it will constitute murder, whether the design be formed at the instant of striking the fatal blow, or have been a long time contemplated. People v. Clark, 3 Seld. 385; Com. v. York, 9 Metc. 93; Anthony v. State, Meigs, 265; Shoemaker v. State, 12 Ohio, 43; People v. Freel, 48 Cal. 436; O'Brien v. People, 48 Barb. 274.

19. Under the statute of New York, declaring the killing of a human being to be murder when done from a premeditated design to cause the death of the person killed, it was held erroneous for the court to instruct the jury that it was murder if the intent to kill was formed at the instant of striking the fatal blow. Sullivan v. People, 1 Parker, 347. And see People v. Johnson, Ib. 291; Wilson v. People, 4 Ib. 619.

20. But when the killing occurs with an intent to effect death, however instantaneously the intent is formed prior to the commission of the deed, the crime is murder under the statutes of New York of 1860 and 1862. Lowenberg v. People, 5 Parker, 414; Lanergan v. People, 6 Ib. 209; s. c. 50 Barb. 266; Walters v. People, 6 Parker, 15.

21. Under the law of New York, as it existed prior to 1860, the penalty for homicide committed with premeditation was death. Since the act of 1862, such killing is murder in the first degree, and the penalty is the same. The word "premeditated" is used in the same connection in the old and in the present statute, and has the same meaning and construction. Lanergan v. People, *supra*.

22. The statute of New York has given no definition of murder in the second degree, except negatively, that it is not murder in the first degree, nor any of the degrees of manslaughter. It cannot occur when the homicide was committed with premeditation. O'Brien v. People, 48 Barb. 274, per Leonard, J.

23. In Missouri, every deliberate and intentional killing is murder in the first degree, although the design to kill was formed but an instant before it was executed. State v. Dunn, 18 Mo. 419; State v. Jennings, Ib.; Green v. State, 13 Ib. 382; State v. Hays, 23 Ib. 287; State v. Starr, 38 Ib. 270; State v. Holme, 54 Ib. 153. It is the same in Iowa. State v. Johnson, 8 Iowa, 525; overruling Fouts v. State, 4 Greene, 500.

24. In Tennessee, to constitute murder, the intention to kill need not have pre-existed in the mind, but may be formed on the instant. Lewis v. State, 3 Head, 127. And in Nevada, it has been held that willful, deliberate and premeditated killing may take place where the design to kill is formed at the very moment of striking the fatal blow. State v. Millain, 3 Nev. 409. In California, the following instruction, on a trial for murder, was held proper: "In deliberating, there need be no appreciable space of time between the intention to kill and the act of killing. They may be as instantaneous as successive thoughts of the mind. It is only necessary that the act of killing be preceded by concurrence of will, deliberation and premeditation on the part of the slayer; and if such is the case, the killing is murder in the first degree, no matter how rapidly these acts of the mind may succeed each other, or how quickly they may be followed by the act of killing." People v. Williams, 43 Cal. 344; s. c. 1 Green's Crim. Reps. 412; approving People v. Nichol, 34 Cal. 211.

25. In Virginia, where the prisoner as he approached the deceased, and first came in view of him at a short distance, there formed a murderous design, and walked up quickly and killed him without provocation, it was held murder in the first degree. Whiteford v. Com. 6 Rand. 721.

26. But in Kentucky, it has been held that charging the jury that the existence *for an instant* before the killing, of an unlawful intent to take life "is sufficient to constitute the legal malice required to make the killing murder," is misleading and a misapplication of the correct principle, that "it is sufficient to constitute murder that it appear that malice existed at the time of the killing, without regard to the time which it had before existed. Donnellan v. Com. 7 Bush, 676.

27. In Tennessee, where the intent to kill was formed upon the sudden impulse of

passion, without any previous design to kill, it was held murder in the second degree, although the act was committed willfully and maliciously. Clark v. State, 8 Humph. 671; Anthony v. State, Meigs, 265.

**28. Degree of offense determined by intent.** The intention with which the act is committed distinguishes murder as it exists at common law and murder as it is understood and defined in Pennsylvania by the statute of 1794. Where the act producing death is malicious, and perpetrated with an intent to take life, the offense is murder in the first degree; but where no such intent exists, the crime is murder in the second degree. Com. v. Keeper, 2 Ashm. 227; Com. v. Williams, Ib. 69.

**29.** In Pennsylvania, it was held that to constitute murder in the first degree the homicide should not only be willful, premeditated, malicious and without legal justification, but the act must have been committed with the formed intention to take life. Com. v. Murray, 2 Ashm. 41; Com. v. Williams. Ib. 69.

**30.** In Tennessee, the distinguishing characteristic of murder in the first degree is the existence of a fixed design on the part of the assailant that the act shall result in the death of the party assailed. Swan v. State, 4 Humph. 136; Riley v. State, 9 Ib. 657. When the killing is perpetrated by poison or lying in wait, the fact of lying in wait will be evidence of a malicious and premeditated purpose. Ib. And see Dale v. State, 10 Yerg. 551; Anthony v. State, Meigs, 265; Copeland v. State, 7 Humph. 479; Dame v. State, 2 Ib. 439. But such premeditation as to make it murder in the first degree under the statute will not be inferred from the employment of a deadly weapon. Clark v. State, 8 Humph. 671. If the defendant, with premeditated intent to kill one person, contrary to his intention killed another, it would not be murder in the first degree. Bratton v. State, 10 Ib. 103.

**31. Murder by poisoning.** To constitute the act of administering poison it is not necessary that there should have been a delivery of the poison to the person poisoned. It is sufficient if it was taken from a place where it was put by the accused for that purpose. Sumpter v. State, 11 Fla. 247.

**32.** The criminal act of administering poison is not consummated by simply prescribing or delivering the poison; but it must have been actually swallowed pursuant to the direction. Where, therefore, the poison is furnished in one county to a person who carries it into another county and there takes it and dies, the crime is committed in the latter county. Robbins v. State, 8 Ohio, 131.

**33. In riot or affray.** The fact that a riot was in progress at the time of a homicide, does not in law distinguish the homicide either in kind or degree. State v. Jenkins, 14 Rich. 215.

**34.** Where murder is committed by rioters, an indictment charging it as the act of one of them, will be sustained by evidence that any other of them gave the fatal stroke, or that it was given by some one of them, though it does not appear by which. State v. Jenkins, *supra*.

**35.** But when an innocent person is accidentally killed by persons engaged in suppressing a riot, a rioter cannot be convicted of murder or manslaughter therefor. Com. v. Campbell, 7 Allen, 541.

**36.** It is no justification of a homicide resulting from an affray which the defendant commenced, that when it was committed he was acting on the defensive. State v. Hudson, 59 Mo. 135.

**37.** Where one interferes to separate persons engaged in an affray, and gives notice of his intention, and is killed by one of them, it is murder. State v. Cheatwood, 2 Hill, S. C. 459.

**38.** But it is erroneous to charge that if the prisoner inflicted a mortal wound, and then another person having no connection with him, struck the deceased a blow which proved fatal, the prisoner would still be guilty of murder. State v. Scates, 5 Jones, 420.

**39. By engaging another in a fight.** If a person go after another and engage him in a fight in order to stab him, and death ensues, it will be murder in the assailant, no matter what provocation was then given, or

how the assailant's passion rose during the combat. State v. Lane, 4 Ired. 113.

40. Upon a quarrel, one of the parties retreated about fifty yards, apparently wishing to avoid a fight. The other followed, overtook, stabbed, and killed him, the latter having stopped and first struck with his fist. *Held* murder. State v. Howell, 9 Ired. 485.

41. A. being unarmed, was pursued by B. to a house in which A. took refuge. B. then tried to break down the door with an axe, but not succeeding, threw the axe away. The door being opened by A., B. collared him, and after a tussle, killed him with a deadly weapon. *Held* murder. State v. Hargett, 65 N. C. 669.

42. If a person attack another with malice aforethought, even though he should be driven to the wall, and kill his adversary there to save his own life, he will be guilty of murder. State v. Hill, 4 Dev. & Batt. 491.

43. On a trial for murder, the evidence tended to show that the prisoner had followed the deceased with a deadly weapon for the purpose of demanding satisfaction for an insult, and to kill the deceased, or to do him great bodily harm should the demand for satisfaction be refused; that the deceased turned upon him, at the same time putting his hand to his side as if to draw a weapon, and that thereupon the prisoner killed him by a blow with his gun. *Held* that a verdict of guilty was proper. State v. Owen, Phil. N. C. 425.

44. If a person prepares and conceals a deadly weapon before entering into a fight which he provokes, with the determination to use it if necessary, in the fight, and he kill his antagonist in the fight, it is murder. Price v. State, 36 Miss. 531.

45. The prisoner having prepared a deadly weapon with an intention to use it in case he got into a fight with deceased, sought him with the expectation of having a conflict with him. *Held*, that the killing was murder, although the deceased made the first assault. State v. Hogue, 6 Jones, 381.

46. If one goes into a fight having upon his person a deadly weapon, intending from the first to use the same if necessary to enable him to overcome his antagonist, and in the fight, uses the same and kills his antagonist, he is guilty of murder, notwithstanding he habitually carried the weapon. Green v. State, 28 Miss. 687.

47. If A., from previous resentment, on meeting B., strike him with a whip, in order to induce B. to draw a pistol, intending to shoot B. as soon as he draws, and B. does draw, and A. immediately shoots and kills him, it is murder. State v. Martin, 2 Ired. 101.

48. **In mutual combat.** Where parties, by mutual understanding, engage in a conflict, and death ensues to either, the slayer will be guilty of murder. State v. Underwood, 57 Mo. 40.

49. When a mutual combat is entered into deliberately, as in duels, and death ensues, it is murder, but where it is in hot blood, the the homicide is manslaughter. U. S. v. Mingo, 2 Curtis C. C. 1.

50. Where a person enters a contest with a dangerous weapon, and fights under an unfair advantage, though mutual blows be struck, it is not manslaughter, but murder. State v. Hildreth, 9 Ired. 429.

51. On a trial for murder, it appeared that the prisoner and the deceased after fighting were separated at the request of the prisoner, who was not a match for his antagonist; that the prisoner, being held by a bystander, drew his knife and swore that he would kill the deceased; that the prisoner broke away from the person holding him and ran toward the deceased, who had retreated two hundred and twenty-five yards, and who, upon being apprised that the prisoner was coming, left the road where he was walking and armed himself with a rail from a fence; that when the prisoner reached the place where the deceased was, the latter gave back and struck the former several blows on the head with the rail as he rushed on, and that the rail breaking some ten paces from where the deceased began to give back, the prisoner closed and inflicted the mortal wound. A verdict of guilty having been rendered, the court declined to disturb it. State v. McCants, 1 Spear, 384.

**52. By third person interfering in fight.** While two persons were fighting in a room the defendant rushed in, and without any provocation inflicted on one of them a fatal stab. *Held* murder. Conner v. State, 4 Yerg. 137.

**53.** Where a person who was not insulted or threatened dismounted from his horse, armed himself with a club, stood between two other persons, who were about to engage in a fight, and killed one of them, it was held that it was murder. Johnston's Case, 5 Gratt. 660.

**54.** A. and B. were fighting with their fists, when the son of A., a boy seventeen years of age, came up, and taking hold of B.'s coat collar behind, stabbed B. from behind in the right side, from which he died. It was proved that the son had for a week previous to the homicide manifested strong animosity toward the deceased, and had repeatedly stated that on receiving any provocation from him, he would kill him. It was further proved that he stated after the fight, and before he knew the serious character of the wound, that he had been prompted by a desire and intent to kill on account of the previous conduct of the deceased. *Held* murder. Bristow v. Com. 15 Gratt. 634.

**55. In resisting officer.** When a person resists an officer, or those engaged in assisting him in making a lawful arrest, in a lawful way, and slays one of the arresting party, it is murder. State v. Oliver, 2 Houston, Del. 585. And it will be murder if, in making such resistance, he accidentally kills a third person. Angell v. State, 36 Texas, 542; s. c. 1 Green's Crim. Reps. 653. But if the arrest be without lawful authority, and the resistance is only such as is provoked by, and in due proportion to the assault, and the killing is without malice, it is neither murder nor manslaughter. He who undertakes to resist an officer after he has made known his authority, does so at his peril, if the authority of the officer is valid. But the circumstances of such resistance are proper to be considered on the question of malice. State v. Oliver, *supra*.

**56.** Where, after the commission of a felony, the wrong-doers flee, and within three or four hours are followed by an officer, who overtakes them twelve miles from the scene of the crime, it is an immediate or fresh pursuit, and if the officer, upon overtaking them, points a gun at them, at the same time exclaiming: "You are my prisoners—surrender," they have no right to fire upon him, and if they do so, and he is killed, it is murder. People v. Pool, 27 Cal. 572.

**57.** On the trial of an indictment under the act of Congress of Feb. 24, 1864, § 12 (13 Stats. at Large, 8), for murder in resisting an enrolment, held that if an officer, while engaged in his official duties, is killed by a person under the influence of hostility to the law, or of a violent temper, which is roused by no fault of the officer, or of revenge, it is not necessary to sustain a conviction to show that the defendant intended to obstruct the execution of the law; but that it would be otherwise if the officer became involved in a quarrel upon some matter having no connection with his official duties. U. S. v. Gleason, 1 Woolw. C. C. 75; Ib. 128.

**58.** In misdemeanors, the voluntary killing of the accused, in the effort to arrest him, is murder, though he cannot be otherwise overtaken. Williams v. State, 44 Ala. 41.

**59. In resisting trespass.** A bare trespass against the property of another, not his dwelling, does not justify the owner in using a deadly weapon in its defense, and if he use such weapon and kill the trespasser, it will be murder, notwithstanding the killing may have been necessary to prevent the trespass. If the intention was not to take life, but to chastise or deter the trespasser, or if the killing take place in the passion or heat of blood, it may be manslaughter. Com. v. Drew, 4 Mass. 391; State v. Vance, 17 Iowa, 138.

**60.** When a person goes to another's house in a peaceable manner, and upon being ordered away, and not going immediately, is killed by the owner, the slayer is guilty of murder, although it be proved that he had previously forbidden the deceased from coming there. State v. Smith, 3 Dev. & Batt. 117.

61. It is erroneous for the court to charge the jury that "if they believed that the deceased had taken the horse of the prisoner, and was riding him off beyond the reach of probable recapture, and that the prisoner after repeatedly hailing him slew the trespasser with a deadly weapon, he is not guilty of murder. McDaniel v. State, 8 Smed. & Marsh. 401.

62. **In case of adultery.** It is only where the wife has been discovered in the act of adultery, that the law mitigates the killing of her or her paramour, on the ground of passion, unless the prisoner was smarting under a provocation so recent and strong that he could not be considered as being at the time the master of his own understanding. State v. Holme, 54 Mo. 153; State v. John, 8 Ired. 330.

63. On the trial of an indictment for the murder by a husband of his wife, it is not competent for him to show that for a long time previous to the homicide, he had been cognizant of the adulterous conduct of his wife, either in excuse, or as tending to prove his insanity. Sawyer v. State, 35 Ind. 80.

64. But evidence on a trial for murder, that the accused was informed of his wife's adultery is admissible to show that he committed the crime in a state of frenzy where it appears that there was so short an interval between the time of committing the offense and the information that there was no opportunity for the passion it would naturally excite to subside. Sanchez v. People, 22 N. Y. 147.

65. Although where a husband kills a person caught in the act of adultery with his wife it is manslaughter, yet if he kill him afterward because he believed that he was going away with her to commit another similar act, it is murder. State v. Samuel, 3 Jones, 74; State v. Neville, 6 Ib. 423.

66. On a trial for murder it was shown that about a year previously there had been criminal intercourse between the deceased and the prisoner's wife; and at the time of the homicide the prisoner finding the deceased and his wife in conversation, attacked him with a stone and knife and killed him. *Held* that the prisoner was properly convicted. State v. Avery, 64 N. C. 608.

67. A husband having suspicion that his wife had committed adultery with A., set B. to watch them, and B. killed A. *Held* on the trial of B. for the murder that it was not competent for him to show that A. had committed adultery with the wife. People v. Horton, 4 Mich. 67.

68. On a trial for murder, it was proved that the prisoner going to his sister's house at a late hour in the night heard a noise in her room, and suspecting that she was in the act of adultery, burst open the door of her room, where he found his sister in her night dress and the deceased with her, and that he thereupon stabbed the deceased twice in the back and once in the breast, inflicting upon him wounds from which he died. *Held* that there was not sufficient provocation to reduce the killing to manslaughter. Lynch v. Com. 77 Penn. St. 205.

69. **While committing other offense.** At common law, if a person kill another with an axe, with malice aforethought, and with an intent to rob him, upon a sudden heat, but without any adequate provocation, it is murder. Mitchell v. State, 8 Yerg. 514.

70. When a felony is about to be committed, a bystander may use such force to prevent it as may be necessary; and if while so engaged, he is intentionally killed, it will be murder in the slayer. Dill v. State, 25 Ala. 15.

71. Where a person engages in the prosecution of an unlawful design against another, and uses poison to accomplish such design, which, by its natural action, produces a greater injury than he anticipated, he is not by his ignorance of the probable extent of such injury relieved from criminal responsibility for the act. People v. Carmichael, 5 Mich. 10. It is no justification that the defendant administered poison to another with the intent to obtain his money by stealth, and not to injure his person. People v. Adwards, Ib. 22.

72. Where a female is pregnant, and a drug is administered to her for the purpose of destroying the child, which results in the death of the mother, it is murder in the

second degree, unless the intention was to take away the life of the mother as well as to destroy her offspring, in which case, it is murder in the first degree. Com. v. Keeper, 2 Ashm. 227.

**73.** If a person enters on another's land and builds a house there, and the owner goes to the premises for the purpose of forcibly ejecting the intruder and tearing down the house, and in the conflict that ensues the intruder is killed, it is murder or manslaughter according to circumstances. People v. Honshell, 10 Cal. 83.

**74.** A custom of violating the law will not exempt such violation from punishment. The defendants went to a wedding without invitation, were civilly treated, and in the evening began a disturbance, in which a person was so injured that on the third day after he died. In defense it was claimed that the defendants did no more than engage in a frolic which was the custom of the country. *Held* that a conviction of murder in the second degree was proper. Bankus v. State, 4 Ind. 114.

**75. By several in prosecution of common design.** Where a person is engaged in a common illegal undertaking with another, and the latter gives the blow which causes death, the former may be guilty as a principal, although he did not actually assist in inflicting the fatal blow. Stipp v. State, 11 Ind. 62.

**76.** Where, on a trial for murder, the evidence shows that there was a conspiracy to commit the offense, and that both conspirators were present aiding and abetting the common design, it is immaterial by which of them the fatal shot was fired. People v. Woody, 45 Cal. 289.

**77.** Where the wife is a voluntary active party with her husband in the commission of a robbery, and while both are so engaged he commits a murder, she is chargeable with the same crime as the husband. Miller v. State, 25 Wis. 384.

**78.** Where two are indicted for murder, and the one who is charged with having committed the deed is proved to have only been present aiding and abetting, and the other is proved to have given the mortal blow, the indictment is supported, it being in law the stroke of both. State v. Anthony, 1 McCord, 285.

**79.** Therefore, if the indictment charges that A. gave the mortal blow, and that B. and C. were present aiding and abetting, and it is proved that B. was the person who dealt the blow, and that A. and C. were present aiding and abetting, it is not a material variance, as the blow is adjudged in law to be the stroke of every one of them. Brister v. State, 26 Ala. 107.

**80.** Where death ensues by the act of another in pursuit of an unlawful design, without any intention to kill, it is murder or manslaughter, according to the circumstances of the case. State v. Smith, 32 Maine, 369.

**81.** If several conspire to seize by robbery property belonging to another, and escape with it, and if necessary to kill any person who shall oppose them in the execution of the design, and death ensues in the prosecution of the common purpose, it is murder in all who are present aiding and abetting. People v. Pool, 27 Cal. 572.

**82.** Where several conspired to seize with force a vessel, and run away with her, and a person opposing the design was killed, it was held murder in those who were aiding and abetting. U. S. v. Ross, 1 Gallis. 624.

**83.** If a number of persons combine to commit an unlawful act, and death ensue from anything done in the prosecution of the design, it is murder in all who take part in the transaction. If the design be to commit a trespass, the death must occur in the prosecution of the original design to make it murder in all. But if the design be to commit a felony, it will be murder in all, although death ensue apart from the original design. U. S. v. Ross, *supra;* State v. Shelledy, 8 Iowa, 477.

**84.** The following instruction was held proper: "It is no defense to a party associated with others in, and engaged in a robbery, that he did not propose or intend to take life in its perpetration, or that he forbade his associates to kill, or that he disapproved or regretted that any person was thus slain by his associates. If the

homicide in question was committed by one of his associates engaged in the robbery, in furtherance of their common purpose to rob, he is as accountable as though his own hand had intentionally given the fatal blow." People v. Vasquez, 49 Cal. 560. See People v. Geiger, 49 Cal. 643.

85. On a trial for murder, the following charge of the judge was held to be as favorable as the law would warrant: That if the shot that caused the death was fired by another hand than that of the prisoner, the jury must be satisfied that there was an actual and overt concert and complicity to effect that precise object. Ruloff v. People, 45 N. Y. 213.

86. The time when an illegal combination and arrangement was made which resulted in murder is not material, so long as it was made before the actual commission of the offense. Ib.

87. A person who is constructively present by performing his part in an unlawful and felonious enterprise expected to result in homicide—such as keeping watch at a distance to prevent surprise, or the like—is guilty as a principal, although the murder is committed by some other of the party. State v. Nash, 7 Iowa, 347.

88. It is erroneous to charge the jury that if the murder was perpetrated with the knowledge and consent or connivance of the defendant, he is guilty as a principal. Clem v. State, 33 Ind. 418. There can be no criminal responsibility for anything not fairly within the common enterprise, and which might be expected to happen if occasion should arise for any one to do it. Where therefore parties combine to commit a crime, and some of them in trying to escape perpetrate a homicide, one who did not consent, and was not engaged in the homicide, will not be liable. People v. Knapp, 26 Mich. 106; s. c. 1 Green's Crim. Reps. 252.

89. A., B. and C. having been jointly indicted, A. as principal, and B. and C. as aiders and abettors in the murder of D., and A. tried separately and acquitted, the following instruction on the trial of B. and C. was held misleading and erroneous: "If the jury believe from the evidence, that A. willfully shot and killed the deceased without premeditation, or without the intention to consummate by his act the death of the deceased, and that B. and C. were then and there present aiding, abetting and assisting A. to do the aforesaid act, without premeditation or malice aforethought on their part, then you will find the defendants guilty of murder in the second degree." State v. Phillips, 24 Mo. 475.

90. One who aids and assists another in committing a homicide is a principal, and may be indicted and punished, although the one who inflicted the mortal wound has not been taken. State v. Rochelle, 2 Brev. 338; Beets v. State, Meigs, 106.

91. **By acts regardless of life.** If an unlawful act be done deliberately, and with intention of doing mischief, or great bodily harm, or of mischief indiscriminately, and death ensue contrary to the original intention, it will be murder. But if the act was committed heedlessly, without any mischievous intention, it will be manslaughter only; and if death ensue from the performance of a lawful act, it will be murder, manslaughter, or misadventure, according to the circumstances. Ann v. State, 11 Humph. 150; Com. v. York, 9 Metc. 93.

92. If persons in the pursuit of their lawful and common occupation see that danger will probably arise to others from their acts, and yet persist without giving sufficient warning of the danger, and death ensues, it will be murder. Lee v. State, 1 Cold. Tenn. 62.

93. Death resulting from the following acts, has been held murder in the offender. By wantonly and heedlessly throwing timber into the street of a populous town; by feloniously shooting at tame fowls with intent to steal them; by wantonly permitting wild beasts to go at large; by riding an unruly horse into a crowd; by a mother exposing her infant child in a garden; by overseers of the poor sending an infant pauper child, from one parish to the other in a contest which should support it, until it died of cold and starvation; by a son wantonly exposing his sick father to the cold so that he perished; by a mother hiding her child in

a hog pen where it is killed. Com. v. York, 9 Metc. 93.

**94.** Where the prisoner shot at another on horseback, with the avowed intention to cause the horse to throw him, and the ball hit a third person and killed him, it was murder. State v. Smith, 2 Strobh. 77. See State v. Sisson, 3 Brev. 58.

**95.** When a person enters a house for the felonious purpose of killing any one, and voluntarily fires his gun in execution of that design, the killing of his friend, though not intended, will be murder. If in such case the firing was accidental, he will be guilty of manslaughter. If without any such special purpose he voluntarily and recklessly fires into a crowd, and kills his friend or any other person, he will be guilty of murder. Golliher v. Com. 2 Duvall, Ky. 163; Sparks v. Com. 3 Bush, Ky. 111.

**96.** Subdivision 2, of § 5, of the statute of New York defining murder, was designed to provide for that class of cases, and no others, where the acts resulting in death are calculated to put the lives of many persons in jeopardy without being aimed at any one in particular, and perpetrated with a full consciousness of the probable consequences. Drury agst. People, 10 N. Y. 120.

**97.** On a trial for murder in New York, it appeared that the meeting of the accused and the deceased was casual, without previous acquaintance; that the accused, taking offense at some trifling remarks made by the deceased in passing him near midnight, stabbed the deceased. It was held that as the killing was probably without any intent to take life, but "by an act imminently dangerous to others, and evincing a depraved mind regardless of human life, although without any design to effect the death of any particular individual," it was not within the definition of murder in the second degree, but was murder in the first degree, or manslaughter in the third or fourth degree. People v. Skeehan, 49 Barb. 217.

**98. By cruel treatment.** The legal meaning of malice aforethought, as applied to cases of homicide, applies to all cases of homicide however sudden the occasion when the act is done with such cruel circumstances as show a wicked, depraved, and malignant spirit. U. S. v. Cornell, 2 Mason, 91; State v. Turner, Wright, 20; State v. Smith, 2 Strobh. 77; Anthony v. State, 13 Smed. & Marsh. 263; Ann v. State, 11 Humph. 150. What constitutes a cruel and unusual manner of killing, is to be determined by the jury. State v. Linney, 52 Mo. 40; s. c. 1 Green's Crim. Reps. 753.

**99.** Where a seaman, being in a condition of great debility, so that he could not safely go aloft, which was known to the master, and the latter nevertheless persisted with brutal malignity in compelling him to do so, and the seaman fell from the mast and was drowned, it was held that he was guilty of murder. U. S. v. Freeman, 4 Mason, 505. And see State v. Hoover, 4 Dev. & Batt. 365, where the brutal treatment of a slave, by his master, resulting in the death of the slave, was held to be murder.

**100.** If correction given by parents, masters, and other persons having authority *in foro domestico*, exceed the bounds of due moderation, and death ensue, it will be either murder or manslaughter, according to the circumstances. Where the deceased was stripped naked by his stepfather, placed on his back with his feet tied, so kept every day from morning until dinner, for a week, and beaten day after day with a heavy leather strap, a knotted cord four double, and an iron ramrod, until he died, it was held murder. State v. Harris, 63 N. C. 1.

**101. By advising suicide.** Where one advises another to commit suicide, and the other, in consequence of the advice, kills himself, the adviser is guilty of murder as principal. Com. v. Bowen, 13 Mass. 356; s. c. 2 Wheeler's Crim. Cas. 226.

**102.** On the trial of an indictment for the murder of a woman by poison, it was held correct to charge the jury, that, if by way of persuasion or agreement jointly to commit suicide, the defendant induced the deceased to swallow the poison, with the intent on his part to destroy her life, he being present at the time; and she, influenced by such persuasion or agreement, swallowed the poison knowing it to be deadly, and intending thereby, by virtue of such agreement, to

destroy her own life; or if by force in any manner, he compelled her to swallow down the poison, it constituted an administering of poison. Blackburn v. State, 23 Ohio, N. S. 146.

**103. Death from unskillful treatment.** If a wound be inflicted, not dangerous in itself, and the death which ensues was caused by the erroneous treatment of it, the original author will not be liable. Parsons v. State, 21 Ala. 300.

**104.** But where a person dies from a wound inflicted with a murderous intent, the fact that he had no surgeon, or an unskillful one, or a nurse whose treatment may have aggravated the original hurt, cannot mitigate the crime of the person whose malice caused the death. To do that it must appear that the real cause of the death was misconduct, malpractice, or ill treatment on the part of other persons than the accused. State v. Scott, 12 La. An. 274. And where the wound was adequate to cause death, it is no excuse to show that had proper attention been given, the deceased might have recovered. State v. Baker, 1 Jones, 267; Com. v. McPike, 3 Cush. 181; McAllister v. State, 17 Ala. 434. Therefore, on the trial of an indictment for murder by shooting with a pistol, it was held correct for the court to charge the jury that if the effect of the circumstances intervening between the pistol wound and the death was merely to prevent recovery that might otherwise have taken place, or to aggravate or hasten the effect of the pistol wound, that wound might still be considered the cause of the death. Com. v. Costley, 118 Mass. 1.

**105.** When death ensues from a wound given in malice, but not in its nature mortal, but which, being neglected or mismanaged, the party dies, the accused will be held guilty of the murder, unless he can make it clearly appear that the maltreatment of the wound, or the medicine administered to the patient, or his own misconduct, and not the wound itself, was the sole cause of death. State v. Morphy, 33 Iowa, 270.

**106.** On a trial for murder by stabbing, the following instruction was held proper: That if the jury were satisfied that the wounds inflicted by the defendant were improperly and unskillfully treated by the surgeons in attendance, and that such treatment hastened or contributed to the death of the deceased, the defendant was not for this reason entitled to an acquittal. Com. v. Hackett, 2 Allen, 136.

**107.** Where a wound is apparently mortal, and a surgical operation is performed in a proper manner, under circumstances which render it necessary in the opinion of competent surgeons, upon one who has been wounded by another, and such operation is itself the immediate cause of death, the person who inflicted the wound will be responsible; but not if the death results from grossly erroneous surgical or medical treatment. Coffman v. Com. 10 Bush, Ky. 495.

**108.** On a trial for murder, the evidence left it doubtful whether the deceased came to his death from the wound, or from the improper treatment of it by the attending surgeon in sewing it up. The prisoner's counsel requested the court to charge that if the wound was not mortal, and it clearly appeared that the deceased came to his death from the wrong treatment, and not from the wound, they must acquit the prisoner. This charge the court gave, with this qualification, "that if the ill-treatment relied on, was the sewing up of the wound, the defendant would not be excused; if otherwise, guilty. *Held* error. Parsons v. State, 21 Ala. 300. Goldwaite, J., *dissenting*.

**109.** If the death of the deceased was hastened by the act of the prisoner, his guilt is not extenuated because death would probably have been the result of a disease, with which the deceased was afflicted at the time. State v. Morea, 2 Ala. 275.

**110.** As to what constitutes the crime of murder, see Com. v. Crane, 1 Va. Cas. 10; Resp. v. Bob, 4 Dall. 145; and how distinguished from manslaughter, see McWhirt's Case, 3 Gratt. 594. In Arkansas, the distinction between murder and manslaughter remains as at common law. Bivens v. State, 6 Eng. 455.

(*b*) *Indictment.*

**111. Venue.** At common law, the prisoner must be indicted in the county where the offense was committed. But in the case of homicide, if the wound was given in one county and the death occurred in another, it was said by some that the party could not be indicted, because the offense was not complete in either county. But the common opinion was that he might be indicted where the wound was given. Riley v. State, 9 Humph. 657.

**112.** In Virginia, where a person being stabbed, died of his wounds in another State, it was held that the perpetrator of the murder could not be tried in Virginia, but might be tried for the assault in the county where the wound was given. Com. v. Linton, 2 Va. Cas. 205.

**113.** In Iowa, where a mortal blow is struck in one county, and death occurs therefrom in another, the offender may be prosecuted and tried in the latter. Nash v. State, 2 Greene, 286.

**114. Averment of time.** An indictment for murder must specify the date of the homicide, and state that it was caused by the injury inflicted by the defendant. Omitting the word "did," in charging the injury will be fatal. Edmondson v. State, 41 Texas, 496. The words "instantly did die," do not sufficiently charge time and place. Lester v. State, 9 Mo. 658.

**115.** The allegation of time is material in one respect, and that is, that the death must be laid to have occurred within a year and a day of the wound. State v. Shepherd, 8 Ired. 195.

**116.** An indictment charged that the mortal wound was inflicted the 7th of November, and that the deceased languished until 8th of November, on which 8th day of May, the deceased died. *Held*, that the insertion of May for November was a clerical error which did not vitiate. Ailstuk's Case, 3 Gratt. 650.

**117.** Where, in case of murder, the blow was given before, but the death ensued after the passage of a statute, the death must be made to relate back to the unlawful act which occasioned it; and the day on which the act was committed, and not the one on which the result of the act was determined, is the day on which the murder is properly to be charged. People v. Gill, 6 Cal. 637.

**118. Averment of place.** An indictment for murder must allege the place of the death. State v. Cummings, 5 La. An. 330. But the Legislature may, by statute, dispense with the averment that the offense was committed within the body of the county in which the indictment was found, and require that fact to be shown by the evidence. Noles v. State, 24 Ala. 672.

**119.** Where a murder has been committed in an unincorporated place, the venue is well laid, if the place is described as being within a certain county, and designated by the name which it publicly and commonly bears. The allegation that the scene of the crime was "an island called Smutty Nose, a place within the county of York aforesaid," was held sufficient. State v. Wagner, 61 Maine, 178.

**120. Averment of means employed.** The instrument or means by which the homicide was committed should be distinctly set out so far as known. State v. Williams, 36 Texas, 352. An indictment for murder which does not state facts showing the manner in which the crime may have been perpetrated, is insufficient. White v. Com. 9 Bush, 178. But the indictment need not set out the circumstances which determine the degree of the offense. Davis v. State, 39 Md. 355; s. c. 2 Green's Crim. Reps. 381.

**121.** An indictment for murder which alleges that A. B. was killed "with a shot gun," does not state the manner and circumstances attending the use of the gun with sufficient certainty, and is bad on demurrer. Edwards v. State, 27 Ark. 493; s. c. 1 Green's Crim. Reps. 741.

**122.** Where the indictment alleged that the defendant, "with a certain stone which he held, feloniously did cast and throw and strike the deceased on the right side of the head," it was held sufficient to show that the defendant threw the stone and hit the deceased. White v. Com. 6 Binn. 179. See Turns v. Com. 6 Metc. 224.

123. An indictment against H. for inciting S. to murder K., by mistake charged H. with inciting H. to commit the murder. *Held* fatal. State v. Houston, 19 Mo. 211.

124. An indictment for murder is sufficient, although in consequence of the omission of the word "with," the deed is charged to have been committed by a knife, instead of by the prisoner. Shay v. People, 22 N. Y. 317.

125. An indictment which charges an actual poisoning, need not state what particular poison was administered. Carter v. State, 2 Carter, 617. Nor allege that the substance administered was a poison. But it is otherwise as to an indictment for an attempt to poison. Anthony v. State, 29 Ala. 27.

126. Where a homicide is charged to have been caused by a battery, it is necessary to allege an assault. Lester v. State, 9 Mo. 658. An indictment is sufficient which charges that the defendant committed an assault upon the deceased, in some way and manner, and by some means, instrument and weapons to the jury unknown, and that the defendant did thereby willfully and maliciously deprive him of life. Com. v. Webster, 5 Cush. 295.

127. An indictment for murder may allege several modes of death inconsistent with each other. Smith v. Com. 31 Gratt. 809. Although a person indicted for one species of killing, as by poisoning, cannot be convicted by evidence of a species of death entirely different, as by shooting, starving, or strangling, yet where the indictment charges in one count a homicide by beating, and in another count by drowning, the prosecution will not be compelled to elect between the counts. State v. Johnson, 10 La. An. 456.

128. Under a statute declaring "that every person who shall be convicted of having administered, or of having caused and procured to be administered," &c., shall be punished, &c., an indictment is not bad for duplicity which charges that the prisoner did administer, and did cause and procure to be administered, &c. La Beau v. People, 6 Parker, 371; affi'd 34 N. Y. 223.

129. Where several are aiding and assisting in the perpetration of a homicide, it is not material whether it is correctly stated which of them gave the fatal blow. State v. Rochell, 2 Brev. 333; Young v. Com. 8 Bush, 366; s. c. 1 Green's Crim. Reps. 710. An indictment charging in one count A. as principal and B. as accessory before the fact, and in another count B. as principal and A. as accessory before the fact, charges one offense, and is not repugnant. People v. Valencia, 43 Cal. 552; s. c. 1 Green's Crim. Reps. 745.

130. An indictment for murder was held good which charged the prisoners with the offense by doing acts aiding and abetting its perpetration in their presence. U. S. v. Douglass, 2 Blatchf. 207. Where several are engaged in committing a murder, all being present, but one only giving the fatal blow, the indictment may charge the act as done by them all, or as done by one and abetted by the others. Anderson v. State, 5 Ark. 444; State v. Cameron, 2 Chand. 172.

131. In Maine, an indictment for murder need not allege the "manner in which, and means by which," the homicide was committed. It is sufficient to charge that the prisoner, on a day and at a place mentioned, in and upon the body of A., did feloniously, willfully, and of his malice aforethought, make an assault, and him, the said A., did then and there feloniously and of his malice aforethought kill and murder. State v. Verrill, 54 Maine, 408.

132. **Name of deceased.** "An infant child, name to the grand jury unknown," is a sufficient description of the deceased, in an indictment for murder; and the child may be described in different counts as the infant child of the prisoner, and as an infant child generally, not naming its father or mother; and the murder may be charged in different counts to have been committed by different means or instruments. Tempe v. State, 40 Ala. 698.

133. An indictment for murder which alleges that the deceased was a "Wyandott Indian, whose name is to the jurors unknown," without stating that the deceased was a human being, is sufficient. Reed v. State, 16 Ark. 499.

**134.** An indictment for murder, after alleging that A. made an assault upon B., and feloniously inflicted upon him a mortal wound, by stabbing him with a knife, whereof B. died, concluded thus: "And so the jurors, upon their oaths, do say, that the said A., in manner and form, and by the means aforesaid, feloniously, willfully, maliciously, deliberately, premeditatedly, on purpose, and of his malice aforethought, did kill and murder, contrary to the form of the statute, and against the peace and dignity of the State." *Held* bad in omitting to name the person murdered. State v. Pemberton, 30 Mo. 376.

**135.** Where an indictment for murder stated the surname of the deceased in three different ways, as follows: "Giddings," "Gidings," and "Gidines," it was held that they were to be regarded as *idem sonans*. State v. Lincoln, 17 Wis. 579.

**136. Part of body wounded.** The indictment must state what part of the body was injured; and if it be the hand or arm, it must be stated whether it is the right or left. Where it was charged that the prisoner struck the deceased with an axe on the left side of the head and over the left temple, giving to him then and there with said axe over the right side of the head, and over the right temple, a mortal wound, the indictment was held bad. Dias v. State, 7 Blackf. 20. But an indictment for murder was held sufficient which alleged that the defendant shot the deceased in the head, breast, and side, giving him one mortal wound of which he died. Hamby v. State, 36 Texas, 523; s. c. 1 Green's Crim. Reps. 650.

**137.** Where, in an indictment for murder charging that the wound was inflicted in the breast, the word breast was misspelled, it was held that the defect was fatal. Anon. Hayw. 140.

**138.** In Indiana, the indictment need not aver upon what part of the body of the deceased the mortal wound was inflicted. Jones v. State, 35 Ind. 122; Whelchell v. State, 23 Ib. 89; Cardell v. State, 22 Ib. 1. In New York, an indictment alleging that a mortal wound was inflicted upon the body of the deceased is sufficient without showing upon what part of the body the wound was given. By the word body in such connection is to be understood the trunk, in distinction from the head and limbs. But the particular part of the body upon which the violence producing the death was inflicted is now regarded as immaterial. Sanchez v. People, 22 N. Y. 147; s. c. 4 Parker, 535.

**139.** Where an indictment for murder sets out the acts of the prisoner which hasten the death of the deceased, it need not aver the state or condition of the body of the deceased at the time of the assault, or the causes merely natural then existing which tended to make the acts of the prisoner more dangerous and fatal. Com. v. Fox, 7 Gray, 585.

**140. Description of wound.** When death is occasioned by a wound, it should be stated to have been mortal; but the length, breadth, and depth of the wound need not be alleged, if it appear that it contributed to the party's death. And an indictment which charges that the prisoner struck and gave a wound of which the person died, need not allege that he died "by the stroke or strokes aforesaid;" nor that he "did suffer and languish, and languishingly did live." State v. Conley, 39 Maine, 78; Dias v. State, 7 Blackf. 20; Stone v. People, 2 Scam. 326; Alexander v. State, 3 Heisk. 475; *contra*, State v. Owen, 1 Murphy, 152.

**141.** An indictment for murder which charges that the defendant "did strike and thrust" the deceased "in and upon the left side of the belly, and also in and upon the right shoulder, giving to the deceased then and there, in and upon the left side of the belly, and also in and upon the right shoulder, *one* mortal wound of the breadth of three inches, and of the depth of six inches, of which mortal wound he then and there instantly died," is bad, as being inconsistent and repugnant. State v. Jones, 20 Mo. 58.

**142. Death of party.** An indictment for murder must show that the party died of the injury specially described and set forth. Lutz v. Com. 29 Penn. St. 441. But an indictment was held sufficient which alleged that at a certain time and place the defend-

ant, "without authority of law, and with malice aforethought, killed A. B. by shooting him with a pistol, contrary to the form of the statute," &c., without averring that A. B. then and there died. State v. Anderson, 4 Nev. 265, Lewis, J., *dissenting*. And an indictment for murder which charged that the defendant on, &c., at, &c., did feloniously, &c., shoot, kill and murder one E. B., without specifically alleging that E. B. died, was held good. People v. Sanford, 43 Cal. 29; s. c. 1 Green's Crim. Reps. 682.

**143.** An indictment for murder is not fatally defective because it charges that the death was caused by four distinct assaults, and does not allege that it resulted from any one of them. Com. v. Stafford, 12 Cush. 619.

**144.** When a single felonious act results in the death of two persons, the offender may be indicted for a single offense of murder in slaying both, but not if the acts of killing are distinct, and the intention to kill one is an intention formed and existing distinct from and independent of the intention to kill the other. Womack v. State, 7 Cold. Tenn. 508.

**145.** The word "murder" is a term of art, which cannot be supplied by any other word in an indictment for murder. Dias v. State, 7 Blackf. 20. But see Anderson v. State, 5 Ark. 444.

**146. Averment of intent.** In Ohio, as the statute makes an intent to kill an essential ingredient of murder, an indictment for murder under the statute must contain a direct averment of such intent in the description of the offense. Fouts v. State, 8 Ohio, N. S. 98; Kain v. State, Ib. 306. And the same is true as to an intent to damage or defraud in an indictment for forgery. Drake v. State, 19 Ib. 211.

**147.** An indictment for murder must charge that the offense was committed with malice aforethought, and it is not enough to allege that the mortal wound was inflicted with malice aforethought. Com. v. Gibson, 2 Va. Cas. 70; and it must be stated that the act was done feloniously. Fairlee v. People, 11 Lee, 1. But see Anderson v. State, 5 Ark. 444.

**148.** An indictment for murder, which charges that A. committed the assault, and that B. and C. "feloniously were present aiding, abetting and assisting said A.," is sufficient without alleging that B. and C. were feloniously, willfully and of their malice aforethought present aiding, &c. State v. Rabon, 4 Rich. 260.

**149.** In Massachusetts, an indictment for murder need not allege that the act was done willfully and with malice aforethought. Com. v. Chapman, 11 Cush. 422. In Wisconsin, an indictment under the statute for murder is sufficient which charges that the act was committed "with a premeditated design to effect death," omitting the words "with malice aforethought." State v. Duvall, 26 Wis. 415.

**150.** An indictment for murder is sufficient without the words "malice aforethought," if it contain language which is equivalent, as "willfully, maliciously, feloniously and premeditatedly." People v. Vance, 21 Cal. 400. See People v. Brown, 27 Ib. 500. But an indictment for murder charging that the accused "purposely and of premeditated malice" gave the blow, omitting the word "feloniously," is fatally defective. Edwards v. State, 25 Ark. 444.

**151.** An indictment charging that the accused willfully, feloniously and maliciously shot another with intent to murder him, is sufficient without the words "with malice aforethought." State v. Forney, 24 La. An. 191. And the same is true of an indictment which charges that the accused "did then and there feloniously kill, slay and murder." State v. Phelps, Ib. 493.

**152.** After conviction of murder, it is not a good ground for a motion in arrest of judgment that the indictment omitted to aver that the prisoner, in administering poison to the deceased, did it with an intent to kill. Com. v. Hersey, 2 Allen, 173.

**153.** An indictment for murder by poison need not allege that the defendant knew that the drug used to produce death was a deadly poison. Thornton v. Com. 24 Gratt. 657. An indictment which charges that the defendant feloniously, willfully and maliciously mingled a drachm of a certain deadly

poison called belladonna with the food of one B., with intent then and there thereby the said B. feloniously, willfully and of his malice aforethought to kill, is good without alleging that the defendant knew the belladonna to be a deadly poison, or that the act was done knowingly, or that B. was about to eat the food which contained the poison, or that he intended that B. should eat it. Com. v. Bearse, 108 Mass. 487.

**154. Averment of premeditation.** The word "deliberately" in an indictment for murder, means that the homicide was determined upon after reflection. "Premeditatedly," means planned beforehand. Craft v. State, 3 Kansas, 450. The words "with malice aforethought," do not embrace in substance, the words "deliberate and premeditated." Fouts v. State, 4 Greene, 500.

**155.** In Iowa, an indictment for murder in the first degree, must allege not only that that the killing was willful and premeditated, but also that it was deliberate. State v. McCormick, 27 Iowa, 402; State v. Watkins, Ib. 415; State v. Knouse, 29 Ib. 118. The allegation that the *assault* was willful, deliberate and premeditated is not sufficient. State v. Thompson, 31 Ib. 393.

**156.** In New York, an indictment for murder in the common-law form, may charge that the offense was committed feloniously, willfully, and of malice aforethought, instead of charging that it was committed from a premeditated design to effect the death of the person killed. But in order to convict the prisoner of a felonious homicide with malice aforethought, the evidence must bring the case within the statutory definition of murder. People v. Enoch, 13 Wend. 159; Fitzgerald v. People, 37 N. Y. 413; 5 N. Y. Trans. Appeals, 273; s. c. 49 Barb. 122; Kennedy v. People, 39 N. Y. 245; 6 N. Y. Trans. Appeals, 19.

**157.** Where an indictment for murder at common law, after charging that the offense was committed with malice aforethought, added that the act was done from a premeditated design to effect the death of the deceased—*Held* that the latter words might be rejected as surplusage. People v. White, 22 Wend. 167.

**158.** An indictment which alleges that the prisoner "feloniously, willfully and of his malice aforethought, did kill and murder," charges murder by deliberate and premeditated killing within the statute of New Hampshire (Gen. Stat. ch. 242, § 14). State v. Pike, 49 New Hamp. 399, Doe and Smith, JJ., *dissenting*. Under such an indictment, a verdict may be rendered of "guilty of murder in the first degree," upon proof of murder and robbery. Ib.; approved in State v. Jones, 50 Ib. 369.

**159. Unnecessary averments.** The omission of an averment in an indictment for murder, that the party murdered was in the peace of the commonwealth, is not a ground of exception. Com. v. Murphy, 11 Cush. 472. Nor is it necessary that the indictment contain a certificate signed by the foreman of the grand jury that it is "a true bill." Com. v. Smyth, Ib. 473.

**160.** An indictment for murder need not allege that the prisoner is a person of sound memory and discretion, nor that the act was unlawful, where the manner of killing is so described as to show that it is unlawful. Jerry v. State, 1 Blackf. 395.

**161.** Form of an indictment for murder, with counts at common law, and under the statute of New York; and form of writ of error, see Lake v. People, 1 Parker, 495.

**162. Plea to indictment.** A plea to an indictment for murder of "once in jeopardy," without stating how or in what manner, is bad on demurrer. Such plea should set out the record of the former indictment, propose to verify the same, and allege the identity of the defendant. Atkins v. State, 16 Ark. 568.

**163. Trial of plea.** Where a woman after conviction of murder, pleads pregnancy, the question, before she is sentenced, may be submitted to a jury of matrons. State v. Arden, 1 Bay, 437.

*(c) Evidence in general.*

**164. Right of prosecution.** On the trial of a capital case, the prosecution are only bound to introduce such evidence as they think proper. State v. Stewart, 9 Ired. 342.

**165. Person killed.** Where in a case of

homicide, it appears that the deceased went by a name different from his or her true name, the true name may be stated in the indictment, and if the true name is proved on the trial, there is no variance, although it also appears that the deceased went by another name. So also, if the name charged in the indictment is not the true name, yet if it is proved that the deceased was called among his or her acquaintances by the name charged, it is sufficient. Walters v. People, 6 Parker, 15, per Welles, J.

166. An indictment charged the murder of H. G. Trobuck. It was proved that the name of the person killed was Gilbert Trobuck. *Held* that the variance was fatal. Timms v. State, 4 Cold. Tenn. 138.

167. But where, on the trial of an indictment charging that the person murdered William R. Morris, it was proved that W. R. Morris was killed by him, it was held that the proof was sufficient to support a conviction. Mitchum v. State, 11 Ga. 615. And where the deceased wrote his name Amsey Mulock, but was equally well known by the name of Amasa Mulock, and the latter name was given in the indictment, it was held that there was no misnomer. Gardiner v. People, 6 Parker, 155.

168. It is error in the court on a trial for murder to assume that the name of the deceased is stated correctly in the indictment, that being a question for the jury. State v. Dillihunty, 18 Miss. 331; State v. Angel, 7 Ired. 27; *contra*, Gardiner v. People, *supra*.

169. An averment in an indictment for murder, that the deceased was a Wyandott Indian is material, and must be proved as laid. It may be proved by reputation, and the jury may find the fact from the testimony of a witness that he heard from the band of Indians to which the deceased belonged, that the latter was a Wyandott. Reed v. State, 16 Ark. 499.

170. Where an indictment for murder describes the deceased as a free negro, the designation, though unnecessary, must be proved as alleged, and proof that he was a mulatto will not be sufficient. Felix v. State, 18 Ala. 720.

171. **Corpus delicti.** In every case of homicide the prosecution must prove the *corpus delicti* beyond a reasonable doubt. People v. Schryver, 42 N. Y. 1; s. c. 46 Barb. 625.

172. The *corpus delicti* has two components—death as the result, and the criminal agency of another as the means; and there must be direct proof of one or the other. People v. Bennett, 49 N. Y. 137.

173. In order to justify a conviction for murder, there must either be direct proof of death, or proof of violence, or other act of the defendant which is alleged to have produced death, sufficient to account for the disappearance of the body. Ruloff v. People, 18 N. Y. 179; reversing s. c. 3 Parker, 401; Smith v. Com. 21 Gratt. 809.

174. It is not essential to a conviction for murder that the body of the deceased should be found. Where, in a case of homicide, the discovery of the body is impossible, the fact of death may be proved by circumstances, provided they are sufficient to establish the fact beyond a reasonable doubt. U. S. v. Williams, 1 Cliff. 5; Stocking v. State, 7 Ind. 326; State v. Williams, 7 Jones, 446.

175. On a trial for murder, an extrajudicial confession with extrinsic circumstantial evidence, satisfying the minds of the jury beyond a reasonable doubt that the crime has been committed, will warrant a conviction, although the dead body has not been found. State v. Lamb, 28 Mo. 218; but not where there is no other proof of the *corpus delicti* than the confession. State v. German, 54 Mo. 526.

176. In general, there can be no conviction of murder until the body of the deceased has been found. People v. Wilson, 3 Parker, 199.

177. There need not be any more direct or positive proof to identify the body of a murdered person than is required to prove the murder, or to identify the murderer. Taylor v. State, 35 Texas, 97.

178. On the trial of an indictment for murder, a witness who had found the dis-

colored and mutilated body of a person whom he had never before seen, was permitted to testify that the face resembled the photograph of the man alleged to have been killed. *Held* proper. Udderzook v. Com. 76 Penn. St. 340.

**179.** Ordinarily, the question of identity is one of fact, and a witness may be asked whether he knows a particular individual, and if so, whether he is the person indicated. But where, on a trial for murder, it was proved that a body which, if that of the deceased, had been submerged in salt water for upward of five months, and had undergone many changes, it was held for the jury to determine, after hearing the statements of the witness, whether the body was that of the deceased. People v. Wilson, 3 Parker, 199.

**180.** On the trial of an indictment for the murder of W. C., it was proved that a human skeleton, not quite entire, of the male sex, and Caucasian race, corresponding in size with W. C., was found in a pond. The skull had a hole on the lower posterior part, and a cut or gash on the top, apparently made with some sharp instrument, which could not have been self-inflicted, and was sufficient to have caused death. *Held* competent for the prosecution to show by circumstantial evidence that the skeleton was that of W. C. McCulloch v. State, 48 Ind. 109.

**181.** It is not error to permit the district attorney to show the witnesses, in the presence of the jury, articles of clothing found on the dead body of a person whom it is alleged the prisoner murdered, or a hat and gun found near the dead body, or a watch it was claimed the deceased wore the morning he disappeared, or to produce in court the skull of the deceased. Gardiner v. People, 6 Parker, 155.

**182.** It is proper on a trial for murder to allow a physician and surgeon to examine the skull of the deceased in court, with a broken gun that was found beside the dead body, and explain the fractures in the skull and the marks on it to the jury, and to show how the gun-lock and sight fitted the fractures in the skull, and to give his opinion as to what would cause the fractures. Ib.

**183.** On a trial for murder it was proved that, when the remains were found, the head had been severed from the body, and that it was preserved by a physician in alcohol. Many witnesses for the prosecution identified the head, the greater portion from the features alone, and others from peculiar marks on the teeth. The prisoner proposed to prove, by two physicians and surgeons, that, on account of the natural and inevitable changes through which a human body passes after death, it was not possible for any one to identify the head. *Held* that the evidence was not admissible. State v. Vincent, 24 Iowa, 570.

**184.** Where, on a trial for murder, the defense has introduced evidence tending to show that the person alleged to have been murdered was seen alive afterward, it was held that the prosecution could not prove that, about the time of the alleged murder, a person so strongly resembling the deceased as to have been mistaken for him by his acquaintances, was seen near the place where the murder was alleged to have been committed. Com. v. Webster, 5 Cush. 295.

**185. Weapon.** Where an indictment for murder charges that the death was caused by a particular weapon, the evidence need not show that it was done by that particular instrument. It will be sufficient if proved to have been done by some other one, if the nature of the violence, and the kind of death occasioned by it, be the same. State v. Smith, 32 Maine, 369; Goodman v. State, 5 Sm. & Marsh. 510; Short v. State, 7 Yerg. 513.

**186.** Therefore, under an indictment for murder charged in one count to have been committed by striking and cutting the deceased with a hatchet, and in another count by striking and cutting him with an instrument to the jurors unknown, it was held competent for the prosecution to prove that the deceased was killed with a pistol. People v. Colt, 3 Hill, 432. So, likewise, if the indictment charges that the defendant gave the mortal wound with a knife or dagger, and it is proved that he gave the wound with a sword, staff, or bill, it is sufficient. State v. Fox, 1 Dutch. 566; Donnelly v. State, 2 Ib. 463.

187. Where, however, the indictment charges the killing to have been done with a particular weapon, it is not competent to prove that it was done with a weapon of a totally different character. Witt v. State, 6 Cold. Tenn. 5.

188. Whether any, and what kind of instrument was used in effecting an alleged murder, is a fact for the jury to find, and not to be derived from the opinions of physicians. Wilson v. People, 4 Parker, 619.

189. But the question whether or not an instrument with which a homicide was committed was a deadly weapon, is to be determined by the court. Com. v. Morler, 4 Barr, 264.

190. **Mode of violence.** Although an indictment for murder must state correctly the particular mode of violence by which the death was produced, yet, if the death resulted from wounds or fractures, they need not be proved to have been inflicted by means of the particular instrument, or on the part of the body charged. State v. Jenkins, 14 Rich. 215.

191. The first count of an indictment for murder charged the defendant with shooting the deceased, and the second count with aiding and assisting another man in stabbing him. *Held* that evidence of the aid and assistance charged in the second count was sufficient to support the allegation of shooting in the first count. Hudson v. State, 1 Blackf. 317.

192. An indictment charged that the prisoner made an assault, and with a pistol charged and loaded with gunpowder and a leaden bullet, fired at the deceased, and then and there feloniously, and of his malice aforethought, did strike, penetrate and wound the deceased with the leaden bullet, causing a mortal wound of which he died. *Held* that the prosecutor was bound to prove this; but that it did not matter which of the bullets and which of the wounds caused the death. Real v. People, 55 Barb. 551; 42 N. Y. 270.

193. An indictment alleging that the defendant administered poison is supported by evidence tending to show that he obtained the poison and placed it in or on the food which he knew was prepared for the immediate use of the deceased. La Beau v. People, 6 Parker, 371; 34 N. Y. 223.

194. In Tennessee, an indictment for an attempt to give poison, under the statute (Code, § 4626), is sustained by proof that the defendant bought the poison, placed it in the hands of his minor son, and advised and directed him to administer it. Collins v. State, 3 Heisk. 14.

195. Under an indictment charging a homicide by shooting, evidence that the death was caused by beating on the head with a gun is inadmissible; and an acquittal on a charge of the one, will not bar an indictment for the other. Guedel v. People, 43 Ill. 226.

196. Where an indictment for homicide charged that it was committed by beating and striking, and it was proved that the deceased came to his death from injuries occasioned by falling on a mound of earth, the court directed an acquittal. People v. Tannan, 4 Parker, 514.

197. An indictment charged that the husband "feloniously did make an assault" upon his wife and "from out of the said dwelling-house into the open air his said wife, violently, feloniously and of his malice aforethought, did remove, force, and there leave, whereby she came to her death." It was proved that after the wife had been beaten, and her husband had gone to bed, she left the house of her own accord, and without any necessity. *Held*, that the variance was material. State v. Presler, 3 Jones, 421.

198. On a trial for murder, a surgeon who examined the body of the deceased, was permitted to exhibit to the jury engraved plates of the human neck, and of the bones of the neck, and also a skeleton of the human neck, in order to illustrate his testimony in describing the wounds; also a diagram to illustrate the properties of the human blood ascertained by chemical tests and microscopic observations. *Held* proper. State v. Knight, 43 Maine, 11.

199. **Time and place.** A homicide may be proved to have been committed at any time previous to the finding of the indict-

ment, either before or after the time alleged. O'Connell v. State, 18 Texas, 343.

**200.** An indictment alleged that the blow was given on the 27th of December, and the deceased then and there instantly died; and it was proved that he survived twenty days. *Held* that the variance was not material. State v. Baker, 1 Jones, 267.

**201.** It is too late after verdict, to object that the homicide was not proved to have been committed in the county alleged, or that the year of the fatal injury was not proved to show that death followed within a year and a day. Wagner v. People, 54 Barb. 367; affi'd 4 N. Y. Ct. of App. Decis. 509; s. c. 2 Keyes, 684.

**202.** But in Arkansas, where, after conviction of murder, the bill of exceptions, which purported to contain all the evidence, did not show that it was proved that the offense was committed in the county where the indictment was found, it was held ground for reversal of the judgment. Reed v. State, 16 Ark. 499.

**203. Opinions as to cause of death.** In a prosecution for homicide, the opinions of medical men who are experts, are competent evidence as to the instrument employed by the defendant, and the nature and consequences of the wound. State v. Morphy, 23 Iowa, 270; State v. Porter, 34 Ib. 131.

**204.** On a trial for murder, it is competent for a surgeon to swear which of the wounds, each of which is mortal, in his opinion, caused the death. Eggler v. People, 56 N. Y. 642.

**205.** But where, on a trial for murder, a medical expert has testified as to the form, nature, and extent of the wounds found on the body of the deceased, it is not competent for him to give his opinion as to the probable position of the deceased when the blows were inflicted, the jury being equally capable of arriving at a conclusion on that subject. Kennedy v. People, 6 N. Y. Trans. App. 19.

**206.** On a trial for murder by poisoning, the opinion of a witness is admissible as to whether symptoms particularly specified, were symptoms of arsenical poisoning, he having testified in relation to the same subject, and the opinion referring to symptoms of which evidence by other witnesses had been given. Stephens v. People, 4 Parker, 396; affi'd 19 N. Y. 549. But the following instruction was held proper: "Counsel for the prosecution having read to the medical witnesses certain symptoms from a paper marked by the judge, and inquired their opinion as to the cause of death in a case where such symptoms existed, if the jury believe that the symptoms of which the deceased complained in her lifetime, are not in all respects the symptoms stated in the paper read to the physicians, then the medical opinions are not admissible as evidence." Ib.

**207.** On a trial for murder by poisoning, the following question propounded by the prosecution to a professor of chemistry, was held competent: "In your opinion, can a physician, from a mere *post mortem* examination of the exterior surface, and the indications of inflammation which he discovers, determine with any degree of certainty, the precise period of time when such inflammation was caused?" People v. Hartung, 4 Parker, 319, Wright, J., *dissenting*.

**208.** It is not error for the judge to permit witnesses, who are not chemists, to testify that the clothes worn by the accused on the night of the murder, and produced on the trial, were marked with stains apparently produced by blood, when found in the possession of the prisoner at the time of his arrest. People v. Gonzales, 35 N. Y. 49.

**209. Opinion on question of insanity.** Where an expert has heard only part of the evidence on which the defense relies to establish the insanity of the prisoner, it is error in the court to permit him to give his opinion on the prisoner's sanity, based on the portion of the evidence so heard by him. Lake v. People, 1 Parker, 495; 12 N. Y. 358.

**210. Proof of malice.** Whether the crime be murder or manslaughter, is not to be decided upon any presumption arising from the mere fact of killing; but the prosecution must show that the killing was malicious. U. S. v. Mingo, 2 Curtis C. C. 1; Read v. Com. 22 Gratt. 924; s. c. 1 Green's Crim. Reps. 267; *contra*, U. S. v. Travers, 2

Wheeler's Crim. Cas. 490. Circumstances may, however, attend a homicide which, in point of law, stamp it as malicious, without other evidence of malice. U. S. v. Armstrong, 2 Curtis C. C. 446; as in case of poisoning. Shaffner v. Com. 72 Penn. St. 60; s. c. 2 Green's Crim. Reps. 504.

**211.** In Oregon, under the statute, malice is not presumed from the mere proof of killing, but must be established by the prosecution by other evidence. Goodall v. State, 1 Oregon, 333.

**212.** Where, on a trial for murder, the circumstances proved tended to show malice, which the defense attempted to rebut, it was held that the prosecution might show that there was express malice. Bird v. State, 14 Ga. 43.

**213.** It is not improper for the court, on a trial for murder, to charge the jury that "if they believed from the evidence that the prisoner had malice against the deceased on the morning of the homicide, and there was nothing to show that such malice had been abandoned, even if the prisoner accidentally met the deceased, the question of manslaughter could not arise, as the malice would exclude provocation." State v. Tilly, 3 Ired. 424.

**214.** Where there is fresh provocation between the antecedent malice and the homicide, it must be proved that the killing was upon the preconceived malice to make it murder; for if there be an old feud between A. and B., which is made up, and upon a new and sudden quarrel A. kills B., it is not murder. Clark v. State, 8 Humph. 671; McCoy v. State, 25 Texas, 33.

**215.** Where a homicide grows out of a personal combat, the question of cooling time is one to be determined by the court. But if left to the jury, and they decide it correctly, the error will not be ground for a new trial. State v. Moore, 69 N. C. 267; s. c. 1 Green's Crim. Reps. 611.

**216. Proof of premeditation.** A homicide will not be presumed to have been deliberate and premeditated, and done with malice, but it must be proved that such was the case. Craft v. State, 3 Kansas, 450.

**217.** The lying in wait does not constitute a deliberate and premeditated purpose as a conclusion of law, but is a question of fact to be left to the jury. Floyd v. State, 3 Heisk. 342.

**218.** Although to establish premeditated malice some affirmative evidence should be introduced by the prosecution, yet the evidence as to this may be circumstantial. State v. Turner, Wright, 20.

**219.** Where a mortal wound is inflicted with a deadly weapon in the previous possession of the prisoner, without any, or upon very slight provocation, the homicide is *prima facie*, willful, deliberate, and premeditated, and the burden is on him to show extenuating circumstances. Hill v. Com. 2 Gratt. 594.

**220.** In Tennessee, the fact that the prisoner used a deadly weapon does not imply such premeditation as to make the homicide murder in the first degree, under the statute. Clark v. State, 8 Humph. 671; Dame v. State, 2 Ib. 439.

**221.** Where, on a trial for murder, it is proved that the purpose of the defendant was to commit robbery, and in the execution of that purpose, in order to overcome the resistance, and silence the outcries of his victim, he made use of violence that caused death, no further proof of premeditation, or of willful intent to kill, is necessary. Com. v. Pemberton, 118 Mass. 36.

**222.** Where the indictment charges that the homicide was committed with a premeditated design to effect the death of the person killed, the premeditated design or express malice must be proved, notwithstanding it is also charged to have been committed with malice aforethought. People v. White, 24 Wend. 520.

**223.** On a trial for murder it appeared that the deceased and one S. were quarreling, and the prisoner interfered; that the latter struck the deceased a blow on the head, which blow the deceased returned and then retreated, followed by the prisoner; that the prisoner secretly opened his knife, which led the deceased again to strike at him, and again retreat; that the prisoner then cut the deceased in his face with the knife; that the deceased continued to re-

treat, and the prisoner was approaching him, when K. ran in between them; that the prisoner struck at K. with the knife, who jumped out of the way, and the prisoner then followed the deceased; that one of his brothers called out to him to take care, or he would be killed, and as the deceased looked around the prisoner struck the knife into his temple with such force that, after three unavailing efforts to get it out, made by the prisoner, he fled. *Held*, that the foregoing was sufficient to warrant the jury in concluding that the prisoner, before striking the last blow, had formed the determination to take the life of the deceased. People v. Shay, 4 Parker, 344; 22 N. Y. 317.

224. On a trial for murder, the prosecution having proved that the prisoner broke open the door of the room in a house of ill-fame, in which the deceased was staying, dragged her out of bed, threw her upon the floor and stabbed her several times with a knife in different parts of her body, offered to show that the prisoner, on the night before the morning of the homicide, at the same house, wanted the deceased to go out with him, which she refused to do; that he then struck her, and bit her hand, and she still refused; that he then went out and brought in an officer, and charged her with stealing his watch; that the officer took both to the station-house, where they were locked up all night; that the deceased returned to the house, and went to bed, and that some time after the prisoner followed her to the house and committed the crime. *Held*, that the evidence was proper for the purpose of showing deliberation and malice. Walters v. People, 6 Parker, 15; 32 N. Y. 147.

225. On a trial for murder, it was proved that a store had been burglariously entered in the night, and property removed therefrom by the burglars, when they were confronted by two clerks, who were awakened, and that a fight ensued, in which one of the clerks was shot by the prisoner. *Held*, that the question whether or not the deceased was unnecessarily engaged in an attempt to kill, was one of fact for the jury. Ruloff v. People, 5 Lans. 261.

226. **Intoxication of accused.** On a trial for murder, the drunkenness of the accused at the time of the commission of the act may be proved on the question of guilty intent. People v. Nichol, 34 Cal. 211; People v. Williams, 43 Ib. 344.

227. The intoxication of the prisoner when he committed the homicide may be considered by the jury, with the other facts in the case, to enable them to determine whether the killing was done deliberately and premeditatedly. Hall v. State, 11 Humph. 154; State v. McCants, 1 Spear, 384; Swan v. State, 4 Humph. 136; Pirtle v. State, 9 Ib. 663; Clark v. State, 8 Ib. 671; People v. Belencia, 21 Cal. 544; People v. King, 27 Ib. 507. See *post*, tit. INTOXICATION AS A DEFENSE.

228. In Connecticut, under a statute making murder in the first degree consist of "willful, deliberate, premeditated killing," intoxication was held admissible in evidence as tending to prove that the prisoner was not capable of deliberation. State v. Johnson, 40 Conn. 136; s. c. 2 Green's Crim. Reps. 487. But where murder in the second degree rests upon implied malice, if an intoxicated person takes the life of another without provocation or justification, the jury may find malice, although no malice be proved. State v. Johnson, 41 Ib. 584.

229. **Res gestæ.** Everything which happened in the immediate presence and hearing of the prisoner at the time of the homicide is admissible, as tending to show his motive for the act. McKee v. People, 36 N. Y. 113.

230. On a trial for murder, it is proper to show the acts of the prisoner during the day of the homicide. Campbell v. State, 23 Ala. 44.

231. Any fact tending to prove the motive of the prisoner in killing the deceased, or the object of the deceased in going to the prisoner's house, or the prisoner's knowledge at the time of the killing that the accused and his companions did not intend to commit any felony or to do him any harm, is relevant. Noles v. State, 26 Ala. 31.

232. Where two persons are murdered at the same time and place, by the same person, evidence as to what occurred at the murder

of one is admissible on the trial for the murder of the other. Brown v. Com. 76 Penn. St. 319.

233. On the trial of an indictment for the murder of A., there was evidence tending to show that B. and C. were killed at the same time by the same weapon. *Held* that the prosecution were entitled to lay before the jury the whole transaction of which the murder of A. was a part, and that for this purpose, the testimony of a physician as to the autopsy of C. was competent. Com. v. Sturtivant, 117 Mass. 122.

234. On a trial for murder, it appeared that A. and B. being together, the prisouers attacked A. who after firing his pistol at one of them fled; that they followed him a short distance, and immediately returned to where B. was, whom it was charged they killed. *Held* competent for the prosecution to show the attack upon A. as a part of the *res gestæ*. Glory v. State, 8 Eng. 236.

235. On a trial for murder, evidence was offered that the prisoner, on the same day the deceased was killed, and shortly before the killing, shot a third person. *Held* that the evidence was competent, though it sought to prove a distinct felony; the killing of the deceased appearing to be connected as parts of an entire transaction. Heath's Case, 1 Rob. 735.

236. On a trial for murder committed during a burglary, it is competent for the prosecution to prove a conspiracy between the prisoner and the other persons alleged to have been engaged in the burglary; also to identify his deceased confederates by means of a photograph and stereoscope. Ruloff v. People, 5 Lans. 261.

237. **Extenuating circumstances.** On a trial for murder, it is competent for the defendant to prove that the place where the homicide occurred was a house of ill-fame, in order to show the intent and object of his going there. Villareal v. State, 26 Texas, 107.

238. On a trial for aiding and abetting in the murder of one of a mob who were endeavoring in the night to force an entrance into the house of U., which the prisoner was assisting U. to prevent, it was held competent for the prisoner to prove, on the question of intent, that he had heard that persons had been at the house shortly previous to the homicide, made a disturbance, taken U. out in the night, and beaten him severely. Temple v. People, 4 Lans. 119.

239. On the trial of an indictment for malicious shooting, it is competent for the defendant to prove as tending to show the motives and acts of the parties, that a son of the person wounded, who was in the store when his father and the defendant entered it, immediately ran up stairs and returned about the time of the shooting, with a pistol, which he aimed and snapped at the defendant; and that the son had loaded his pistol a few days before, and had then made a threat to shoot the defendant, of which the latter was notified. Rapp v. Com. 14 B. Mon. 614.

240. On a trial for murder, the prisoner offered to prove that a few minutes before he made the attack upon the deceased, he went to the house where he lived, and found his sister crying, and asking the cause, was told by her that the deceased had just been there, and called her mother and herself prostitutes, whereupon the prisoner went directly into the lot where the deceased was, and asked him why he had so done, and immediately struck him with his fist. *Held* that the evidence was proper on the question whether the prisoner intended the death of the deceased, and that its exclusion was ground for a new trial. People v. Lewis, 3 N. Y. Ct. of Appeals Decis. 535.

241. On a trial for murder, evidence that the prisoner's wife had been in the habit of adultery with the deceased is not admissible. State v. John, 8 Ired. 330.

242. Evidence that the prisoner was in possession of land, and that the deceased was coming to commit a trespass upon it, is not admissible in justification or excuse, but may be received to show the state of feeling of the parties toward each other at the time of the occurrence. State v. Zellers, 2 Halst. 220.

(*d*) *Presumptions.*

243. **From homicide.** It is erroneous to

charge the jury, on a trial for murder, that the homicide being proved, the law implies that the killing was willful, deliberate, and premeditated. People v. Moody, 45 Cal. 289; s. c. 2 Green's Crim. Reps. 420.

**244.** But in a case of homicide, where there was no apparent well founded danger of great bodily harm, or such provocation as was calculated to excite irresistible passion, the law implies malice. Com. v. Drew, 4 Mass. 391; Peri v. People, 65 Ill. 17. When a person voluntarily does an act which has a direct tendency to destroy life, and death ensues, the presumption is that he intended to kill. Com. v. York, 9 Metc. 93; Riley v. State, 9 Humph. 657; State v. Turner, Wright, 20; Com. v. Webster, 5 Cush. 295; Hill v. Com. 2 Gratt. 594; Oliver v. State, 17 Ala. 587. Where deliberate malice is once established, its continuance down to the perpetration of the homicide will be presumed, unless rebutted. State v. Johnson, 1 Ired. 354.

**245.** And the law implies malice where the act causing the death of another is attended with such circumstances as are the usual concomitants of a wicked, depraved, and malignant spirit. State v. Smith, 2 Strobh. 77; Ann v. State, 11 Humph. 150.

*See post*, tit. BURDEN OF PROOF.

**246. From possession or use of deadly weapon.** Where a weapon with which a murder is committed is not known, it is competent for the public prosecutor to introduce evidence to raise a presumption that the wound was caused by a pistol ball, and to prove for that purpose that the prisoner had pistols in his possession, and that a ball propelled by the explosion of a percussion cap, would be likely to cause such a wound; or to prove that the prisoner had such pistols, in order to show, in connection with other evidence, that the prisoner had probably taken the ramrod from the pistol and driven it into the head of the deceased. Colt v. People, 1 Parker, 611.

**247.** Where a dangerous weapon is used against an unarmed adversary, even upon reasonable provocation, the killing will be murder and not manslaughter, the law implying that the intent was to kill, and not to fight on equal footing. Holland v. State, 12 Fla. 117.

**248.** It is erroneous to charge that the use of a deadly weapon not in necessary self-defense, whereby death ensues, will constitute murder. Donnellan v. Com. 7 Bush, 676. Or that, if homicide be committed by a deadly weapon in the previous possession of the accused, the law implies malice. Smith v. Com. 1 Duvall, 224; *contra*, State v. Lipsey, 3 Dev. 485. And the error is not cured by giving a correct instruction at the request of the defendant. Clem v. State, 31 Ind. 480; Bradley v. State, Ib. 492.

**249.** Where the killing is with a dangerous weapon, calculated to produce and actually producing death, in the absence of proof that it was accidental or upon provocation, the presumption is that the act was voluntary and with malice aforethought. State v. Gillick, 7 Iowa, 287.

**250.** The following instruction was held proper: "That if the homicide was committed in a sudden heat by the use of a deadly weapon, no provocation given by mere words would reduce the killing to manslaughter; that the question was not whether there was anger merely, but whether there was legal provocation to such anger; that the use of a dangerous weapon under a provocation by words only, or under no provocation, was always evidence of malice aforethought; that to constitute malice aforethought it was only necessary that there should be formed a design to kill, and that such design might be conceived at the moment the fatal stroke was given, as well as a long time before. Beauchamp v. State, 6 Blackf. 299.

**251.** In the absence of proof to the contrary, the law presumes an intent to kill from the use of a deadly weapon. Kilpatrick v. Com. 31 Penn. St. 198.

**252.** In Arkansas, the fact of killing with a deadly weapon has been held *prima facie* evidence that the design to kill was formed at the time of committing the act. Bevins v. State, 6 Eng. 455.

**253.** When the proof shows that the killing was done intentionally by the defendant with a deadly weapon, the law raises a presumption from the use of such a weapon that

the party using it intended to kill, and that the killing was malicious; and unless the circumstances show that the killing was justifiable or excusable, the burden of proof devolves on the defendant to show a justification or excuse. State v. Bertrand, 3 Oregon, 61. The defendant is only required to show this by a preponderance of evidence. State v. Conolly, Ib. 69.

254. The law infers an intent to kill from the use of a deadly weapon, notwithstanding it may be lawful to carry such weapon. Head v. State, 44 Miss. 731. But in Mississippi, under the law permitting a citizen to carry a deadly weapon, although he may be the aggressor in a difficulty, the fact that he was armed with a deadly weapon is no proof of his criminality, unless he provided himself with the weapon with a view to using it if necessary in overcoming his adversary. Cotton v. State, 31 Miss. 504.

255. On the trial of an indictment for murder committed with a deadly weapon, the prisoner may show that he came by the weapon accidentally and for an innocent purpose. Aaron v. State, 31 Ga. 167.

256. When a mother intentionally kills her infant child, who is incapable of any resistance, by beating it over the head with a deadly weapon, the law implies malice, although it would be otherwise if the child were capable of taking the mother's life, and was attempting to take it with means adequate to the end, and she killed it to preserve her own life. Tempe v. State, 40 Ala. 350.

257. On a trial for murder, the defense offered to show that some twenty or thirty minutes before the difficulty, the deceased had fired off, and reloaded, two pistols, and put them in his pocket at his own house, which was two or three hundred yards distant, and then started immediately for the place of the difficulty, and that the pistols were found at his side on the ground where he fell after being shot by the prisoner. *Held* that these facts were competent evidence, without proof that the prisoner had knowledge of them. Reynolds v. State, 1 Kelly, 222.

258. Articles found in prisoner's possession. Articles found in the prisoner's pockets when he was searched soon after the murder, which are claimed to have been shortly before in the possession of the deceased, may be put in evidence; also articles belonging to the prisoner and in his possession just before the murder, which were found at the place where the crime was committed. State v. Wagner, 61 Maine, 178.

259. On a trial for murder, the fact that the prisoner, whilst passing from the jail on a former trial for the same offense, was found in possession of a slung shot, is competent evidence for the consideration of the jury on the question whether he contemplated an escape. State v. Houser, 28 Mo. 233.

260. On a trial for murder, evidence that a writing found near the body of the deceased was given to the prisoner's son for the use of his father, is sufficient to render the paper admissible in evidence, with instruction to the jury to disregard it unless satisfied that it came from the prisoner's possession. State v. Arthur, 2 Dev. 217.

261. Clothes which have been identified as those worn by the accused at the time a murder was committed, may be submitted to the jury for inspection. People v. Gonzales, 35 N. Y. 49.

262. On a trial for murder, a witness who was not an expert was permitted, against the objection of the prisoner, to testify that certain hairs which were found adhering to the club with which it was claimed the murder was committed, appeared to his naked eye to be human hairs, and another witness to testify to his impression that they resembled human hairs. *Held* proper, and that testimony offered in behalf of the prisoner in respect to hairs seen on wood piles in the yard where the homicide occurred, five months subsequent thereto, was rightly rejected. Com. v. Dorsey, 103 Mass. 412.

263. Where on a trial for murder by poison, alleged to have been administered to the deceased by the accused in a bowl, it was held to be a question for the jury as to whether or not the bowl was identified, and that evidence given by a physician as to the condition and contents of the bowl, and his

analysis of its contents, was proper. People v. Williams, 3 Parker, 84.

**264. Feebleness of person killed.** Where on a trial for murder, the prisoner sets up self-defense, it is competent for the prosecution to show that the prisoner was a large and the deceased a small man. Hinch v. State, 25 Ga. 699.

**265.** Where on a trial for murder, it is proved that the prisoner at the time he committed the assault on the deceased, knew or had reasonable cause to believe that she was suffering from disease, and was in consequence so feeble that his attack would endanger her life, or inflict on her great bodily harm, or hasten her death, it will justify the jury in finding implied malice and in convicting of murder. Com. v. Fox, 7 Gray, 585.

**236. Foot-prints.** Evidence that shoes taken from the feet of the horse which the prisoner rode on the morning of the murder seemed to fit the tracks found near the body of the deceased, is admissible. Campbell v. State, 23 Ala. 44.

**267. Spots of blood.** On a trial for murder, it is not error to refuse to instruct the jury that it is the duty of the prosecution to prove by scientific analysis, that the spots found on the clothes and person of the prisoner were in fact spots of blood. People v. Bell, 49 Cal. 485.

**268. Anonymous letter.** On the trial of the defendant for the murder of his wife, the alleged motive being a desire to marry S. B., an anonymous letter proved to be the prisoner's handwriting, addressed to a person to whom S. B. was about to be married, and received by that person at the time of its date, which was eleven months after the murder—*Held* proper for the consideration of the jury. Stephens v. People, 19 N. Y. 549; affi'g s. c. 4 Parker, 396.

**269. Ill feeling between the parties.** On a trial for murder, evidence that the prisoner was in possession of land, and that the deceased was about to commit a trespass upon it, is admissible to show the state of feeling of the parties toward each other at the time of the homicide; and for the same purpose, it may be proved that lawsuits were pending between them. State v. Zellers, 2 Halst. 220.

**270.** On the trial of a husband for the murder of his wife, it is competent for the prosecution to show a long course of ill treatment by the husband toward the wife. State v. Rash, 12 Ired. 332.

**271.** On a trial for the murder of his wife by the accused by poisoning, it is competent to prove, to show motive, that some time previous to the alleged murder the wife made a complaint against her husband for abandonment, and that he gave a recognizance with surety, on which he had been compelled to pay $2 a week for her support. People v. Williams, 3 Parker, 84.

**272.** On a trial for murder, ill feeling between the prisoner's wife and the wife of the deceased cannot be proved, unless the evidence shows that the prisoner knew of such ill feeling. Hackett v. People, 54 Barb. 370.

**273.** If A. and B. entertain hostile feelings toward each other, and A. goes away and remains absent six months, and then returns, and is found shortly after murdered, and the circumstances point to B. as the murderer, the relations of the parties when last together are competent evidence. Dillon v. People, 8 Mich. 357.

**274.** On the trial of a man for the murder of his wife, which took place on the 8th of July, evidence was held admissible to prove that the parties quarreled the previous fall, as tending to show an alienation of affection, from which the jury might infer that the same state of feeling continued until the commission of the homicide. *Held*, also, that it was proper to prove that several months before the fatal event, the deceased had made a complaint against her husband for an assault and battery, upon which he was arrested and held to bail; also, that the deceased had deposited money in a savings bank to her own credit, that a bank book was issued in her name and left with her sister, and that the defendant complained that he had no money, that what money there was his wife had taken and put in a bank, and that she had the bank book. People v. McCann, 3 Parker, 272.

275. Where an antecedent grudge has been proved, and there is no satisfactory evidence to show that the wicked purpose has been abandoned, it must be clearly shown that the provocation was a grievous one in order to warrant the jury in finding that the blow was struck on the recent provocation and not on the old grudge. Holland v. State, 12 Fla. 117.

276. Slight evidence is admissible to show motive. On a trial for murder, it may be shown that a relative of the accused had, on two successive days, difficulties with deceased, which *originated* about the accused; that in the first of said difficulties accused was present and *sided* with his relative, and in the second his relative and friend was killed by deceased. Kelsoe v. State, 47 Ala. 573.

277. On a trial for murder, evidence that the prisoner, a short time before the homicide, had set fire to the house of deceased, in the night time, was held inadmissible. State v. Merrill, 2 Dev. 269.

278. Where one of several jointly indicted for murder is tried separately, it may be shown that at and before the alleged murder, an unfriendly state of feeling existed between the deceased and the accused not on trial. McMillan v. State, 13 Mo. 30.

279. **Threat.** Where there is a deliberate threat, and the person against whom the threat was made be afterward killed with a deadly weapon by the person making the threat, no mere provocation at the time of committing the act will relieve it of the character of a malicious killing, but it will be presumed to have been in consequence of the previous threat or grudge. Riggs v. State, 30 Miss. 635.

280. **Alienation of affection.** On the trial of the husband for the murder of his wife, evidence of conversations between the prisoner and his wife, and between the prisoner and his brother-in-law, tending to show an alienation of affection on his part, in regard to his wife, is admissible on the question of motive. So, likewise, the will of the wife's father would be competent evidence to show that the prisoner was disappointed in his pecuniary expectations. People v. Hendrickson, 1 Parker, 406; s. c. 10 N. Y. 13, Gardiner, Ch. J., and Selden, J., *dissenting*.

281. On the trial of a husband for the murder of his wife, evidence that during the year previous to the homicide, the prisoner applied to a woman for permission to visit her daughter, and also that the wife for some time before her death was compelled by the prisoner to sleep alone in his kitchen, which was very open and apart from the dwelling-house, was held admissible to show malice and motive. Oliver v. State, 17 Ala. 587.

282. On the trial of an indictment for the murder of a female with whom the prisoner was living as his wife, it was held that, for the purpose of repelling the presumption of conjugal affection, it was competent for the prosecution to prove that the prisoner's lawful wife was still living; that he had married the deceased under a fictitious name; that he had deceived her by false letters and papers, and that he had married again five weeks subsequent to the death of the deceased. State v. Green, 35 Conn. 203.

283. **Adulterous intercourse.** On the trial of the husband for the murder of his wife, proof of a criminal intimacy between him and another woman, at the time of the homicide, is admissible against him. Hall v. State, 40 Ala. 698.

284. Where on the trial of a husband for the murder of his wife, the evidence was wholly circumstantial, it was held that testimony to show that for some months before, and down to the time of the homicide, adulterous intercourse had existed between the prisoner and a certain woman, was admissible to repel the presumption of innocence arising from the conjugal relation. State v. Watkins, 9 Conn. 47.

285. Where facts and circumstances amount to proof of another crime than that charged, and there is ground to believe that the crime charged grew out of it, or was in any way caused by it, such facts and circumstances may be proved to show the *quo animo* of the accused. Therefore, on a trial for murder, continuous illicit intercourse between the wife of the deceased and the prisoner, down to the homicide, may be

proved to show motive. Com. v. Ferrigan, 44 Penn. St. 386.

**286.** On the trial of a husband for the murder of his wife by poison, it was proved that there existed a criminal intimacy between the defendant and the wife of another man, and that there was an insurance on the life of this man, the proceeds of which, on his death, the defendant tried to get. *Held* that evidence that this man died with the same symptoms as the defendant's wife, and that in his last illness, he was attended by the defendant, was not admissible. Schafner v. Com. 72 Penn. St. 60.

**287.** The prisoner and Mrs. L. were indicted for the murder of the husband of Mrs. L. On the separate trial of the prisoner, evidence was offered by the prosecution having a tendency to show an incestuous connection between the prisoner and his sister, Mrs. L. No evidence was offered tending to connect this with the homicide, other than as might be inferred from the fact of the homicide occurring subsequent to the alleged incest; and no other evidence was offered on the subject, except that it appeared that the deceased saw at least one of the acts of sleeping together by the parties, and that he showed no anger and made no objection. *Held* that the evidence was admissible on the question of motive. People v. Stout, 4 Parker, 71.

**288.** On a trial for murder, it was held competent on the question of motive to prove that the prisoner and the deceased had visited the same woman; that immediately after the homicide the prisoner referred to the fact that he warned the deceased to let her alone; that she would be a curse to any one, and now his words had come to pass. McCue v. Com. 78 Penn. St. 185.

**289. Outcries of person killed.** The outcries of a person deceased, during the perpetration of the assault which results in death, or upon the approach of the assailant, are competent evidence on the trial of a party charged with the murder of such person upon the question of the identity of the accused. The outcries of another person who was murdered by the same party a few minutes previous, during the perpetration of the same burglary, but on another part of the premises, are also admissible for the same purpose. State v. Wagner, 61 Maine, 178.

**290. Conduct and situation of defendant.** Where upon a trial for murder, the evidence is wholly circumstantial, the conduct and situation of the accused as affording him opportunities of knowing at what time the deceased left a certain place on the morning of the murder where she was last seen alive; whether or not it was unusual for him to be in that place at such a time, are circumstances which, though weak in themselves, are not so disconnected with the main inquiry as to be inadmissible. Campbell v. State, 23 Ala. 44.

**291.** The fact that the prisoner, after the homicide, wipes the knife with which the fatal wound was given, does not call for any instruction from the court, but should be left to the jury with the other circumstances of the case. Pierson v. State, 12 Ala. 149.

**292. Silence of prisoner.** What the wife of the prisoner said to him upon visiting the scene of the homicide soon after it occurred, and the fact that he made no reply, are admissible in evidence as a part of the *res gestæ*. O'Mara v. Com. 75 Penn. St. 424.

**293.** Where a person charged with crime, who in the course of a judicial inquiry is at liberty to speak or remain silent, does the latter, his silence may be taken into consideration by the jury in deciding upon his guilt. State v. Swink, 2 Dev. & Batt. 9.

**294. Appearance of defendant.** On a trial for murder a witness testified that he called on the defendant the next morning after the homicide, and told him that the police officers were inquiring for him. The counsel for the prosecution asked the witness how the defendant appeared at the time, to which the witness replied, "he turned white, and then laughed." *Held* that the evidence was proper. State v. Nash, 7 Iowa, 347.

**295.** But where the prosecutor has proved how the prisoner appeared the evening of the day of the murder, and on the following day, he will not be permitted to show that,

on the third day after, on being informed of the murder, he seemed surprised, and appeared astonished on being told he was suspected of the murder. Campbell v. State, 23 Ala. 44.

**296. Escape of defendant.** On a trial for murder it is competent to prove that the prisoner, after killing the deceased, in order to escape, shot down another person, and tried to shoot others. Revel v. State, 26 Ga. 275. But evidence is not admissible in defense that the prisoner's brother advised him to fly after suspicions against him began to be entertained, and that he refused to do so. Com. v. Hersey, 2 Allen, 173.

**297. Handwriting of prisoner.** Where on the trial of an indictment for murder it was proved that the prisoner had written his name in the registers of three hotels in as many different cities, it was held that, in considering the question whether the three names were written by the same person, the jury might compare the handwritings in the several registers. Crist v. State, 21 Ala. 137. To render the opinion of experts admissible in evidence in such cases, it must be founded on a proposition which includes all the facts relied upon to establish the theory claimed. Lake v. People, 1 Parker, 495; 12 N. Y. 358.

**298. Possession of money by person killed.** On a trial for murder, evidence is admissible that the deceased had money in his possession, as suggesting a motive for taking his life. Whether the time of the possession of money by him be, or be not, too remote to render the evidence proper, must depend upon the circumstances of each case. Proof that he led a solitary life and had gold in his possession six weeks before the murder, *held* competent. Kennedy v. People, 39 N. Y. 245.

**299. Commission by defendant of other offense.** On a trial for murder, evidence is admissible concerning a fight in which the prisoner was engaged, but at which the deceased was not present, to show a conspiracy on the part of the prisoner and others against the deceased and others, and to connect the two difficulties. People v. Stonecifer, 6 Cal. 405.

**300.** Where a husband was indicted for the murder of his wife, by means of his slave and two other persons as accessories, and was also indicted for the murder of his slave, it was held, upon the trial of the latter indictment, that evidence that the defendant murdered his wife, and that the other defendants were accessories before and after the fact to that crime, and accessories after the fact to the murder of the slave, was admissible in order to show guilty motive. State v. Posey, 4 Strobh. 142.

**301. Suicide of person killed.** The exhibition to the jury during the recess of the court, on a trial for murder, of screws and hooks inserted in a door, and experiments made with them in the presence of the jury, on the trial, for the purpose of ascertaining whether the deceased might not have committed suicide by hanging, should be permitted by the court with great caution. Jumpertz v. People, 21 Ill. 375.

**302. Demeanor of deceased.** On a trial for murder, a witness for the prisoner gave evidence, tending to show that the deceased was in the habit of becoming intoxicated; and he was then asked what her demeanor was when she was then in that condition. *Held* not material; and that if it had been, the facts themselves should have been offered, not the conclusions of the witness. Shufflin v. People, 6 N. Y. Supm. N. S. 215.

**303. Presumptions in favor of defense.** Where on a trial for murder alleged to have been committed after dark, it appeared that the prisoner and the deceased had been on friendly terms, it was held competent for the prisoner to show that immediately after dinner on the day the homicide was committed, the deceased and two other persons had quarreled. Crawford v. State, 12 Ga. 142.

**304.** On a trial for murder by poisoning, the following instruction was held proper: "If the jury are of opinion that the body of the deceased, after being exhumed for analysis, was so exposed that access could be had to it by other parties than those who made the *post mortem* and conducted the analysis, under such circumstances that they could have applied arsenic to it, and

particularly if they believe that R. B., who first charged the prisoner with poisoning his wife, had access to the body and tampered with it, then so much of the analysis as was made after the body was so exposed and tampered with, is not competent evidence against the prisoner." Stephens v. People, 19 N. Y. 549; affi'g 4 Parker, 396.

**305.** On the trial of an indictment for murder, it appeared that the homicide occurred while the deceased was in the act of injuring a mining claim. *Held* competent for the defense to prove that the prisoner was the owner, and in the lawful possession of the claim at the time of the occurrence, as tending to show the condition of the prisoner's mind and the character of the offense. People v. Costello, 15 Cal. 350.

**306.** On a trial for murder, it is not competent to show on the part of the defense, that the accused had been a deformed cripple from infancy, and thereby rendered nervous and sensitive to fear from external violence. State v. Shoultz, 25 Mo. 128.

**307.** On a trial for murder, the prisoner offered to prove that the son and the widow of the deceased had employed counsel to assist the prosecution, and had agreed to pay him a fee in case of conviction. The court admitted evidence of the employment of the assistant counsel, but rejected the testimony as to character of the fee. *Held* proper. Beauchamp v. State, 6 Blackf. 299.

**308.** Where the person injured does not die within a year and a day after the wound is given, the presumption is that his death proceeded from some other cause. State v. Orrell, 1 Dev. 139.

**309. Presumption from record.** Where the jury, on a trial for murder, render a verdict that the prisoner at the bar is guilty, and the clerk in recording the verdict calls him the prisoner at the bar, the record sufficiently shows that the prisoner was present in court when the verdict was rendered. State v. Collins, 8 Ired. 407.

**310.** Where an indictment for murder describes the defendant as a freedman, but the record does not show whether the offense was committed while the defendant was a slave, or after he became free, the appellate court will presume, when necessary to sustain the judgment of the court below, that the offense was proved to have been committed after the abolition of slavery. Tempe v. State, 40 Ala. 350.

(*e*) *Admissions and declarations of defendant.*

**311. In general.** On a trial for murder, the declarations of the parties a short time previous to the homicide, while going toward the place where it occurred, showing why they were going in that direction, and for what purpose they were seeking the deceased, are admissible in evidence as a part of the *res gestæ*. Garber v. State, 4 Cold. Tenn. 161.

**312.** On a trial for murder, what the prisoner had said of the deceased, more than a year before the homicide, was held admissible to show the relation existing between the prisoner and the deceased; also that the prisoner had stated a short time before the alleged murder that the deceased was jealous of her; also, that evidence was admissible to show that a few days previous to the homicide the deceased, who owned the house in which the prisoner was then living, had agreed to rent it to another person, although the prisoner was not present at the making of the agreement. People v. Cunningham, 6 Parker, 398.

**313.** Where, on a trial for murder, the defense is insanity, the subsequent, as well as previous acts and declarations of the prisoner are admissible in evidence. McLean v. State, 16 Ala. 672.

**314.** On a trial for murder, it appearing that a letter was found on the day on which the homicide was committed, near the door of the house in which the deceased was killed, which purported to have been sent by the prisoner, and which was proved to have never been delivered to the person to whom it was addressed, it was held that the prosecution might show by the person who found the letter that he exhibited it to the prisoner, and asked him if he knew anything about it, and that the prisoner, who could neither read or write, at first denied all knowledge of it, but, on being questioned a second time, said "that it looked like a

note that was handed to him by L. P. to carry to his brother, J. P." (mentioning the names of the person by whom the letter was written, and the person to whom it was addressed). Mose v. State, 35 Ala. 421.

315. On a trial for murder, it was proved that the deceased was last seen in company with the prisoner and his wife, whom he was engaged in moving from an adjoining State, and that they were seen after his disappearance prosecuting their journey in his wagon. A person who helped arrest the prisoner, and who was acquainted with him and with the deceased, testified that the prisoner's wife, at the time of the arrest, "ran out of the house, and slapping her husband on the shoulder, said, 'I told you that, Tommy,' to which the prisoner replied, 'Go off, God damn you, and hold your tongue, and speak to nobody about it.'" *Held*, that the wife's exclamation, and the prisoner's reply to her were admissible against him. Liles v. State, 30 Ala. 24.

316. **Conversation between prisoner and deceased.** Where on a trial for murder, it was proved that the prisoner and the deceased were in company several hours previous and up to the homicide, it was held that all that transpired and was said between them during that time was admissible in evidence as part of the *res gestæ*. People v. Potter, 5 Mich. 1.

317. **Threats by defendant.** On a trial for murder, evidence of threats made by the defendant a long time prior to the homicide are admissible in evidence to show malice. People v. Cronin, 34 Cal. 191. And where a policeman was killed, it was held competent to prove that the prisoner, shortly before the homicide, made threats against policemen generally. Dixon v. State, 13 Fla. 636; s. c. 1 Green's Crim. Reps. 687.

318. Where, on a trial for murder by poisoning, it was proved that a short time prior to the procuring and administration of the poison the prisoner had in his possession a slung-shot, which he said was going through J.'s (the deceased's) head, it was held that the evidence was admissible on the question of intent, and that it was proper to produce and identify the slung-shot on the trial. La Beau v. People, 6 Parker, 371; 34 N. Y. 223.

319. On the trial of an indictment against a married woman for the murder of her husband, it was proved that the homicide was committed the 5th of July; that on the 30th of the previous March, a suit for divorce was commenced against her, by her husband, and that a short time before the bringing of the suit, she had declared that her husband would never get a divorce, that she understood he was to be a witness against her, but that he never should live to swear against her, for she would kill him first, and that she would have her revenge against all the witnesses who should testify against her in the divorce suit. *Held*, no ground of exception. Com. v. Madan, 102 Mass. 1.

320. On a trial for murder, it is competent to show that the defendant within an hour of the homicide, declared that "he would kill somebody before twenty-four hours, although he did not expressly refer to the deceased. Hopkins v. Com. 50 Penn. St. 9.

321. On a trial for murder, the prosecution may show that threats were made by the accused against the property of a third person then in the possession of the deceased, but which was found soon after the murder, in the possession of the accused. Mimms v. State, 16 Ohio, N. S. 221.

322. Where on a trial for murder, threats are proved to have been made by the accused against the deceased, he may interrogate the witness as to irritating language employed at the same time by the deceased, which provoked the threats. Threats made by the deceased against the accused are not competent evidence in his favor, unless they were communicated to him previous to the homicide. Atkins v. State, 16 Ark. 568; Coker v. State, 20 Ib. 53. But see *post*, *sub* (g), *contra*.

323. **Testimony before coroner.** On a trial for murder, what the accused testified at the coroner's inquest, before it was ascertained that a murder had been committed, is admissible in evidence against him. Hendrickson agst. People, 10 N. Y. 13, Selden

and Allen, JJ., *dissenting;* approved in Teachout v. People, 41 N. Y. 7.

**324.** At the time of the investigation before the coroner, the prisoner had not been arrested, though he had been charged with the murder. He was cautioned that he was not obliged to testify to anything that might criminate him, and made no objection to be sworn. His testimony contained no confession, but a denial of all knowledge of the homicide. *Held* that his testimony so given by him before the coroner, was admissible against him on a trial for murder. State v. Gilman, 51 Maine, 206.

**325.** On a trial for murder, the prosecution offered in evidence the deposition of the defendant taken on her examination as a witness before the coroner, taken before her arrest, and before any charge had been made against her, although she then knew that she was suspected. When before the coroner she was advised by her counsel that she had a right to refuse to answer in regard to anything which tended to show her guilt. She attended before the coroner under a subpœna, and her deposition was in writing and signed by her after it had been read over to and corrected by her. *Held* admissible. People v. McCranie, 6 Parker, 49.

**326.** On a trial for murder, the prosecution may prove what the prisoner swore before a coroner's jury, at an inquest held on the body of the deceased, though it appear that he and others were at the time under arrest for the alleged murder, the inquiry on such inquest not having been as to the guilt of the accused, but being to ascertain, if possible, who was the murderer. People v. Thayer, 1 Parker, 595.

**327.** On a trial for murder, the fact that the prisoner's answers before the coroner's jury were taken down in writing, is no reason for excluding other statements made by him at other times. Com. v. Dower, 4 Allen, 297.

**328.** On a trial for murder, after proving on the cross-examination of a daughter of the defendant, that she had been examined as a witness before the coroner, and that her deposition had been read over to and signed by her, the prosecution offered in evidence her testimony so taken before the coroner to contradict her. *Held* admissible, although the witness's attention had not been previously called to the subject. People v. McCranie, 6 Parker, 49.

**329. Testimony before magistrate.** On a trial for murder, it appeared that the father of the prisoner had been arrested and examined before a magistrate, on a complaint against him for the same murder, and that on such examination, one of the accused, who was also at the same time under arrest for the murder, voluntarily testified on such examination. *Held*, that his statement made under oath, on such examination, was admissible in evidence against him. People v. Thayer, 1 Parker, 595.

**330. Admissions in affidavit.** On a trial for murder, the voluntary statements of the accused, made in an affidavit for a continuance, are admissible in evidence against him. Coker v. State, 20 Ark. 53.

**331. Confessions.** On a trial for murder, the prisoner's confessions were held admissible, although made to the officer who was carrying him before an examining court, and who had said to him, "If you know anything about the circumstances, it will be better to tell the truth about it," notwithstanding another officer had previously told him that his supposed accomplice had been arrested and shot, which statement was false, and made to induce a confession. King v. State, 40 Ala. 314, Byrd, J., *dissenting.*

**332.** But where a surgeon visiting a prisoner accused of murder, said to her, "You are under suspicion of this, and had better tell all you know, it would have been better if you had told at first," it was held that the prisoner's confession could not be given in evidence. Ann v. State, 11 Humph. 150.

**333.** A boy of the age of twelve years and five months may be found guilty of murder on his confession of the crime, and executed; the capacity to commit a crime implying the capacity to confess it. State v. Guild, 5 Halst. 163.

**334.** Where, on a trial for murder by poisoning, it was proved that the deceased had all the symptoms, and might have died of conjestion of the brain or stomach, and

the same symptoms indicated poisoning by the narcotic stramonium, it was held that these facts, in connection with the confession of the accused that he administered stramonium to the deceased, were not sufficient to warrant conviction. Pitts v. State, 43 Miss. 472.

**335. Acts and declarations of defendant in his own behalf.** On a trial for murder, the prisoner may show what he was doing when he met the deceased, and what his conduct was a short time before the affray which resulted in the killing. Stewart v. State, 19 Ohio, 302.

**336.** A witness being asked by the prisoner's counsel, on a trial for murder, why she put a particular question to the deceased just before his death, replied that she did so in consequence of what the prisoner had told her some two hours previous. *Held* that the prisoner could not give in evidence his conversation with the witness at the time referred to. McLean v. State, 16 Ala. 672.

**337.** On a trial for murder, the prisoner cannot give in evidence his own account of the affair, related immediately after the occurrence, although he and the deceased were the only persons present when the homicide was committed. State v. Tilly, 3 Ired. 424.

**338.** But a statement made by the accused, a few minutes after the homicide, and near the place of its occurrence, is admissible in evidence in his behalf, as a part of the *res gestæ*. Little v. Com. 25 Gratt. 921.

**339.** On a trial for murder, the prosecution proved that immediately after the homicide, the witness saw the prisoner at the post office, where the prisoner stayed ten or fifteen minutes, and that he seemed excited, and to be trying to conceal it. *Held* that the conversation of the prisoner on that occasion was admissible in his favor, as bearing upon the question of his alleged excitement or agitation of mind. Dillin v. People, 8 Mich. 357, Martin, Ch. J., *contra*.

**340.** On a trial for murder, a witness swore that he was thirty or forty yards from the house where the deceased was shot; that upon hearing the report of the pistol, he saw a person, whom he took to be the prisoner, run out, turn and run in, and immediately run out again to where witness stood; that when he came to witness, he seemed greatly agitated and troubled, and at the moment of coming up to him exclaimed that he would not have done it for the world; and that one minute would probably cover the time from the firing until the prisoner uttered the exclamation; two certainly would. *Held* that the exclamation was admissible in evidence. Mitchum v. State, 2 Ga. 615.

**341.** On the trial of several slaves for the murder of another slave, a witness for the State (one B.) testified that "he overtook the defendants immediately after the fight, going towards the house of one W.; that one of them was bleeding profusely from a wound on the back of his head; that on his inquiring how it happened, Frank gave him a false account of the fight, and tried to conceal the fact that any serious hurt had been done to any one, and that when he got to W.'s house, he went in and brought W. out into the yard where the negroes were. W. was afterwards introduced as a witness for the defense, and the prisoners offered to prove by him, that when he came out, Frank, in reply to questions asked by him, made a full and fair statement of all that occurred in the fight—the wounds which he had inflicted upon the deceased, the manner in which the fight had been brought about, and the way in which he had been wounded." *Held* that these declarations were admissible for the prisoners, being a continuation of the conversation commenced with B. Frank v. State, 27 Ala. 37.

**342.** Where, on a trial for murder, it was proved that the accused shot the deceased as he was coming up the street toward the accused's office, it was held that the accused's declaration to the witness, "Yonder comes M. (the deceased) with his yauger," was admissible in evidence, but not the statement which followed, "He intends to shoot or kill me." *Held*, also, that the declaration of the accused, to a witness, before the shooting, that he saw the conduct of the deceased that morning, which conduct was shown by the witness to have have been violent and threatening, as he passed with

his gun, was admissible, as proving the accused's cause of alarm. Monroe v. State, 5 Ga. 85.

**343.** On a trial for murder, in the course of the examination of the accused as a witness in his own behalf, a conversation was elicited tending to establish admissions by him. *Held* that he was entitled to state the exact words constituting the alleged admissions, and also the whole conversation relating to the subject-matter. People v. Murphy, 39 Cal. 52.

**344. Declaration of third person in defendant's favor.** On a trial for murder, the declaration of a person who had left the State, and who had as strong motives as the prisoner to commit the deed, that the prisoner was not the right man, is not admissible. State v. Terrell, 12 Rich. 321.

*(f) Admissions and declarations of codefendant.*

**345. Statements in relation to occurrence.** Where on the trial of A. for murder, a conspiracy to commit the crime is proved to have been entered into by A. and B., the declarations of B. are entitled to the same weight as if made by A. People v. Geiger, 49 Cal. 643.

**346.** On a trial for murder, the court permitted a witness to detail statements made to him by one D., in the absence of the accused, ten days previous to the homicide, it having been first proved that the accused, D., and others, were present at and participated in the murder. *Held* proper. Rice v. State, 7 Ind. 332.

**347.** On a trial for murder, the evidence tended to prove that certain moneys and watches were in the possession of the deceased; that after the murder, part of the money was found in the possession of the prisoner; that the watches produced on the trial belonged to the deceased; that subsequent to the homicide, the prisoner was at B.'s and in communication with him, and that the watches were found concealed under B.'s barn. *Held* that the conduct and declarations of B., at the time and place of finding the watches, were admissible in evidence, to show in connection with other proof that B. was made custodian of the watches by the prisoner. Mimms v. State, 16 Ohio, N. S. 221.

**348. Threats.** On a trial for murder, threats made by one of several defendants who were engaged in a conspiracy a few hours before the killing, in the presence and hearing of the others, and also immediately afterward, are admissible in evidence against the others. Mask v. State, 32 Miss. 405.

**349.** On the separate trial of A., who was jointly indicted with B. and C., for murder, the threats of the latter against the deceased, made when A. was not present, were held admissible in evidence, it having been proved that the parties were acting in concert in the prosecution of a common design, and that although temporarily separated, such separation was for the purpose of providing weapons and making preparations to carry their design into execution. Gardner v. People, 3 Scam. 84.

**350.** Three brothers, N., J. and W., were indicted for murder, N., as accessory before the fact, and J. and W. as principals. Upon the trial of J. and W., it was held that the prosecution, without having proved any confederacy between J. and N., might prove expressions of hostility toward the deceased, uttered to N., in the presence of J., but not responded to or acquiesced in by him, as testimony which in connection with the relations existing between J. and N. might tend to show a motive on the part of J. for committing the crime. State v. Gordon, 1 R. I. 179.

**351.** It is not error on a trial for murder to refuse to permit the accused to prove that another person had made threats to kill the deceased just before the homicide, and that immediately after the homicide, such other person left the country and has not since been heard from. Crookham v. State, 5 West Va. 510.

**352.** On a trial for murder, threats of other persons against the deceased, or admissions by them that they had killed him, are hearsay, and inadmissible. State v. Duncan, 6 Ired. 236.

**353. Husband and wife.** On a trial of a wife for murder, the declarations of the

husband to a third person, that he made her commit the crime, are not competent evidence in her favor. Edwards v. State, 27 Ark. 493.

354. But on a trial for murder, the exclamation and acts of the wife of the prisoner at the time of the homicide, and in the presence of the prisoner, tending to show complicity between the prisoner and his wife in the killing, are admissible in evidence against him. People v. Murphy, 45 Cal. 137.

355. Under an indictment charging two, one as principal in a murder, and the other as present, aiding and abetting; if they are tried separately, the wife of one is a competent witness for the other. Wakeman v. State, 4 Sneed, 425.

356. **Declarations of witness.** The testimony of a witness taken down in writing on a coroner's inquest, in the absence of the prisoner, by the coroner, signed by the witness and returned to the clerk, is not admissible in evidence against the prisoner, on a trial for murder, after the death of the witness. State v. Campbell, 1 Rich. 124.

357. Where on a trial for murder, a witness on cross-examination denied that he had made threats against the deceased, it was held that such threats might be proved for the purpose of impeaching him. Gaines v. Com. 50 Penn. St. 319.

358. On the trial of an indictment for the murder of one Blanchard, an accomplice conveyed by his testimony in chief the idea that he was a reluctant and unwilling abettor in the crime, charged the prisoner with the actual execution of the murder, and exonerated himself from any further criminality than going with the accused to whip or chastise Blanchard. *Held* that the question on cross-examination, "Did you not a few days before the homicide state that you intended to kill Blanchard?" was proper to contradict the witness and affect his credibility with the jury. People v. Williams, 18 Cal. 187.

359. **Record of conviction or acquittal.** An indictment charged A., B. and C. as principals in murder, but alleged that the fatal blow was given by A., and that B. and C. were present aiding and abetting him. The defendants being tried separately, and A. convicted, it was held that the record of A.'s conviction was not admissible in evidence on the trial of his codefendants. People v. Bearss, 10 Cal. 68; affi'd People v. Newberry, 20 Cal. 439. And where A., B. and C., being jointly indicted, A. as principal and B. and C. as aiders and abettors in the murder of D., and A. tried first and acquitted, it was held that the record of his acquittal was not competent evidence in favor of B. and C. State v. Phillips, 24 Mo. 475; State v. Ross, 29 Ib. 32.

(*g*) *Declarations of person killed.*

360. **Complaint.** On a trial for murder, the complaint of the deceased of pain within two hours after the mortal wound was inflicted is competent evidence. Livingston v. Com. 14 Gratt. 592.

361. **Statement as to cause of injury.** Where a person has received a mortal wound, his statement as to the cause of the injury, made immediately afterward, is admissible in evidence as part of the *res gestæ*. Donnelly v. State, 2 Dutch. 601.

362. But in order to render the declaration of the deceased after he received the mortal wound part of the *res gestæ*, it must have been made recently after the injury, and before he had time to make up a story. Hill v. Com. 2 Gratt. 594.

363. On a trial for murder, a witness testified that he heard the deceased crying for help; that he called out to him to know what was the matter, and that the deceased replied that somebody was killing him and cutting him with a knife, and that it was the accused. Another witness testified that he heard the deceased calling a number of times; that he asked him what was the matter; that he answered that "C." (the accused) "has stabbed me; he has killed me; for God's sake run for the doctor." *Held* admissible as part of the *res gestæ*. Crookham v. State, 5 West Va. 510.

364. On a trial for murder, the evidence tended to show that the prisoner, after fatally stabbing the deceased in the night, immediately ran away. *Held* that the exclamation of the deceased to a person who went to him a moment afterward, that the

prisoner had stabbed him, was admissible as a part of the *res gestæ*. Com. v. Hackett, 2 Allen, 136.

**365.** On a trial for murder, evidence is admissible that the defendant and the deceased after the occurrence, and while the deceased believed he was going to die, talked it over, and that the deceased said he was to blame and asked the defendant to forgive him. Hurd v. People, 25 Mich. 405.

**366.** On the trial of an indictment for murder, it was proved that the deceased, who was an aged woman, was found lying dead near her dwelling-house, about twelve o'clock of the day, with her face and head in a pool of water, and that the prisoner was in her employ as a hired man and the only other member of her family. *Held* that the evidence offered by the defense that the deceased a year before her death had stated to the witness that she was subject to fits, and had several times fallen upon her face when alone, was inadmissible on the ground that it was mere hearsay. State v. Dart, 29 Conn. 153.

**367.** On a trial for murder by poisoning, the declarations of the deceased tending to throw light upon the cause of death, or upon any criminal relation with the proximate cause, are proper and original evidence; as that the deceased several days before her fatal illness made a threat that she would poison herself. Shaw v. People, 5 N. Y. Supm. N. S. 439.

**368. Declarations of deceased as to his intentions.** Where on a trial for murder the evidence was wholly circumstantial, it was held that declarations of the deceased made the day before his death as to the object and purpose of a contemplated journey which he took, were admissible in explanation of a conversation had in the presence of the accused, and as a part of the *res gestæ*. Carroll v. State, 3 Humph. 315.

**369.** Although when it is necessary to inquire into the nature of a particular act or the intention of the actor, proof of what the person said at the time of doing it is admissible, yet to render the declaration competent, the act with which it is connected must be pertinent to the issue. Where on a trial for murder it was proved that the accused lived apart from his wife in the city of New York, and that she left home Saturday night and returned the next morning ill, and continued so until she died, apparently from poisoning, it was held that what the deceased said when she went away Saturday evening as to where she was going was not admissible in evidence; and where such proof was given, and that she said she was going with clothing for her husband, it was held error. People v. Williams, 3 Parker, 84; s. c. 1 N. Y. Ct. of Appeals Decis. 596.

**370.** It is not competent for the defendant on a trial for murder to prove that the deceased, before he left home, told the witness that he intended to leave soon, and that when he left he would never make himself known or be heard from by his family. State v. Vincent, 24 Iowa, 570.

**371.** On a trial for murder, it is not competent to show that the day previous to the homicide, the deceased, the prisoner not being present, stated that he was going to the place where his body was afterward found, and that the prisoner was going with him. Kirby v. State, 2 Yerg. 383. But on the trial of an indictment for murder it was held competent to prove, for the purpose of identifying the dead body as being that of a person who was seen the night before, that he then stated that a certain horse had got away from him, and upon being told that the defendant had such a horse, said that the defendant was the man he wished to see, and thereupon went in pursuit of him. Hamby v. State, 36 Texas, 523; s. c. 1 Green's Crim. Reps. 650.

**372.** On the trial of an indictment for murder alleged to have been committed while the deceased and the defendant were traveling in company, evidence is admissible as to what the deceased said on the journey as to where they had come from, and where they were going, although the declarations were made in the defendant's absence. State v. Vincent, 24 Iowa, 570.

**373.** On the trial of an indictment for murder, evidence offered tending to prove that the deceased, who was the father of

the defendant's wife, was and had been in league with one C. to induce the defendant's wife to leave him and elope with C., was rejected by the court. *Held* that the acts, sayings, and doings of the deceased of a a recent date, which had come to the knowledge of the defendant, should have been admitted, as tending to show the state of the defendant's mind. Cheek v. State, 35 Ind. 492.

374. **Must, in general, have come to defendant's knowledge.** As a general rule, on a trial for murder, a declaration made by the deceased, which did not come to the knowledge of the accused, is not admissible in evidence in behalf of the defendant. Messner v. People, 45 N. Y. 1; Edgar v. State, 43 Ala. 45; Powell v. State, 19 Ib. 577; Hoye v. State, 39 Ga. 718.

375. Therefore, declarations of the deceased, made several hours previous to the homicide, in the absence of the defendant, tending to prove the defendant's presence at the house of the deceased the night of the murder, not being a part of the *res gestæ*, or made *in extremis*, are not admissible in evidence. People v. Carkhuff, 24 Cal. 640.

376. A. made an affidavit before a justice that B. had assaulted and wounded him, and on the same day gave his deposition upon the same charge before magistrates in the absence of the accused. Afterward A. died. On the trial of B. for the murder, it was held that the affidavit and deposition could not be read in evidence by the prosecution. Collier v. State, 8 Eng. 676.

377. The declarations of the deceased, that he had no money, made several weeks before the murder, are not competent evidence. Kennedy v. People, 39 N. Y. 245.

378. **Threats of deceased.** Threats made by the deceased a short time before the homicide, showing an angry and revengeful spirit toward the prisoner, and a determination to do him violence, which were communicated to the prisoner before the homicide, may be given in evidence for him. Dupree v. State, 33 Ala. 380. Proof of such threats made by the deceased the day prior to and down to the time of the homicide is admissible as part of the *res gestæ*. State v. Keene, 50 Mo. 357.

379. Evidence that the defendant had prosecuted the deceased for embezzlement, and that in consequence the deceased had threatened to kill him, is admissible in connection with other circumstances to show that the defendant was in fear of his life from the deceased, and that the killing was in self-defense. Monroe v. State, 5 Ga. 85.

380. On a trial for murder, threats of personal violence made by the deceased, and not communicated to the prisoner, when connected with the main fact, are admissible on the question as to which was the aggressor. Burns v. State, 49 Ala. 379.

381. On the trial of an indictment for murder, threats made by the deceased against the accused, shortly previous to the homicide, are admissible in evidence as part of the *res gestæ*, as tending to explain the conduct and motives of the deceased, although such threats were not communicated to the defendant. Pitman v. State, 22 Ark. 354.

382. On a trial for murder committed in an affray, it it competent, for the purpose of characterizing the conduct of the deceased toward the accused at the time of their meeting, to prove that the deceased had made threats against the accused, although such threats did not come to the knowledge of the latter until after the homicide. Campbell v. People, 16 Ill. 17.

383. Where, on a trial for murder, evidence had been given making it a question for the jury, whether the case was one of excusable homicide, on the ground that the act was perpetrated by the accused in defending himself against an attempt by the deceased to kill or inflict some great bodily injury upon him, it was held that violent threats made by the deceased against the accused shortly before the occurrence were admissible in evidence, although such threats were not communicated to him. Stokes v. People, 53 N. Y. 164.

384. On a trial for murder, it is competent to prove that a week before the homicide the deceased threatened to kill the defendant, which threats were not communicated

to him, it being already in proof that the defendant was put in fear of the deceased on that occasion, and had left his place of business to avoid an attack of which he was in imminent peril at the time of the killing. State v. Dodson, 4 Oregon, 64.

385. Where, on the trial of an indictment for murder, a witness for the defendant had testified that the deceased, on the night of the homicide, had a bowie knife, which the prosecution denied, it was held that the fact that the deceased had such a knife, was proper evidence to go to the jury, and that the deceased made threats against the life of the defendant, without reference to whether the threats had or had not been communicated to the defendant. Holler v. State, 37 Ind. 57; see Cluck v. State, 40 Ib. 263.

386. Where, on a trial for murder, the question was, which of the parties assaulted the other, the defendant contending that the deceased was the aggressor in the fatal rencounter, and had placed the defendant in danger of his life, from which peril he could only extricate himself by killing his assailant, it was held that the declarations of the deceased at the time of borrowing a pistol, which was found in his possession after the homicide, were admissible in evidence as a part of the *res gestæ*, without proving that the defendant had knowledge of them. People v. Arnold, 15 Cal. 476; and see People v. Scoggins, 37 Cal. 676.

387. Where, on a trial for murder, the defense relied on is an insane delusion on the part of the prisoner, that the deceased intended to injure him, the declarations of the deceased, though made in the prisoner's absence, are admissible to show his state of mind toward the prisoner at that time, as tending to show some ground for the prisoner's feeling toward him. Com. v. Wilson, 1 Gray, 337.

388. Where, on a trial for murder, it was proved that the deceased had threatened to kill the accused, and that the threats were communicated to the prisoner, it was held competent for him to prove other threats which were not communicated, as tending to confirm the proof of the other threats, and to show that the deceased intended to attack the prisoner. Cornelius v. Com. 15 B. Mon. 539.

389. On the trial of an indictment for murder in an affray, it is not competent for the defendant to prove that the deceased, recently before the affray, threatened to shoot him. McMillan v. State, 13 Mo. 30.

390. **In case of conspiracy.** When, on a trial for murder, a conspiracy is proved to have existed between the deceased and others to co-operate in any hostile meeting between the prisoner and the deceased, the declarations of any of the party, with reference to the hostile meeting, are admissible in evidence. Cornelius v. Com. 15 B. Mon. 539.

391. On the trial of a keeper of a house of ill-fame, for murder committed in resisting the attempt of the deceased and others to gain admittance by violence, it was held competent to prove that threats had been made a week previous to the assault by the persons who had broken into the house, that they would return some other night and break in again. People v. Rector, 19 Wend. 569.

392. **Must have been overt act.** Apprehension from a previous threat, followed by no overt act, will not justify a homicide. Therefore, on a trial for murder, evidence of what the deceased had said about the prisoner three weeks before the killing, in order to show, with other facts, whether at the time of the occurrence the prisoner was justified in apprehending danger from the deceased, is not admissible. Real v. People, 55 Barb. 551; affi'd 42 N. Y. 270.

393. However desperate and abandoned the character of the deceased may have been, and however numerous and violent the threats he may have made, he does not forfeit his claim to life, unless by some act at the time of the killing, he made it appear that he was about to put his threats into execution. Pritchett v. State, 22 Ala. 39.

394. Previous bad treatment will not justify a homicide; therefore, evidence that the deceased previously clubbed the prisoner inhumanly when nearly insensible from intoxication, to justify the apprehension of similar treatment at the time of the homi-

cide, is not admissible. Real v. People, 55 Barb. 551; 42 N. Y. 270.

**395. In corroboration.** Where, on a trial for murder, the declarations of the deceased have been proved, and an attempt has been made by the defense to destroy the effect of such declarations, by showing the bad character of the deceased, the prosecution, in order to corroborate the evidence, may show that the deceased made other declarations to the same effect, a few moments after he was wounded, though it did not appear that he was then under the apprehension of immediate death. State v. Thompson, 1 Jones, 274.

**396. In rebuttal.** Proof, on a trial for murder, of the acts and declarations of the deceased for several months previous to the homicide, for the purpose of proving that she was in a cheerful and healthful mental condition, and not predisposed to suicide, is only proper as rebutting evidence after the testimony for the defense is closed. Jumpertz v. People, 21 Ill. 375.

**397. How to be regarded by jury.** Where during the quarrel immediately preceding the fight between the prisoner and the deceased, the latter said that the former had for some time been offended with him, giving reasons for the assertion, but which was denied at the time by the prisoner; it is the duty of the court to charge the jury, that the statement of the deceased is no evidence of its truthfulness, and should only be regarded by them as part of the *res gestæ*, to show under what circumstances the fight between the parties began. Haile v. State, 1 Swan, 248.

*(h) Dying declarations.*

**398. General grounds of admissibility.** By the common law, the declarations of a person mortally wounded, made under the apprehension of death, are admissible in evidence on a trial for murder. Woodside v. State, 2 How. 655; Campbell v. State, 11 Ga. 353; Nelson v. State, 7 Humph. 542; Smith v. State, 9 Ib. 9; Hill v. Com. 2 Gratt. 594; Moore v. State, 12 Ala. 764.

**399.** Such declarations are only admissible in cases of homicide, and are restricted to the act of killing, and the circumstances immediately attending it, and forming part of the *res gestæ*. Leiber v. Com. 9 Bush, 11; Wright v. State, 41 Texas, 246.

**400.** Dying declarations are only admissible where the death of the person killed is the subject of the inquiry, and the circumstances of the death are the subject of the dying declarations. People v. Davis, 56 N. Y. 95; Lambert v. State, 23 Miss. 323.

**401.** In case of homicide, declarations by one mortally wounded, and who is conscious of his condition, are admissible in evidence, not only as to the perpetrator, but also as to the facts that attended the transaction. Campbell v. State, *supra;* People v. Knapp, 26 Mich. 112; s. c. 1 Green's Crim. Reps. 252; approving Hurd v. People, 25 Mich. 405.

**402.** The declaration of a person badly wounded, that the defendant had stabbed her, made immediately after the transaction, though with such an interval of time as to permit her to go from her own room up stairs, into another room, is admissible in evidence after her death, as a part of the *res gestæ*. Com. v. McPike, 3 Cush. 181.

**403.** Dying declarations as to the previous conduct of the prisoner are admissible. State v. Terrell, 12 Rich. 321. But they must be confined to what occurred in immediate connection with the offense and forming a part of the *res gestæ*. State v. Shelton, 2 Jones, 360.

**404.** Whether the statements of the deceased as to previous difficulties and threats of the prisoner can be received—*query*. Declarations that the prisoner's boys followed the deceased and clubbed him, immediately preceding the encounter, which was the cause of his return to his house where the fatal blow was struck, being a part of the *res gestæ* are admissible. But declarations that the prisoner had often threatened to kill the deceased, made after the deceased had related the circumstances of the stabbing, and entirely disconnected from it, it not appearing that the threats were made to the deceased or to others who told him, are not admissible. Hackett v. People, 54 Barb. 370.

**405.** The prosecution has a right to prove the dying declarations, notwithstanding there may be other witnesses by whom the same facts might be shown which are sought to be established by the dying declarations. People v. Green, 1 Parker, 11.

**406. Substance of declaration sufficient.** The substance of dying declarations may be proved. Ward v. State, 8 Blackf. 101. It is not necessary that the declarant should state everything that constituted the *res gestæ* of the subject of his communication; but that his statement of any given fact should be a full expression of all he intended to say as to such fact. State v. Patterson, 45 Vt. 308. The fact that the witness lost the writing containing the declarations, has no bearing upon their admissibility, but only as to the weight which ought to be accorded to his recollection. Ib.; s. c. 1 Green's Crim. Reps. 490.

**407.** Where the deceased being asked who shot him, replied "the prisoner," it was held that the declaration could not be excluded because from weakness and exhaustion, he was not able to answer another question put to him immediately afterward. McLean v. State, 16 Ala. 672.

**408.** But where it appeared that the declarations were intended by the deceased to be connected with, and qualified by other statements, and that before the narrative was completed it was interrupted, and left unfinished, it was held that such partial declarations were not admissible in evidence. Bass' Case, 3 Leigh, 786.

**409.** Where dying declarations were repeated by a person who heard them to a justice of the peace, by whom they were reduced to writing and afterward approved and sworn to by the deceased, but it appeared that it only contained a portion of what the deceased said, and that material statements made by him were designedly omitted, it was held that the writing was not admissible in evidence. Brown v. State, 32 Miss. 433.

**410. Opinions not admissible.** The mere expression of opinion by the deceased, made when *in extremis*, is not admissible in evidence. Binns v. State, 46 Ind. 311; Whitley v. State, 38 Ga. 50; State v. Williams, 67 N. C. 12.

**411.** On a trial for murder by poisoning, it was proved that the deceased stated that the defendant and B. were the cause of all her sufferings; and again in answer to an inquiry of the cause, that she suspected it was C. (referring to the defendant), and B. *Held* that neither of these statements was competent evidence as a dying declaration. Shaw v. People, 5 N. Y. Supm. N. S. 439.

**412.** On a trial for murder, a witness was asked whether the deceased, after he declared he was dying, and while dying, made any declaration as to how he received the wounds, and by whom they were inflicted. The witness answered that the deceased said it "was hard to die by the hand of another and leave his family." *Held* error to admit this declaration in evidence. Crookham v. State, 5 West Va. 510.

**413.** But on a trial for murder, it appeared that the deceased was shot at night while riding with a companion, who saw the flash of the gun but not the defendant. The deceased, about fifteen minutes before he died, stated that the defendant was the man who had killed him. *Held* admissible as a dying declaration, and that it was for the jury to say whether the statement was made by the deceased as a fact known to him, or only as his opinion. State v. Quick, 15 Rich. 342.

**414.** And where the deceased, in making his dying declaration, stated that the "fatal wound was given without any provocation on his part," it was held not incompetent as matter of opinion. Wroe v. State, 20 Ohio, N. S. 460.

**415.** On a trial for murder, the dying declarations of the deceased as to the state of feeling existing between him and the prisoner are not competent evidence for the prosecution. Ben v. State, 37 Ala. 103.

**416.** Where on a trial for murder, it appeared that the homicide occurred in the night, and was committed by some unknown person, it was held that the dying declarations of the deceased that the prisoner, who was one of his employer's slaves "was the only slave on the place who was at enmity

with him," were not admissible in evidence against the prisoner. Mose v. State, 35 Ala. 421.

417. On a trial for murder, dying declarations were offered in evidence, and the witness, who testified to the precise words used, was asked whether the deceased did not so express himself as to convey the idea that it was a mere opinion. *Held* that as it was for the jury to judge of the import of the language employed, the question was improper. Nelms v. State, 13 Smed. & Marsh. 500.

**418. Who competent to make.** If the declarant would not have been permitted to testify had he survived, either because he was too young to comprehend the nature of an oath, or was disqualified by infancy or imbecility of mind, his dying declarations are not admissible. Lambert v. State, 23 Miss. 323; State v. Williams, 67 N. C. 12. When admitted, they are to be received with the same degree of credit that the testimony of the deceased would have been if examined on oath. Green v. State, 13 Mo. 382.

419. In New Jersey, it was held that dying declarations made by a person who did not believe in a God and in a future state of rewards and punishments were not admissible in evidence. Donnelly v. State, 2 Dutch. 463.

**420. Must have been made in the belief of approaching and inevitable death.** It is error to admit dying declarations in evidence, without first ascertaining that the deceased was conscious of his condition before making them. Montgomery v. State, 11 Ohio, 424; People v. Williams, 3 Parker, 84; Dixon v. State, 13 Fla. 636; s. c. 1 Green's Crim. Reps. 687. Written declarations were held inadmissible, where there was nothing to show except from the writing, that the deceased thought he was *in articulo mortis*. State v. Medlicott, 9 Kansas, 257; s. c. 1 Green's Crim. Reps. 227.

421. To make the statement of a deceased person evidence as a dying declaration, it is not necessary that when he made it he was in the very act of dying. It is sufficient if he was under the apprehension of approaching dissolution. State v. Tilghman, 11 Ired. 513. On the trial of an indictment for manslaughter, a statement made by the deceased under a sense of impending death was held admissible as a dying declaration, though he lived seventeen days afterward. Com. v. Cooper, 5 Allen, 495.

422. Although to render dying declarations admissible, it must appear that they were made under a sense of impending death, it is not necessary that they be stated at the time to be so made, it is enough, if it satisfactorily appears in any mode, that such was the case. Daniel v. State, 8 Smed. & Marsh. 401; Morgan v. State, 31 Ind. 193.

423. Where the deceased when first discovered, after he was mortally wounded, said "Oh, my people," but nothing more, it was held not sufficient to show the apprehension of immediate death. Lewis v. State, 9 Smed. & Marsh. 115. And where, on a trial for manslaughter, the judge ruled that if the deceased believed his end was near at hand, his dying declarations were admissible, although he might think there was a slight chance of life, it was held error. Com. v. Roberts, 108 Mass. 296.

424. On a trial for murder, a statement of deceased was offered in evidence as his dying declaration, which was taken down and sworn to the day before his death, but not signed by him, he being too far gone to write his name. The language of the deceased was not taken down, but only the substance; and when read over to him he said it was substantially correct. Upon his inquiry of the attending surgeon whether there was any hope, he had been told that he could not recover. The deceased was under the influence of morphine; and to some of the questions he nodded assent, and to others gave answers. At times it became necessary to rouse him. He was visited by his spiritual adviser, and partook of the last rites of the church before the declarations were made, and seemed to have lost all expectation of recovery. *Held*, that although the declarations were not entitled to much weight, yet that they were admissible in evidence. Murphy v. People, 37 Ill. 447.

425. Where the declarant said "she knew

she should die," but added that "if she lived to get well she would never go to C.'s again," it was held that as the latter expression showed the hope, if not the expectation of recovery, her declarations were not admissible. State v. Center, 35 Vt. 378.

**426.** If the declaration was competent when uttered, a subsequent hope of recovery will not render it incompetent. State v. Tilghman, 11 Ired. 513; Dunn v. State, 2 Ark. 229. On a trial for murder it appeared that the deceased made a statement relative to the occurrence, on the 8th of January, about two hours after he received his wounds, he at the time having no expectation of recovery, but that he survived ten days longer, during which he had some hope that he might live. *Held* that his statement was admissible in evidence as his dying declaration. Swisher v. Com. 26 Gratt. 963.

**427.** To render dying declarations admissible, it is not necessary to prove the existence of a belief of approaching dissolution by any express statement of the declarant to that effect, but it may be inferred from the tenor of his conversation, the nature of his sufferings, and his whole demeanor. People v. Williams, 3 Parker, 84; People v. Sanchez, 24 Cal. 17; Com. v. Murray, 2 Ashm. 41; Johnson v. State, 47 Ala. 9; Hill v. Com. 2 Gratt. 594; McLean v. State, 16 Ala. 672.

**428.** Where the deceased, being mortally wounded, and very weak from the loss of blood, said that he must die, his account, in a conversation of short duration, as to the manner in which the conflict began and was continued between him and the prisoner, was held admissible as a dying declaration, although the witness could not say whether the opinion expressed by the deceased, that he must die, was before or after his narration of the facts. State v. Peace, 1 Jones, 251.

**429.** The deceased was poisoned on Sunday, and from that time until Tuesday evening, when she died, was in great agony. At intervals during her illness, she used such language as the following: "I cannot stay here; I must go; good people, I am gone;" and her physician considered her at the point of death until she died. Tuesday forenoon she asked the doctor if he could help her, to which he replied that he thought he could. *Held*, that her dying declarations were admissible in evidence. Oliver v. State, 17 Ala. 587.

**430.** On a trial for murder, the statement of the deceased having been offered in evidence as his dying declaration, it was objected that he told P. he did not believe the wound would kill him. The father of the deceased thereupon testified that he was with his son about an hour after he had made the remark to P.; that deceased said that although he had told P. he did not think he would die, yet he believed he would die, and believed so when he made the statement to P., but was induced to tell P. he did not think he would, because a man who had been shot in the neighborhood, and had said he would die, got well and was disgraced. *Held* that the statement of the deceased was admissible in evidence. Young v. Com. 6 Bush, Ky. 312.

**431.** On the same day the mortal wound was received, an attendant told the deceased that he thought his deposition ought to be taken, as he must inevitably die before morning. The deceased replied he thought so to. Afterward, the deceased exclaimed, "Oh Lord, I shall die soon!" His declarations were written out, read over to him twice, and signed by him. The physician, the evening before, had held out to the deceased some hope of recovery, but told him his chance was small. The deceased lived some ten days after making the declaration. *Held* that the declarations were admissible. McDaniel v. State, 8 Smed. & Marsh. 401.

**432.** Where, in a case of murder by poisoning, the deceased, on the third day of her illness, said to her nurse that she expected to die because she was poisoned, and afterward made a similar declaration, and at no time supposed she would get well, her declarations made after the third day of her illness, down to her death, on the twelfth day, were received in evidence, although it did not appear that either of her attending physicians had told her she was going to die,

and one of them had spoken to her encouragingly of her prospect of recovery. People v. Grunzig, 1 Parker, 299.

433. Where by direction of the attending physician, and in his presence, W. told the deceased the day before her death, that she could not live, whereupon she asked the physician to hear a communication she wished to make, and proceeded to give an account of the conduct of the accused during her illness, tending to show that he had several times during her illness administered arsenic to her—it was held that such communication was admissible as a dying declaration. People v. Green, 1 Parker, 11.

434. **Declarations of husband.** The declarations of a husband are admissible on the trial of his wife for the murder. People v. Green, *supra*.

435. **Declarations of other person killed at the same time.** Where another person was mortally wounded by the accused at the same time and place that he perpetrated the killing for which he is on trial, the dying declaration of such other person is admissible in evidence. State v. Wilson, 23 La. An. 558.

436. Where A., B. and C. are murdered with poison by D., on the trial of D. for the murder of A. the dying declarations of B. are admissible in evidence. State v. Terrell, 12 Rich. 321.

437. But, on a trial for murder, it was proved that the body of the deceased was found, with marks of violence upon it, in the highway, about three hundred yards from his house; that his wife was found at the same time wounded and in a dying condition, and there was evidence tending to show that the house had been robbed. *Held* that the dying declarations of the wife were not admissible as evidence in behalf of the prosecution. Brown v. Com. 73 Penn. St. 321; 76 Ib. 319; s. c. 2 Green's Crim. Reps. 511.

438. **Declarations of codefendant.** Where some of several charged with crime die before trial, and make dying declarations, such declarations are not admissible in evidence on behalf of the others. Resp. v. Langcake, 1 Yeates, 415.

439. **How taken.** Dying declarations are governed by the same rules as the testimony of a witness sworn in the case, except as to the manner of conducting the examination, which may be by leading questions, and even earnest and pressing solicitation, although by such a course their credibility is impaired. People v. Sanchez, 24 Cal. 17.

440. Where a female who was mortally wounded in the head and unable to speak, but who was conscious that she could not survive the injury, was asked if the fatal blows were dealt by C., and told, if he did, to squeeze the hand of her interrogator, which was accordingly done by her, it was held admissible as a dying declaration. Com. v. Casey, 11 Cush. 417.

441. On a trial for murder it appeared that the deceased and the prisoner both understood the English language. The dying declaration of the deceased that the prisoner shot him was proved to have been made in English, in reply to a question addressed to him in that language, and the answer of the prisoner, given in Chinese, was sworn to by a Chinaman who understood both languages. *Held* proper. People v. Ah Wee, 48 Cal. 236.

442. A statement was written by an attorney during the night on which the deceased died, the attorney putting questions to him which he made an effort to answer, but could not. The sick man's friends then "explained the questions to him, and made the answers, to which he assented only by nodding his head." The statement, consisting of the answers thus made, was then "read over to him by the attorney, slowly and distinctly, and he signified his assent thereto by nodding his head." He spoke but a few words afterwards, and had frequently to be aroused, and seemed, while the statement was being read to him, to be in a stupor. *Held* that the statement was not admissible as a dying declaration. McHugh v. State, 31 Ala. 317.

443. It is not essential to the admissibility of dying declarations, when reduced to writing and signed by the deceased, that there should be a subscribing witness. Ib.

444. **Admissibility of, how determined.**

The admissibility of dying declarations is a question of law to be determined by the court. People v. Anderson, 2 Wheeler's Crim. Cas. 390; Smith v. State, 9 Humph. 9; State v. Burns, 33 Mo. 483; and is subject to review on writ of error. Donnelly v. State, 2 Dutch. 463; Lambert v. State, 23 Miss. 323.

**445.** The court must decide upon the admissibility of dying declarations; and the truth of the facts put in evidence to show that the declarations were made in view of speedy death, is a question exclusively for the court. State v. Simon, 50 Mo. 370.

**446.** But where dying declarations are inconsistent with each other, it is the duty of the jury to determine which, or whether either, is entitled to credit. Moore v. State, 12 Ala. 764.

**447.** Where the offer to introduce a dying declaration shows a *prima facie* case for its admission, the evidence is received and left to the jury to decide whether the deceased was really in such a condition, or used such expressions as that the apprehension in question might be inferred. Com. v. Murray, 2 Ashm. 41; Com. v. Williams, Ib. 69; People v. Green, 1 Parker, 11.

**448. How proved.** A witness may detail the substance of dying declarations when he is not able to give the precise language. Montgomery v. State, 11 Ohio, 424.

**449.** Where on a trial for murder, the dying declarations of the deceased are offered in evidence, it is not error to permit witnesses to state the substance of what the deceased said as to his apprehensions of death, and to receive the same through interpreters who sometimes differ in their rendition of words into English. In such case, the condition and state of mind of the deceased, with all attendant circumstances are proper for the consideration of the jury. Starkey v. People, 17 Ill. 17.

**450.** The fact that a written memorandum of the dying declaration verified by deceased was read in evidence is no objection to the introduction of independent oral proof of the same or similar dying declarations of deceased. People v. Vernon, 35 Cal. 49.

**451.** Although when dying declarations have been taken down in writing and signed by the deceased, the writing itself should be produced, yet if the deceased made other declarations at a different time, which were not reduced to writing, they may be proved by parol. Collier v. State, 20 Ark. 36.

**452.** Where dying declarations are reduced to writing and signed by the party making them, the writing, if in existence, must be produced. If the same statements were made both in writing and orally, the absence of the writing must be accounted for before evidence of the oral statement can be given. But if the declarations were repeated at different times, and one of them which was reduced to writing, covers different ground from that comprised in the verbal statements, both may be introduced. State v. Tweedy, 11 Iowa, 350.

**453.** A copy of dying declarations, taken down in writing by a magistrate, is admissible as secondary evidence, if the magistrate swear that he cannot recollect the statement of the deceased. Beets v. State, Meigs, 106.

**454. How discredited.** On a trial for murder, it is competent to introduce evidence of the bad moral character of the deceased, for the purpose of discrediting his dying declarations. Nesbit v. State, 43 Ga. 238.

**455.** The fact that a person was a disbeliever in a future state of rewards and punishments is admissible in evidence for the purpose of discrediting his dying declarations. Goodall v. State, 1 Oregon, 333.

**456.** On a trial for murder, the dying declarations of the deceased having been given in evidence, the defendant offered to prove that the deceased, on his examination before the committing magistrate, testified to facts contradicting his dying declarations, and had also made other contradictory declarations. But the court refused to allow the proof. *Held* error. People v. Lawrence, 21 Cal. 368.

**457.** Where on the trial of an indictment for manslaughter, the dying declarations of the deceased were admitted in evidence to prove the identity of the prisoner with the one who committed the crime, it was held proper to show that the deceased was in the

habit of mistaking persons with whom she was well acquainted for others whom they did not resemble. Com. v. Cooper, 5 Allen, 495.

*(i) Character of person killed.*

**458. Prosecution cannot show.** On a trial for murder, it is not competent for the prosecution to introduce evidence in the first instance, and as a part of their case, to show that the deceased was a quiet and peaceable man. State v. Potter, 13 Kansas, 414; Ben v. State, 37 Ala. 103.

**459. Cannot in general be proved by defense.** As a general rule, evidence on a trial for murder, that the deceased was well known to be quarrelsome, vindictive, and dangerous, is not admissible. But it is otherwise when the character of the deceased is a part of the *res gestæ*. Wesley v. State, 37 Miss. 327.

**460.** Where on a trial for murder, there is no proof that the deceased assaulted the prisoner, evidence cannot be given that the deceased was quarrelsome, vindictive and brutal. People v. Lamb, 54 Barb. 342; affi'd 2 Keyes, 360.

**461.** On a trial for murder, it is not competent to show that the deceased was a quarrelsome and dangerous man, unless there is evidence which at least raises a doubt as to whether the defendant acted in self-defense; and the defendant must have believed himself in danger. Wise v. State, 2 Kansas, 419; People v. Murray, 10 Cal. 309; People v. Edwards, 41 Ib. 640.

**462.** It having been proved on a trial for murder that the deceased, just previous to the homicide, assaulted the prisoner, it was held that evidence offered by the latter that the deceased was quarrelsome, vindictive and cruel, was too remote to be admissible. Com. v. Hilliard, 2 Gray, 294. See Com. v. Mead, 12 Ib. 167.

**463.** On the trial of an overseer for the murder of his employer, it is not competent for the defense to show the general temper and deportment of the deceased towards his overseers and tenants. State v. Tilly, 3 Ired. 424.

**464.** On a trial for murder, proof relative to the general character and habits of the deceased as to temper and violence, is inadmissible, unless all the evidence as to the homicide is circumstantial. State v. Barfield, 8 Ired. 344.

**465. When defendant may show.** Where it is doubtful whether the homicide was malicious or in self-defense, the defendant may prove the character of the deceased for violence. Monroe v. State, 5 Ga. 85; State v. Hicks, 27 Mo. 588; State v. Keene, 50 Ib. 357; State v. Bryant, 55 Ib. 75.

**466.** The character of the deceased as a turbulent man, when it tends to produce in the mind of the slayer a reasonable belief of imminent danger, is admissible for the defendant, and it may sometimes be looked to in determining the amount of provocation. Franklin v. State, 29 Ala. 14; Pritchett v. State, 22 Ib. 39; People v. Lamb, 54 Barb. 342; affi'd 2 Keyes, 360.

**467.** Although as a general rule, on a trial for homicide, evidence of the character and habits of the party killed, as to temper and violence, is not admissible, yet when it becomes necessary for the prisoner to account for the fact that he began a sudden mutual affray with the use of a deadly weapon, he may show that the deceased was a powerful, violent and dangerous man. State v. Floyd, 6 Jones, 392.

**468.** Evidence of the character and habits of the person slain is proper only so far as they can be supposed to have affected the intention of the slayer in the fatal act, by giving reasonable apprehensions of grievous bodily harm. State v. Smith, 12 Rich. 430.

**469.** Evidence of the general bad character of the deceased as a turbulent, blood-thirsty, revengeful man, is competent (although it may not be sufficient to reduce the offense from murder to manslaughter). Fields v. State, 47 Ala. 603.

**470. What may be proved.** In case of homicide, the character of the deceased for violence, as well as his animosity toward the defendant, as indicated by words and actions then and before, are proper matters for the consideration of the jury on the question of reasonable apprehension. Rippy v. State, 2 Head, 217. Such apprehensions may be

created by particular acts reasonably connected in point of time or occasion with the fatal rencounter, or by threats, as well as by the habits or conduct of the deceased. State v. Smith, 12 Rich. 430.

**471.** The rule that on a trial for murder, the prisoner may give in evidence the character of the deceased for turbulence and violence, contemplates only his general character in this regard, and proof of specific acts is not admissible unless they are so connected with the homicide as to form a link in the chain of circumstances. Pound v. State, 43 Ga. 88; Eggler v. People, 56 N. Y. 642.

**472.** The bad character of the deceased cannot be proved by showing previous misconduct or immorality, having no connection with the case; as that he was an escaped convict from the penitentiary of another State. Dupree v. State, 33 Ala. 380.

**473.** The fact that the deceased went to the prisoner's premises several weeks before the homicide, and there sought a personal difficulty with an employee of the prisoner, cannot be proved for the defense. Dupree v. State, *supra*.

**474.** On a trial for murder, the defense offered to prove that on the evening of the homicide the deceased drew his knife upon a stranger, and would have cut him had he not been prevented; also, that he slapped the naked knife against the cheek of another man, at the same time using threatening language. The defendant was not present at the time, and these acts were not brought to his knowledge. *Held* that the evidence was not admissible. People v. Henderson, 28 Cal. 465.

(*j*) *Character of defendant.*

**475. Defendant not obliged to prove.** On a trial for murder, the evidence being circumstantial, the court charged the jury that fair character was important to the prisoner, and that they were to inquire why it was that she had given no evidence of her general character. *Held* error. Bodine v. People, 1 Denio, 281.

**476. When admissible.** On a trial for murder, the defendant may prove his character for peace and quiet to be good. To that extent his character is involved in the issue of not guilty. People v. Stewart, 28 Cal. 395; overruling People v. Josephs, 7 Ib. 120, and People v. Lombard, 17 Ib. 316; Dupree v. State, 33 Ala. 380.

**477.** Where, on a trial for homicide, the evidence was wholly circumstantial, the defense was allowed to prove that the prisoner was of a mild and peaceable temper and habits, for the purpose of ascertaining the probable grade of the offense. Carroll v. State, 3 Humph. 315.

**478. By whom shown.** One who is acquainted with the prisoner's character, and who has known him for eight or ten years, may testify as to his character, although he has lived more than twenty miles from the prisoner's residence. Dupree v. State, *supra*.

**479. Proof must be confined to offense charged.** Proof of the general character of the prisoner is confined to the trait involved in the offense charged. Therefore, on the trial of a female for murder, the mere fact that the evidence as introduced in behalf of the prisoner tended to show that her prospects had been injured by reason of her relations with the deceased, will not authorize the prosecution to attack her character for chastity. People v. Fair, 43 Cal. 137; McDaniel v. State, 8 Smed. & Marsh. 401; Beauchamp v. State, 8 Blackf. 299.

**480.** On the trial of an overseer for the murder of a slave, a witness for the prosecution was permitted to testify as to the prisoner's general habit as overseer in punishing slaves upon the plantation. *Held* improper. Dowling v. State, 5 Smed. & Marsh. 664.

**481.** On a trial for murder, the jury are not at liberty to take into consideration the peaceable character of the prisoner, in making up their minds as to the intention which induced the commission of the offense charged. His intention can only be determined by his acts. People v. Milgate, 5 Cal. 127.

**482. Effect of proof of good character.** On a trial for murder by poisoning, the following instruction was held proper: That when a prisoner is charged with the commission of a crime, and evidence of good

character is introduced by him, which is not controverted by the prosecution, such evidence is not merely of value in doubtful cases, but will of itself sometimes create a doubt where, without it, none could exist; and if good character be proved to the satisfaction of the jury, it should produce an acquittal, even in cases where the whole evidence slightly preponderates against the accused. Stephens v. People, 4 Parker, 396; affi'd 19 N. Y. 549.

**483.** Where, on a trial for murder, the prisoner admits that he committed the homicide, but claims that he did it while defending himself against the deceased, who was trying to rob him, and the only evidence in the case is that the prisoner was found on a public highway, standing over the dead body, with a bloody weapon in his hands, the previous good character of the prisoner is entitled to very great weight. Davis v. State, 10 Ga. 105.

**484.** On a trial for murder, good character shown to belong to the prisoner cannot avail against clear proof of guilt, but only where doubt exists as to the commission of the crime and the intent. Wagner v. People, 54 Barb. 367; affi'd 4 N. Y. Ct. of App. Decis. 509; s. c. 2 Keyes, 684.

(*k*) *Burden of proof.*

**485. When on prisoner.** As a general rule, all homicide is presumed to be malicious until the contrary is shown. State v. Town, Wright, 75; Mitchell v. State, 5 Yerg. 340; McDaniel v. State, 8 Smed. & Marsh. 401; People v. McLeod, 1 Hill, 377. And every unlawful killing to be murder, although the perpetrator was at the time intoxicated. State v. McFall, Addis. 255. But in Pennsylvania and Tennessee, this presumption rises no higher than murder in the second degree, until it is shown by the prosecution to be murder in the first degree. Com. v. Druum, 58 Penn. St. 9; Witt v. State, 6 Cold. 5.

**486.** In Pennsylvania, the following instruction was held proper: "When once a homicide is proved, and the prisoner is shown to have committed the act, the offense will amount to the crime of voluntary manslaughter; for every killing of a human being is presumed to be unlawful. The burden of proving the act excusable or justifiable is on the prisoner," without adding the qualification "unless the circumstances excusing the act arise out of the evidence produced against him. Cathcart v. Com. 37 Penn. St. 108.

**487.** In Georgia, when a homicide has been proved, the law presumes malice, and the burden is upon the defendant to show the contrary. Hill v. State, 41 Ga. 484; Pound v. State, 42 Ib. 88. In North Carolina, the fact of the homicide being established against the prisoner, it is incumbent on him to show matter of excuse or mitigation beyond a reasonable doubt. State v. Johnson, 3 Jones, 266; State v. Willis, 63 N. C. 26. In Missouri, a homicide is deemed malicious, unless justified, excused, or palliated; and the proof of justification, excuse, or palliation rests upon the accused, unless evolved in the testimony produced by the prosecution. State v. Holme, 54 Mo. 153; *contra*, Bower v. State, 5 Ib. 364. In Indiana, where a person unlawfully and purposely kills another, malice, in the absence of rebutting evidence, is presumed from the act. *Ex parte* Moore, 30 Ind. 197.

**488.** In California, where a homicide is proved to have been committed by the accused, it rests upon him to show justification, excuse, or circumstances of mitigation; and this not being done, the legal inference is that he has committed the crime of murder. People v. Gibson, 17 Cal. 283; subject to the qualification that where the testimony on the part of the prosecution leaves a doubt as to the character of the homicide, the benefit of the doubt is to be given to the prisoner. People v. Arnold, 15 Cal. 476.

**489.** But held in an early case in California, that if on a trial for murder, the jury should find the fact that the prisoner made a felonious assault upon the deceased with an unlawful weapon, inflicting a mortal wound which produced instant death, and that there was some evidence tending to prove that such wound was given in the heat of blood in sudden and mutual combat, but that the proof of such fact did not pre-

ponderate over the proof against it, though it raised some doubts in their minds, the matter of extenuation would not be sufficiently made out, and the judgment of the court would be against the prisoner for the higher offense. People v. Milgate, 5 Cal. 127, per Murray, C. J.

**490.** In Ohio, where a homicide is proved to have been committed by the defendant, the law devolves upon him the burden of establishing a justification or excuse; but a preponderance of evidence is all that is required for this purpose. Silvus v. State, 22 Ohio, N. S. 90; s. c. 1 Green's Crim. Reps. 679; approved in Weaver v. State, 24 Ohio, N. S. 584. It was held in an early case in that State, that where circumstances of justification or extenuation did not arise out of the proof on the part of the prosecution, they must be proved by the prisoner, or he would be deemed guilty of murder in the second degree. State v. Turner, Wright, 20. A similar rule prevails in Texas. Hamby v. State, 36 Texas, 523; s. c. 1 Green's Crim. Reps. 650.

**491.** In Mississippi, the following instruction was held correct: "Every killing is presumed malicious, and amounting to murder, until the contrary appears from the circumstances of alleviation, excuse, or justification; and it is incumbent upon the defendant to make out such circumstances to the satisfaction of the jury, unless they arise out of the evidence produced against him." Green v. State, 28 Miss. 687; approving McDaniel v. State, 8 Smed. & Marsh. 417; s. p. Head v. State, 44 Miss. 731.

**492.** In Iowa, it is error to charge the jury, on a trial for murder, that if they find that the defendant inflicted the blow upon the deceased that caused his death, the burden of proof is upon the defendant to show that he did it in self-defense; the defendant being entitled to acquittal if there is a reasonable doubt that his act was willful. State v. Porter, 34 Iowa, 131; s. c. 1 Green's Crim. Reps. 241. When the evidence relates solely to the original transaction, and forms part of the *res gestæ*, the defendant is not driven to the necessity of establishing matter in excuse by a preponderance of evidence: and proof of killing will not change the burden where the excuse is apparent on the evidence offered by the prosecutor, or arises out of the circumstances attending the homicide. Tweedy v. State, 5 Iowa, 433.

**493.** In Florida, it was held that the presumption of malice arises in every instance of homicide, and in every charge of murder, the fact of killing being first proved, the law will imply that it was done with malice; and all the circumstances of accident, necessity, or infirmity, are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him. Holland v. State, 12 Fla. 117. On a trial for murder, the court charged the jury that "when the killing has been proved, the accused must show that it was attended with circumstances of accident, necessity, or infirmity, to reduce it to a lower grade of crime." *Held*, that as the instruction did not contain the qualification "unless they arise out of the evidence produced against him," it was erroneous. Dixon v. State, 13 Fla. 636; s. c. 1 Green's Crim. Reps. 687. But the following instruction was held erroneous: "The killing being proved, even though nothing else be shown, the offense is murder, the burden of extenuation being then thrown on the accused." Dukes v. State, 14 Fla. 499; overruling Gladden v. State, 13 Ib. 623, and Dixon v. State, *supra*.

**494.** In New York, where the judge charged the jury in substance that the law implied motive, and consequently the crime of murder in the first degree, from the proof of killing the deceased by the prisoner, and that upon this proof they should find him guilty of that crime unless he had given evidence satisfying them that it was manslaughter or excusable homicide, it was held error; the mere proof that one has been deprived of life by the act of another utterly failing to show the class of homicide to which the killing belongs. Stokes v. People, 53 N. Y. 164.

**495.** There being evidence tending to show that a murder had been committed, and that the house in which the dead body was had afterward been set on fire to conceal the offense, it being doubtful whether

the accused was in the vicinity of the house when the fire was set, the court charged the jury, that if the prisoner might have been at the scene of the fire, "the onus was cast upon her to get rid of the suspicion that thus attached to her;" that she was bound to show where she was at the time of the fire. *Held* error. Bodine v. People, 1 Denio, 281.

**496.** Where in a trial for murder, the killing and identity of the prisoner are proved, it is for him to satisfy the jury beyond reasonable doubt, that he apprehended and had reason to apprehend, that he was in imminent danger of his life, or of the infliction of some great personal injury. Patterson v. People, 46 Barb. 625.

**497.** Where on a trial for murder, the defense is that the body found is not that of the person alleged to have been murdered, after *prima facie* identification of the dead body, the burden of proof is on the prisoner to show that such person is still alive. State v. Vincent, 24 Iowa, 570.

**498.** Although on a trial for murder, it is incumbent on the prosecution to prove that the blows inflicted by the prisoner caused the death, yet if it shown that blows were given with a deadly weapon, were followed by alarming symptoms, and shortly after by death, the burden is on the prisoner to show that the death resulted from some other cause. U. S. v. Wiltberger, 3 Wash. C. C. 515.

**499.** Where the defense on a trial for murder is, that the prisoner was under the age of presumed capacity, the burden of proof is on him. If the age can be ascertained by inspection, the court and jury must determine it. State v. Arnold, 13 Ired. 184.

*(l) Weight and sufficiency of proof.*

**500. What required to convict.** To authorize the jury to find a person guilty of murder, the circumstances must not only be consistent with his guilt, but must exclude every other reasonable hypothesis. Phipps v. State, 3 Cold. 344; Schusler v. State, 25 Ind. 394.

**501.** On a trial for murder, it was proved that the evening before the homicide, the prisoner was at a certain house, and said that he was going from there to B.'s, and that he came home that evening about eight o'clock. After the evidence was closed on both sides, one of the jurors, addressing the public prosecutor, said, "We must have B. here, and you must bring him here;" and the next morning, the cause being still on trial, the same juror made the same request of the court. The prisoner being found guilty, it was held that the non-production of B. was ground for arrest of judgment. State v. Watkins, 9 Conn. 47.

**502.** Proof that the prisoner was present, aiding and abetting in a murder, will support an indictment charging him as sole principal. Com. v. Chapman, 11 Cush. 422. But an accessory before the fact to murder cannot be convicted on an indictment charging him as principal. Thornton v. Com. 24 Gratt. 657.

**503. Disadvantage of circumstantial evidence.** The disadvantage of circumstantial evidence is, that the jury has not only to weigh the facts, but to derive conclusions from them, in doing which they may be induced by prejudice or partiality, or by want of due deliberation and correct judgment, to make hasty and false deductions. Com. v. Webster, 5 Cush. 295.

*(m) Charge of court.*

**504. Duty of court.** Where, on a trial for murder, there is a question as to the grade of the offense, the court should explain the several grades of homicide to the jury, and leave it to them to determine the grade of which the prisoner is guilty. Crawford v. State, 12 Ga. 142; Davis v. State, 10 Ib. 101.

**505.** Where an instruction asked for, on a trial for murder, is framed in the language of the statute, it is improper for the court to refuse to give it. Boles v. State, 9 Smed. & Marsh. 284.

**506.** When the evidence on a trial for murder establishes provocation, it is the duty of the court to declare as a matter of law, whether it is sufficient to remove the presumption of malice arising from the fatal

use of a deadly weapon. But when the existence and extent of the provocation are to be determined by the jury, the court can only charge them hypothetically in relation to it. U. S. v. Armstrong, 2 Curtis C. C. 446.

**507.** Where part of an entire instruction asked for would be good, and part bad, the court may decline to give it. Stanton v. State, 8 Eng. 317.

**508.** It is not error in the court to refuse to charge the jury that in capital cases they are the judges of the law as well as the fact. Pierson v. State, 12 Ala. 149.

**509. Withdrawing question from jury.** On a trial for murder, the court charged the jury as follows: "If you find the prisoner guilty, it is for you to say from the evidence whether he is guilty of murder in the first, second or third degree. If you find from the evidence that he is not guilty in either degree, you will return a verdict of not guilty." *Held* error, as it prevented the jury from finding a verdict for manslaughter, and as they did not acquit him, they were compelled to find him guilty of murder. Dukes v. State, 14 Fla. 499.

**510.** An instruction that if the deceased was found dead in her bed, with her throat cut, the jury would be authorized to find the existence of all the legal requisites of murder in the first degree is erroneous in excluding from their consideration the question whether the death was the result of suicide, or resulted from a conflict which would reduce the degree of the homicide. Hall v. State, 40 Ala. 698.

**511.** The following instruction was held erroneous: "If the jury should find from the evidence that the prisoner and the deceased armed themselves on account of their quarrel, and both drew, it was quite immaterial which fired first; there was malice aforethought in each, and the slayer was guilty of murder." Alford v. State, 33 Ga. 303.

**512.** It is error to charge the jury on a trial for murder, that they "must infer malice" from the killing, when there is some evidence that the killing was accidental. Hampton v. State, 45 Ala. 82.

**513.** It is error in the court to tell the jury that there is an appellate court, to which the prisoner can carry his case, if testimony offered in his behalf had been improperly rejected; such remark being calculated to diminish their sense of responsibility, and at the same time to convey the idea that the evidence already before them was not sufficient to acquit. Monroe v. State, 5 Ga. 85.

*(n) Verdict.*

**514. May be general.** Where in an indictment for murder, but one offense is charged, though set forth in several counts, if the jury find the defendant guilty of the murder as set forth in either of the counts, they need not find separately on each count, but may return a verdict of guilty generally. Com. v. Des Martean, 16 Gray, 1.

**515.** But where an indictment for murder in one count alleged that the killing was caused by beating with a stick, and in another count that it was caused by drowning, it was doubted whether the jury could find a general verdict of guilty. In such case, the jury ought to specify under which count they find the defendant guilty. Mary v. State, 5 Mo. 71.

**516.** Where under an indictment charging murder in one count, and manslaughter in another count, the jury find the defendant guilty generally, it will be presumed that the verdict is for the highest offense charged. Bullock v. State, 10 Ga. 46.

**517.** The statute of New York defining murder is not a rule of pleading, but a guide to the conduct of the trial and to the instructions to be given to the jury. Under an indictment for murder, in the common-law form, which charges that the killing was with malice aforethought, a general verdict of guilty as charged, is a conviction of murder in the first degree. Kennedy v. People, 39 N. Y. 245.

**518. May be for less offense than that charged.** In general, where the indictment includes an offense of an inferior degree, the jury may acquit the defendant of the higher crime and convict him of the lower. State v. Gaffney, Rice, 431; Com. v. Gallie, 7

Serg. & Rawle, 423; People v. Doe, 1 Manning, 451; Brooks v. State, 3 Humph. 25; King v. State, 5 How. Miss. 730; Reynolds v. State, 1 Kelly, 222; Com. v. Herty, 109 Mass. 348; s. c. 1 Green's Crim. Reps. 194. A verdict finding the defendant guilty of murder in the second degree is an acquittal of the higher crime. State v. Belden, 33 Wis. 120; s. c. 2 Green's Crim. Reps. 647; Clem v. State, 42 Ind. 420; s. c. 2 Green's Crim. Reps. 687.

519. In Connecticut, under an indictment for murder committed by poison, the jury may find the prisoner guilty of murder in the second degree. State v. Dowd, 19 Conn. 388.

520. It is erroneous, on a trial for murder, to charge the jury that they must find the prisoner guilty of murder, or not guilty. Davis v. State, 10 Ga. 108; Holden v. State, 5 Ib. 441.

521. Under an indictment charging that an assault was committed with malice aforethought, the jury may find the prisoner guilty, although their finding negatives the malice aforethought. Sharp v. State, 19 Ohio, 379.

522. On a trial for murder, the jury, under the statute of New York (2 R. S. 725, § 27, Edm. ed.), can convict of any degree of the offense inferior to that charged. Where the instruction restricted the jury in the event of conviction to murder in the first degree or manslaughter in the third degree, and the judge refused to charge that they could convict of murder in the first degree or murder in the second degree, or of any of the degrees of manslaughter, it was held error unless there was no evidence of any other crime than murder in the first degree or manslaughter in the third degree. The proper instruction would have been for the judge to say to the jury that, under the indictment, a conviction of the principal offense, or of any less degree, was allowable, and then leave it to the jury to apply the facts to the definitions of the various grades of the crime, and say which they thought was sustained. McNevins v. People, 61 Barb. 307.

523. In Missouri, where the indictment charged an intent to kill and murder, and the jury found that the intent was "to commit manslaughter," it was held that the variance was fatal, and that the judgment must be arrested. Morman v. State, 24 Miss. 55.

524. **Must find degree.** On a trial for murder, a verdict of guilty must find the degree of the crime. Hall v. State, 40 Ala. 698; and unless it does so the court cannot pass sentence. Robertson v. State, 42 Ala. 509.

525. Under an information charging murder in the first degree, a verdict that the prisoner "is guilty as charged," without specifying of what degree of homicide he is found guilty, will not authorize a judgment for murder in the first degree. State v. Reddick, 7 Kansas, 143. In such case, the court should, on motion of the defendant, grant a new trial. State v. Huber, 8 Kansas, 447.

526. Where on a trial for murder, the jury being polled, the foreman answered "guilty of murder in the first degree," and each of the other jurors answered simply "guilty," it was held that the verdict was insufficient, the statute (of Md. of 1809, ch. 138, § 3) requiring the jury to ascertain by their verdict the degree of the crime. Ford v. State, 12 Md. 514.

527. On a trial for murder, the jury rendered the following verdict: "We, the jury, find the defendant not guilty in manner and form as charged in the indictment, but we do find her guilty of murder in the second degree." *Held* that in legal effect it was a verdict of guilty of murder in the second degree. Freel v. State, 21 Ark. 212.

528. A verdict in the following words: "We, the jury, find the defendant guilty of murder in the first degree, and *assess capital punishment*," was altered, at the suggestion of the court, so that the last clause read, "*and that he must suffer death.*" *Held* good in either form. Bramlett v. State, 31 Ala. 376.

529. **Prisoner must be present.** The record must show affirmatively that the prisoner was present during the trial, or it will be error. Scraggs v. State, 8 Smed. & Marsh. 722; State v. Collins, 8 Ired. 407.

**530. Consent of prisoner.** Where one being indicted and convicted of murder, a new trial was granted, and the Legislature repealed the law, and passed another law making the punishment as for manslaughter, without any saving clause as to offenses previously committed, and a new indictment was found for the same act of killing, and the defendant, with a knowledge of all the facts, on being arraigned pleaded "guilty," and was sentenced to imprisonment under the new law—*Held* that as the conviction appeared to have been the result of a voluntary contract on the part of the defendant, the court would not disturb it. Sellers v. People, 1 Gilman, 183.

**531. Separation of jury.** Where on a trial for murder there has been an improper separation of the jury during the trial, the prisoner, if found guilty, is entitled to the benefit of the presumption that the irregularity has been prejudicial to him, and the burden is on the prosecution to show beyond a reasonable doubt that the defendant has sustained no injury therefrom. Monroe v. State, 5 Ga. 85.

**532. Amendment.** Where the jury returned the following verdict: "We find the prisoner guilty of murder," and the court directed the words "Samuel Yancey" to be interlined after the word "prisoner," it was held that although the amendment was irregular, it did not vitiate the verdict. State v. Yancey, 3 Brev. 142.

**533. Acquittal.** To justify a verdict of not guilty on a charge of murder, the doubt must be substantial, and not a mere possibility. Com. v. Harman, 4 Barr, 269.

(*o*) *Sentence.*

**534. Interrogating prisoner.** On a trial for murder, the record must show that the prisoner was asked if he had anything to say why sentence of death should not be pronounced upon him. Hamilton v. Com. 16 Penn. St. 129.

**535. In case of escape.** Where a person having been convicted of murder and sentenced, before the day named for his execution, escaped, and was afterward retaken by the sheriff, and kept in custody until the next term of court, when he was brought into court, it was held proper for the court to award execution against him on the former judgment. Bland v. State, 2 Carter, 608.

**536. How satisfied.** The judgment of death can only be satisfied by execution or pardon; and where the sentence of death was not carried out in consequence of the decease of the sheriff, the court assigned another day for the execution. State v. Kitchens, 2 Hill, S. C. 612; and see Bland v. State, *supra*.

2. Manslaughter.

(*a*) *What constitutes.*

**537. Meaning and characteristics.** Manslaughter is the unlawful killing of a human being without premeditation or malice. Reynolds v. State, 1 Kelly, 222; Beets v. State, Meigs, 105; People v. Austin, 1 Parker, 154; Com. v. Riley, Thach. Crim. Cas. 471; King v. Com. 2 Va. Cas. 78; Com. v. Mitchell, 1 Ib. 116; Pennsylvania v. Levin, Addis. 279; Com. v. Biron, 4 Dall. 125; Studstill v. State, 7 Ga. 2; U. S. v. Wiltberger, 3 Wash. C. C. 515; State v. Zellers, 2 Halst. 220; Com. v. Webster, 5 Cush. 295.

**538.** Every unlawful killing from the heat of passion, upon a reasonable provocation, without malice, is manslaughter. Clark v. State, 8 Humph. 671; Short v. State, 7 Yerg. 513; Jacob v. State, 3 Humph. 493; Young v. State, 11 Ib. 200; State v. Roberts, 1 Hawks, 349; Preston v. State, 22 Miss. 383.

**539.** A killing on a sudden quarrel, to avoid great bodily harm, is manslaughter. State v. Roberts, 1 Hawks, 349. So, where two fight on fair terms, and after an interval, blows having been given, one of them, in the heat of passion, draws a deadly weapon and inflicts a fatal injury, it is manslaughter only. State v. Hildreth, 9 Ired. 429.

**540.** If A. assault another with a deadly weapon, and kill him, and his intention to assault him with such weapon was unknown to B., and he supposed that A.'s object was to assault and beat deceased only, and B. intended to participate in the assault and

battery only, and participated in no design to kill, he is guilty of manslaughter only, while A. is guilty of murder. Brown v. State, 28 Ga. 199.

541. Where, on a trial for murder, the judge having charged the jury that if the prisoner "in the heat of blood upon sufficient provocation," threw the deceased down stairs, the offense was manslaughter, but afterward explained that the word "sufficient" meant great and sudden provocation, it was held that there was no ground of exception. State v. Murphy, 61 Maine, 56.

542. On the trial of an indictment for murder, it was proved that the deceased, who had boarded in the prisoner's family, went to the prisoner's room for his clothes, when hard words were exchanged between them; that the deceased, having got his clothes, was proceeding down stairs with them under his arm, when the deceased said to the prisoner, "Go with all the money you have got; has'nt your wife to beg every day?" To which the prisoner replied, "You go, you rascal; go." At this the deceased turned to go up stairs again, when the prisoner said, "Come back, I will fix you." As the deceased advanced to the door of the prisoner's room, it being open, the prisoner seized a rolling pin and struck the deceased three or four blows with it on his head, inflicting a wound from which he died the next day. *Held* that a conviction of manslaughter was proper. Greschia v. People, 53 Ill. 295.

543. The beating or striking of the wife by her husband violently, with the open hand, is unlawful, and if death results therefrom, he is at least guilty of manslaughter. Com. v. McAfee, 108 Mass. 458.

544. It is erroneous for the court to charge the jury that "if a man use a deadly weapon in killing his adversary, the law implies malice from its use, except where the killing is excusable," it being tantamount to charging that there is no such thing as manslaughter where a deadly weapon is used, as the implied malice makes it murder if it is not excusable. Miller v. State, 37 Ind. 432.

545. Malice, and an intention to kill, are essential in murder, while malice is excluded from the crime of manslaughter. The intention to kill is also excluded from manslaughter, where the death results from an unlawful act, designed to effect another object; but if there arise a sudden quarrel, and one under great provocation instantly kill another intentionally, it is manslaughter. State v. Turner, Wright, 20.

546. In New York, except by aiding one to commit suicide, or by killing an unborn child by an injury to the mother, to constitute manslaughter in the first degree, it must have been committed without a design to effect death. People v. Clarke, 3 Seld. 385. In that State, in order to bring the case within the definition of manslaughter in the first degree, it is necessary to show that the accused was committing, or attempting to commit, some other offense than that of intentional violence upon the person killed. People v. Butler, 3 Parker, 377.

547. In Ohio, although an intent to kill may be an ingredient of manslaughter, yet it is not a necessary ingredient. Montgomery v. State, 11 Ohio, 424.

548. In Alabama, where an act amounting to manslaughter is voluntarily committed, it is manslaughter in the first degree, without regard to the circumstances of provocation. Oliver v. State, 17 Ala. 587. To constitute the offense, there must be a criminal intent or negligence so gross as to imply it. Therefore, the refusal of the court to charge, when requested by the defendant, that there must be a criminal intent to justify a conviction for manslaughter, is error. Hampton v. State, 45 Ala. 82.

549. On the trial of an indictment for manslaughter, charging the defendant with assaulting the deceased with a knife, and giving him a mortal wound, the record of conviction for the assault and battery is a conclusive answer to the plea of self-defense. Com. v. Evans, 101 Mass. 25.

550. Involuntary manslaughter is where it plainly appears that neither death nor any bodily harm was intended, but death is accidentally caused by some unlawful act, or any act not strictly unlawful in itself, but done in an unlawful manner and without due caution. Lee v. State, 1 Cold. Tenn. 62.

**551. From sudden passion.** To constitute "heat of passion," within the statute of New York defining manslaughter, it is enough that the passions are heated by the acts or conduct of the one upon whom the assault is made, and this state may be caused by words, if naturally calculated to produce it. Wilson v. People, 4 Parker, 619. In Maine, where the deceased created a disturbance in the defendant's hotel, persisted in attempts to enter the rooms of female guests, and resisted attempts to put him out, it was held proper for the court to charge that if the defendant, "in the heat of blood and upon sufficient provocation, threw the deceased down stairs, the offense was manslaughter." State v. Murphy, 61 Maine, 56; s. c. 2 Green's Crim. Reps. 457.

**552.** In case of homicide, the fact that the deceased whipped the child of the accused would be a sufficient legal provocation to reduce the offense from murder to manslaughter, if, in consequence of such whipping, the accused was suddenly so enraged as to be incapable of cool reflection, and she inflicted the mortal wound while so enraged, and not in pursuance of any preconceived design. Maria v. State, 28 Texas, 698.

**553.** Whether a boy who, upon being wantonly provoked, throws a stone at another, and kills him, is guilty of manslaughter, depends upon all of the circumstances of the case. Holly v. State, 10 Humph. 141.

**554.** A. and B. had been drinking together, when A. mounted his horse to ride away; whereupon B. seized the bridle, and insisted that A. should go back with him and take another drink. A. refused to go back, and attempted to get the bridle loose from B., which he was unable to do. A. got off from his horse and knocked B. down with a gallon jug of molasses, and struck B. twice with the jug afterward, as he lay on the ground apparently lifeless. *Held* manslaughter. State v. Ramsey, 5 Jones, 195.

**555. In mutual combat.** Killing in a fight upon a sudden quarrel, the chances being equal, is manslaughter. State v. Massage, 65 N. C. 480. Where, therefore, parties go into a fight by agreement, upon equal terms, each having and using a knife upon a sudden heat of passion, and one of them is killed, it is voluntary manslaughter, and not murder. Gann v. State, 30 Ga. 67.

**556.** If two engage in a fight upon a sudden quarrel, and one kills the other with a deadly weapon, it is but manslaughter; and it is not material which made the first attack. State v. Floyd, 6 Jones, 392.

**557.** Where a mutual combat is proved, without previous malice on the part of the accused, and that mutual blows were given before the accused drew his knife, and that he then drew it in the heat and fury of the fight, and dealt a mortal wound with the purpose of taking life, it is manslaughter and not murder. State v. McDonnell, 32 Vt. 491.

**558.** Where two persons fight by mutual consent, without previous malice, and one kills the other with a deadly weapon, it is at least manslaughter. If one asks the other to strike him, intending to use a deadly weapon, and, upon being struck by the other with his fist or hand, kills him with such deadly weapon, he is guilty of murder. If one assail the other with insulting language and blows, and the latter, without trying to avoid a fight, kills the other with a deadly weapon, it is manslaughter. Atkins v. State, 16 Ark. 568.

**559.** Where, on trial for murder, the defense mainly rested upon the fact that the deceased fired upon and wounded the defendant with a shot gun, and it was proved that the deceased had abandoned his assault and was retiring, and that the defendant was in no imminent danger when he inflicted the mortal wound, it was held that a verdict of manslaughter was proper. Evans v. State, 33 Ga. 4.

**560.** A quarrel occurring between A. and his wife, B. interfered, whereupon a scuffle ensued between A. and B., in which A. fell over a spinning wheel and hurt himself badly. B. then ran out of the house, and A. seized a gun, followed him to the door, from which B. had retreated fifteen yards, and, while B. was still retreating, shot him dead. *Held* not murder. Com. v. Mitchell, 2 Wheeler's Crim. Cas. 471.

561. In case of mutual combat, it is not important as to the character of the homicide, which gave the first blow. The presumption in regard to all such encounters upon equal terms is, that neither intended to kill or do grievous bodily harm to the other. The testimony of the defendant that he only meant to hit the shoulder, and not the head of the deceased, is competent upon the question whether the blow was given in the reasonable exercise of his right of self-defense. Com. v. Woodward, 102 Mass. 155. But if one take a deadly weapon into the affray with the design of using it in the fight, and especially if this be unknown to the other party, it will afford strong evidence of malice. State v. McDonnell, 32 Vt. 491.

562. The following instruction, on a trial for murder, was held proper: "If the defendant sought a difficulty with the deceased for the purpose of killing him, and in the fight did kill him in pursuance of his malicious intention, the jury will find the defendant guilty of murder. But if the defendant voluntarily got into the difficulty or fight, not intending to kill at the time, and did not decline further fighting before the mortal blow was struck, and then drew his knife and with it struck and killed the deceased, they will find the defendant guilty of manslaughter, although the cutting and killing were done in order to prevent an assault upon him by the deceased, or to prevent the deceased from getting the advantage in the fight. Adams v. People, 47 Ill. 376.

563. Where, on a trial for manslaughter, it appeared that the prisoner and the deceased were fighting, and that the prisoner after striking the deceased several times with the handle of a dagger threw it down, it was held that if the prisoner was not defending himself from the loss of life or great bodily harm, or just apprehension of it, and the deceased fell upon the dagger in consequence of a blow or violence inflicted by the prisoner, and so received the mortal wound, a verdict of guilty might be proper. People v. Goodwin, 1 Wheeler's Crim. Cas. 253.

564. A. sought B. and threatened his life, and after quarreling, B. struck A. with his fist, and they then separated, and A. tried to secure a stick which he could not do, and again stooped to pick up another stick of a dangerous character, when B. stabbed him. *Held* manslaughter. Allen v. State, 5 Yerg. 453. See State v. Hildreth, 9 Ired. 429.

565. On a trial for murder, the court charged the jury, that if an altercation took place between the parties in a grocery where they met, and the deceased invited the defendant to go with him into the street and settle the matter, and after getting into the street, angry words were used by both, and both were ready and willing to fight, and they did fight, and the defendant wounded the deceased, and he died from the effect of the wounds, the defendant was guilty of manslaughter. *Held* erroneous, for the reason that the defendant might have gone out for an amicable settlement, and with no hostile intention. Coffman v. Com. 10 Bush, Ky. 495.

566. Where upon angry words on both sides, between A. and B., the latter approached the former and struck him a violent blow with his fist, and the company separated them, and were taking B. away, when A. within one minute advanced upon B., who extended his arm to take hold of him, and A. immediately stabbed him with a knife, it was held manslaughter. State v. Yarborough, 1 Hawks, 78.

567. In order to reduce a homicide committed in a second combat, by what occurred at a previous one, both must be deemed as one, or the first must be considered as a sufficient provocation for the second. State v. McCants, 1 Spear, 384.

568. If the prisoner upon encountering the deceased, unexpectedly, who had confronted her upon her lawful road, accepted the fight when she might have avoided it, the law will not presume the killing to have been upon the old grudge, but upon fresh provocation, and it will be manslaughter. Copeland v. State, 7 Humph. 479.

569. But in case of mutual combat, in order to reduce the offense from murder to manslaughter, it must appear that the contest was waged upon equal terms, and that no undue advantage was sought or taken by

either side; for if such was the case, malice may be inferred, and the killing amount to murder. If sufficient time elapse between the quarrel and the going out to fight to enable the blood to cool and passion to subside, the killing will be murder and not manslaughter. People v. Sanchez, 24 Cal. 17; People v. Smith, 26 Ib. 665.

570. Where a person arranges with an adversary, hours before a fight, that it shall take place, or authorizes his friends to make such arrangements for him, it is not a sudden combat within the statute of New York, which provides that homicide is excusable when committed upon a sudden combat, without any undue advantage being taken, and without any dangerous weapon being used, and not done in a cruel or unusual manner. People v. Tannan, 4 Parker, 514.

571. It is not proper for the court to say to the jury on a trial for murder, that if the defendant made an unlawful attack, or got into a fight with the deceased upon a sudden heat, and slew him in the controversy, he would be guilty of manslaughter, thereby depriving the accused of the benefit of his retreat or withdrawal from the contest, although the aggressor in the first instance. Hittner v. State, 19 Ind. 48.

572. **By third person interfering in fight.** On a trial for murder it was proved that the father of the prisoner and the deceased were engaged in a common fist-fight, no weapons being used or threatened on either side, and that while a brother-in-law of the prisoner was in the act of separating the combatants, the prisoner, who was a lad fourteen years of age, ran up and shot the deceased. *Held* that the evidence was sufficient to sustain a verdict of voluntary manslaughter. Irby v. State, 32 Ga. 496.

573. **Upon provocation.** The provocation which should have the effect to reduce voluntary homicide to the degree of manslaughter must be sudden and great. Flanagan v. State, 46 Ala. 73.

574. To mitigate a homicide to manslaughter, the excited and angry condition of the person committing the act must have been caused by some insult, provocation, or injury which would naturally and instantly produce in the minds of men, as ordinarily constituted, a high degree of exasperation. Preston v. State, 22 Miss. 383; Campbell v. State, 23 Ala. 44.

575. Provocation by words only, however irritating, or by contemptuous or insulting actions or gestures, without an assault upon the person, will not mitigate an intentional homicide so as to reduce it to manslaughter. Com. v. Webster, 5 Cush. 295; Beauchamp v. State, 6 Blackf. 299; State v. Tackett, 1 Hawks, 210; People v. Butler, 8 Cal. 435; State v. Starr, 38 Mo. 270. And the same is the case as to information communicated by others, and the killing of a person because of it. Fralich v. People, 65 Barb. 48; s. c. 1 Green's Crim. Reps. 714.

576. A slight assault will not always extenuate a homicide to manslaughter without reference to the character of the weapon with which the fatal wound was inflicted. To have that effect, there must have been a reasonable proportion between the mode of resentment and the provocation. Nelson v. State, 10 Humph. 518.

577. Mere threats, unaccompanied by some demonstration from which the accused might have reasonably inferred that the deceased intended to execute them, will not justify the homicide, or reduce it from murder to manslaughter. Johnson v. State, 27 Texas, 758; s. p. Dawson v. State, 33 Ib. 431; overruling Pridgen v. State, 31 Ib. 420. And the threat, to justify a homicide, must have been to take life, and have been brought to the knowledge of the slayer. Myers v. State, 33 Texas, 525.

578. As to what provocation is sufficient to reduce the offense from murder to manslaughter, is a question of law. State v. Dunn, 18 Mo. 499.

579. **In resisting unlawful arrest.** If a person is unlawfully arrested, and in resisting the arrest, or in attempting to escape, takes the life of the one so arresting him, it is manslaughter. Com. v. Carey, 12 Cush. 246; Com. v. McLaughlin, Ib. 615.

580. If process be defective in the frame of it, as if there be a mistake in the name of the person on whom it is to be executed, or if the name of such person or of the officer

be inserted without authority, or after the issuing of the process, or if the officer exceed his authority, the killing of the officer by the party would be manslaughter only. Rafferty v. People, 69 Ill. 111.

**581.** The mere fact that an attempted arrest is unlawful, does not necessarily reduce the killing of the officer to manslaughter. In such case, the party sought to be arrested may use such reasonable force proportioned to the injury attempted upon him, as is necessary to effect his escape, but no more; and he cannot do this by using, or offering to use, a deadly weapon, if he has no reason to apprehend a greater injury than a mere unlawful arrest. If the officer had the right to make the arrest, and employed no more force than was reasonably necessary for that purpose, the killing him by the party sought to be arrested would be murder, although done in the heat of blood. Galvin v. State, 6 Cold. Tenn. 283.

**582.** Where a homicide is committed in resisting an illegal arrest, it is manslaughter in the absence of proof of express malice, although a deadly weapon was used. Roberts v. State, 14 Mo. 138; Jones v. State, Ib. 409.

**583.** When a person under color of law unlawfully arrests another, and one not a stranger in endeavoring to rescue him, or to prevent his unlawful arrest, kills the aggressor, it is manslaughter. Com. v. Drew, 4 Mass. 391.

**584. In resisting trespass.** If, in resisting a trespass, the weapon and manner of using it were not likely to kill, it will be manslaughter. Com. v. Drew, *supra*.

**585. By cruelty.** In New York, where a homicide is committed in a cruel and unusual manner, and in the heat of passion, without a design to cause death, it is manslaughter in the second degree. People v. Johnson, 1 Parker, 291.

**586. By killing unborn child.** The willful killing of an unborn child is not manslaughter, except as rendered so by statute; and in New York, to constitute the offense, the child must have quickened. Where therefore, an indictment for causing the death of an unborn child by an attempt to produce a miscarriage did not allege that the female was pregnant with a quick child, and there was no evidence that the child had quickened, it was held error in the judge to charge the jury that an abortion in any stage of pregnancy was manslaughter in the second degree. Evans v. People, 49 N. Y. 86.

**587. Through ignorance.** Although where a person calling himself a physician, through ignorance, causes the death of his patient by grossly harsh and improper treatment, he is not in general guilty of manslaughter (Com. v. Thompson, 3 Wheeler's Crim. Cas. 312), yet if he have so much knowledge of the fatal tendency of the prescription that it may be reasonably presumed that he administered the medicine from an obstinate, willful rashness, and not with an honest intention and expectation of effecting a cure, he is guilty of manslaughter at least, though he might not have intended any bodily harm to the patient. Rice v. State, 8 Mo. 561.

**588. From omission.** It is not necessary that the fatal result should have sprung from an act of commission. If the defendant omitted any act incumbent upon him, from which death resulted to the deceased, where there was no malice, it is manslaughter; and if there was malice, it is murder. State v. Shelledy, 8 Iowa, 477; State v. O'Brien, 3 Vroom (32 N. J.) 169.

**589. Through recklessness.** Where one fires a gun recklessly or heedlessly, he will not be excused; and his offense will be at least manslaughter, though the weapon was pointed in the range of the deceased by accident, with no design or intention to wound or kill. If the act was attended with probable mortal consequences to the deceased, or persons generally, the crime is murder or manslaughter, according to the degree of deliberation. State v. Vance, 17 Iowa, 138.

**590.** Where laudanum was administered by a female servant, without any deliberate or mischievous intention, but heedlessly and incautiously, to an infant, causing its death, it was held manslaughter only, although given to the child contrary to her master's orders, and for the purpose of enabling her

to carry on illicit intercourse with a man. Ann v. State, 11 Humph. 150.

**591.** Deaths caused by the burning of a steamboat while racing, which burning resulted from the making of excessive fires for the purpose of creating an enormous pressure of steam—held not to be murder, but manslaughter in the first degree. People v. Sheriff of Westchester, 1 Parker, 659.

**592. From negligence.** On a trial for murder, it is not erroneous for the court to charge the jury that if they found that the deceased consented to have sexual connection with the defendant H., but in consequence of her condition he was unable to effect a penetration, and she consented that the defendants might use artificial means to perforate the hymen, and they did so, and thereby gave her a wound that caused her death, though not intending it, it would be manslaughter if they were guilty of such carelessness and negligence as endangered her life or personal safety. State v. Center, 35 Vt. 378.

**593.** Conditions printed on the back of a railroad ticket will not relieve the company of their liability under a penal statute (Genl. Stats. of Mass. ch. 63, § 97), for gross negligence. Com. v. Vt. and Mass. R. R. Co. 108 Mass. 7.

**594.** Where the holder of a season ticket on a railroad sells merchandise on the cars upon the payment to the company of a consideration for the privilege, a portion of which consideration consists in furnishing water to passengers, he is a passenger and not a servant, and an indictment may be maintained to recover a fine for his death through the negligence of the servants or agents of the company. Ibid.

**595. By command of superior.** On the trial of an indictment for manslaughter, against the master and mate of a steamer, for a loss of life occasioned by a collision, it was proved that both of the defendants were in the wheelhouse previous to and at the time of the occurrence; and they moved that the court direct the jury to return a verdict of not guilty as to the mate, on the ground that he must be presumed to have acted under the orders of the master. *Held* that the motion was properly denied, for the reason that the commands of the master would be no justification. State v. Sutton, 10 R. I. 159; s. c. 2 Green's Crim. Reps. 370.

(*b*) *Indictment.*

**596. Nature and requisites.** In New York, an indictment for manslaughter in the common-law form is good, and the prisoner may be convicted of the offense in any degree. People v. Butler, 3 Parker, 377.

**597.** In New Hampshire, although an indictment against a railroad company for negligently causing the death of a person, is governed by the principles of the criminal law, yet the proceeding in its main features is a civil action for the recovery of damages. State v. Manchester, &c. R. R. 52 New Hamp. 528.

**598.** In Massachusetts, under the statute providing that in case of the loss of life of a passenger by the negligence of a common carrier, a fine is to be recovered to the use of the executor or administrator of the deceased person, for the benefit of the widow and heirs at law, the indictment must allege that the deceased left a widow and child or heirs at law (Stat. of 1840, § 80), Com. v. Eastern R. R. Co. 5 Gray, 473.

**599. Averment of place.** An indictment against a steamboat company for the loss of life of a passenger through negligence, alleging that A. resided and lost his life in Boston, and that B., otherwise called B. the younger of that name, of Boston, "has been duly appointed and now is administrator of said A.," is sufficient. Com. v. East Boston Ferry Co. 13 Allen, 589.

**600.** Where a statute imposes a fine against common carriers for loss of life through negligence, and gives the fine to the use of the executor or administrator of the person killed, for the benefit of his widow and heirs, the indictment must allege that administration has been taken out in the State. Com. v. Sanford, 12 Gray, 174.

**601. Where there are several defendants.** In an indictment against several for manslaughter, in stabbing the deceased with a knife, it is proper to allege the use of the

knife by all who were present aiding and abetting; and some of the defendants may be convicted of manslaughter, and others of simple assault. Com. v. Roberts, 108 Mass. 296.

**602. Description of wound.** An indictment for manslaughter need not particularly describe the wound. A statement of its general nature and locality, and of the instrument or means by which it was inflicted, is sufficient; as that the death resulted from one mortal wound given on the left side of the head of the deceased, by a blow with a whipstock. Com. v. Woodward, 102 Mass. 155.

**603. Averment of death.** Unless an indictment for manslaughter alleges that the death was caused by the act of the defendant, it will be fatally defective. State v. Wimberly, 3 McCord, 190.

**604. Technical averments.** The word "feloniously," in an indictment for manslaughter, may be rejected as surplusage. Ibid.

**605.** Under the act of Congress, declaring that the officers and others employed on any steamboat, by whose "misconduct, negligence or inattention the life or lives of any person or persons on board" shall be destroyed, shall be deemed guilty of manslaughter, willful negligence or willful misconduct need not be averred or proved. U. S. v. Warner, 4 McLean, 463.

(c) *Trial.*

**606. In case of joint indictment.** Where two persons are jointly indicted, and the prosecution intends to put in evidence the confession of one of them, they should be tried separately. Com. v. James, 99 Mass. 438.

(d) *Evidence.*

**607. Essential to conviction.** Although, when a homicide is proved to have been committed by the prisoner, the law, in the absence of any proper explanation, treats the crime as murder, yet manslaughter can only be established by testimony. Therefore, a verdict of manslaughter, without proof of any of the facts and circumstances of the killing, is erroneous. Hague v. State, 34 Miss. 616.

**608. Nature of act.** On the trial of an indictment which alleges that the killing was willful, it is not necessary to prove that allegation. When there is any evidence which, if believed, will warrant the jury in finding that the defendant acted under apprehension of bodily harm, though it comes from the defendant alone, and is in conflict with all the other evidence in the case, he is entitled to testify that he did in fact act under such an apprehension. Com. v. Woodward, 102 Mass. 155. But evidence tending to prove the great muscular strength of the deceased, and that he was in the habit of seizing persons in a peculiar manner by the throat, is not admissible. Com. v. Mead, 12 Gray, 167.

**609.** Under an indictment for manslaughter, against the master of a steamboat, in causing the loss of life by misconduct, negligence, or inattention, the prosecution need not prove willful mismanagement on the part of the accused. U. S. v. Farnham, 2 Blatchf. 528.

**610.** On the trial of an indictment for manslaughter, committed on board of an American vessel on the high seas, or in a foreign port, the prosecution must prove that the vessel belonged to a citizen of the United States. U. S. v. Imbert, 4 Wash. C. C. 702.

**611. Proof of injury.** An indictment for manslaughter charged that the defendant struck, kicked, beat, bruised and wounded the deceased in and upon her head and body, and threw her upon the floor. The proof was that he struck her with his open hand, upon her cheek, and about her temple, and that she fell on the floor and did not speak afterward. *Held* that the variance was not material. Com. v. McAfee, 108 Mass. 458.

**612. Proof of passion.** Where the homicide is claimed to have been committed in the heat of passion, the proper inquiry is not whether the suspension of reason continued down to the moment the mortal blow was given, but did the prisoner cool, or was there time for a reasonable man to have

cooled, and this must depend upon all the facts and circumstances. State v. McCants, 1 Spear, 334. The question of "cooling time" is one of law, to be decided by the court. State v. Moore, 69 N. C. 267; s. c. 1 Green's Crim. Reps. 611.

**613.** Where, in case of mutual combat, a question arises whether there has been time for excited passions to subside, the inquiry always takes this form: Whether there was sufficient time to cool; and not whether, in point of fact, the defendant remained in a state of anger. People v. Sullivan, 3 Seld. 396.

**614.** Where an assault is returned by the person attacked with disproportionate violence, and the other, in the transport of passion and without malice, kills his adversary, the proper inquiry is whether a sufficient time had elapsed after the violent assault upon him, and before he gave the mortal wound, for passion to subside and reason to resume her sway. State v. Hoover, 4 Dev. & Batt. 365. And see Nelson v. State, 10 Humph. 518.

**615.** The following instruction was held erroneous, as calculated to mislead the jury relative to the proof required to mitigate the offense: That if the prisoner and the deceased engaged in a fight, neither having a deadly weapon to be used in the conflict, but in the progress of the combat, the prisoner's reason being temporarily dethroned, and acting on the passion thus aroused, he slew the deceased, the killing would be manslaughter. Haile v. State, 1 Swan, 248. And see Young v. State, 11 Humph. 200.

**616.** Where an indictment against a father for killing his son, by striking him on the head with a chisel, charged that the offense was committed in the heat of passion, and without the design of effecting death, it was held not competent to prove that the accused had previously been in the habit of striking his son and knocking him down, the question of guilty intent not being in the case. Albricht v. State, 6 Wis. 74.

**617. Admissions and declarations.** On a trial for manslaughter committed in effecting an abortion, it was proved by a witness that she went to the prisoner's place of business; that she stated to one D., in the prisoner's presence, that she was going to see a friend of hers who was in trouble; that D. asked her what trouble, to which she replied that her friend was pregnant; and that the prisoner then said that "he would relieve her friend for twenty-five dollars." It was further shown that the witness then went to the residence of the deceased, and that they immediately returned to the prisoner, and that he thereupon operated on the deceased and produced the abortion. *Held* proper to show the conversation on the subject, but not its details, between the witness and the deceased. Hunt v. People, 3 Parker, 569.

**618.** On the trial of a husband and wife for manslaughter, persons who overheard a private conversation between them in relation to the homicide may testify to it. Com. v. Griffin, 110 Mass. 181.

**619.** On the trial of an indictment for manslaughter, in stabbing deceased with a knife, it was held that evidence that immediately after the assault on the deceased, the exclamation of a third person whom they attacked that they had a knife, was hearsay and inadmissible. Com. v. Roberts, 108 Mass. 296.

**620.** On the trial of an indictment for manslaughter, the declarations of the deceased, uttered several hours after the assault was committed, are not admissible as evidence in favor of the prisoner. Com. v. Densmore, 12 Allen, 535.

**621. Opinion.** On a trial for manslaughter, in attempting to destroy an unborn child, a woman testified to having been sent for by the defendant on the day before the deceased died, to wash her and change her clothes; that there were certain appearances on the bed and clothing, and a peculiar offensive odor different from any she had ever before noticed, though she had noticed something like it. *Held* proper as tending to show the condition of the deceased. But the same witness having, without proof of a minute examination of the person of the deceased, or any facts on which she based her opinion, or of any knowledge or experience which might enable her to form an opinion, been allowed to answer the follow-

ing question: "Will you state what, in your opinion, was the matter with the deceased at that time?" it was held error. People v. Olmstead, 30 Mich. 431.

**622. Proof of motive.** On the trial of an indictment for manslaughter, it appeared that the prisoner was a clerk of a hotel at which the deceased was a boarder, but not a lodger; that the former, about two o'clock in the morning, saw a man who proved to be the deceased, in the act of getting out of a window on the ground floor of the hotel; and that the prisoner fired at and mortally wounded the deceased. The evidence tended to show that the prisoner knew who the deceased was when he fired at him; that in the room into which the window opened was a woman; that for the favors of this woman the deceased and the prisoners were rivals; and that the deceased was retiring from a visit to the woman when he was shot. *Held* that the prisoner was properly convicted. People v. Walsh, 43 Cal. 447.

**623.** Where A. has a grudge against B., and meeting accidentally and quarreling, B. attacks A. with a deadly weapon, whereupon A. shoots B., the motive cannot be referred to the previous grudge. State v. Johnson, 2 Jones, 247; State v. Ta-Cha-Na-Tah, 64 N. C. 614.

**624. Burden of proof.** On a trial for manslaughter, the court charged the jury that if they were convinced beyond a reasonable doubt that the death of the person killed was occasioned by the shot fired by the prisoner, then the prosecution had made out the killing in the manner charged in the indictment; that all killing was presumed to be unlawful; and that when the fact of the killing was established, it devolved on the party who committed the act to justify it. *Held* error; that the jury should have been instructed in substance that upon all the evidence they must find, beyond a reasonable doubt, that the crime charged was committed by the prisoner, in order to warrant his being found guilty. State v. Patterson, 45 Vt. 308; s. c. 1 Green's Crim. Reps. 490; approving State v. McDonnell, 32 Vt. 538.

(*e*) *Verdict.*

**625. In case of proof of higher offense.** Where, under an indictment for manslaughter, it appears that the offense was murder, the prisoner may, notwithstanding, be found guilty of manslaughter. Com. v. McPike, 3 Cush. 181.

**626. Is not restricted.** The following instruction was held erroneous: "If you find the defendant guilty of manslaughter, it must be of voluntary manslaughter. Your verdict must find the defendant guilty of murder, of voluntary manslaughter, or not guilty." Holder v. State, 5 Ga. 441.

**627. Effect.** A verdict of guilty of manslaughter on a trial for murder, operates as an acquital of every crime of a higher grade of which the prisoner might have been convicted under the indictment. Reynolds v. State, 1 Kelly, 222; Hunt v. State, 23 Ala. 44; People v. Knapp, 26 Mich. 112; s. c. 1 Green's Crim. Reps. 252.

**628.** A person was indicted for murder, and found guilty of manslaughter, and the indictment afterward quashed. The statute of limitations having become a bar to an indictment for manslaughter, it was held that the prisoner must be discharged. Campbell v. State, 23 Ala. 44.

3. JUSTIFIABLE HOMICIDE.

(*a*) *In self-defense.*

**629. Must have been overt act.** To justify a homicide, it is not sufficient that the deceased had the means at hand to effect a deadly purpose, but he must have indicated, by some act at the time of the killing, a present intention to carry out such purpose. A mere trespass would not indicate such an intention. Harrison v. State, 24 Ala. 67; Harris v. State, 47 Miss. 318; s. c. 1 Green's Crim. Reps. 601.

**630.** Although A. has reasonable grounds to believe, and does believe, that B. intends to kill him the first time they meet, and they afterward meet armed, and near enough for B. to carry out his intention; yet, if B. then makes no demonstration of carrying out his intention, A. will not be justified in killing him; and if B. makes such demonstration, but with means and under circumstances such as to render it obviously unnecessary for A. to take his life in order to

protect himself, A. will not be justified in killing him. Hinton v. State, 24 Texas, 454.

**631.** It is not enough to excuse a homicide, that the defendant honestly believed that his own life was in danger, or that he was in danger of great bodily harm from the deceased at some future time; but he must have believed that the danger was imminent at the time. There must have been words or overt acts at the time clearly indicative of a present purpose on the part of the deceased to take his life, or do him great bodily harm. Williams v. State, 3 Heisk. 376; s. c. 1 Green's Crim. Reps. 255.

**632.** To excuse a homicide on the ground of self-defense, the danger of death or great bodily harm must either be real or honestly believed to be so at the time, and upon sufficient grounds. Previous threats, or even acts of hostility, however violent, will not of themselves excuse the slayer; but there must be words or overt acts at the time indicative of a present purpose to do the injury. Rippy v. State, 2 Head, 217.

**633.** Fear, though grounded upon the fact that one lies in wait to take a party's life, or upon the threats of a desperate and determined enemy, will not, in the absence of actual danger at the time, justify the party so endangered or threatened, in killing his adversary. But when threats have been accompanied by an attempt to kill, and the party in danger believes, and has the right to believe, that he can escape in no other way except by killing his foe, he is not obliged, when he casually meets him, to fly for safety, nor to await his attack. Bohannon v. Com. 8 Bush, 481.

**634.** On a trial for murder, it was proved that the deceased had threatened to take the life of the defendant, and that these threats were communicated to the latter previous to the killing; but it did not appear that the threats were followed by any overt act. *Held* that the mere apprehension of danger was not sufficient to justify the homicide. People v. Lombard, 17 Cal. 316.

**635.** The mere belief that a person has formed a design to take my life, without some positive act on his part, will not justify me in taking his life. State v. Bradley, 6 La. An. 554; State v. Mullen, 14 Ib. 570; State v. Swift, Ib. 827. But if there be an actual physical attack of such a nature as to afford reasonable ground to believe that the design is to destroy life, or to commit a felony upon the person assaulted, the killing of the assailant will be justifiable homicide in self-defense. State v. Chandler, 5 La. An. 489.

**636.** To excuse a homicide on the ground of self-defense, the apprehensions of the accused must have been excited by an actual assault. *Held*, therefore, not error to refuse to charge that "if the defendant had a reasonable ground to believe, from appearances, that his life was then and there in danger, and killed the deceased to save his own life, he is justified, although he was not then attacked." State v. King, 22 La. An. 454.

**637. Must have been apparent danger.** Whether a person attacked by another is justified in employing, in the first instance, such means of resistance as to produce death will depend upon the nature of the attack and the circumstances under which it was committed. Young v. State, 11 Humph. 200. Where the prisoner did nothing more than defend herself against a violent assault with a hickory stick three and a half feet long, and between three and four inches thick, it was held that the killing was justifiable. Copeland v. State, 7 Humph. 479. But where the prisoner, upon being attacked by the deceased in the street, instantly stabbed him in five places, and it was not shown that when the prisoner inflicted the mortal wounds he was in danger of great bodily harm, or that he had a reasonable apprehension of such danger, it was held that the homicide was not excusable. Stewart v. State, 1 Ohio, N. S. 66.

**638. Rule in New York.** The law of New York, as interpreted in Shorter v. People, 2 Comst. 193, is, that one who is without fault himself when attacked by another may kill his assailant, if the circumstances are such as to furnish reasonable ground for apprehending a design to take his life or to do him some great personal injury, and there is imminent danger that such design will be

accomplished, although the appearances were in fact false, and there was no such design. Patterson v. People, 46 Barb. 625.

639. Where the evidence is offered to show that the prisoner killed the deceased in self-defense, and that he feared the deceased intended to attack him, the rule is that the prisoner must have had reasonable ground for believing the deceased intended to take his life or to do him bodily harm, and that there was reasonable ground for supposing the danger imminent that such design would be accomplished, although it should afterward appear that no such design existed. People v. Lamb, 54 Barb. 342; 2 Keyes, 360.

640. To justify a person in killing another in self-defense, the person must have been attacked, and have reasonable ground to suppose that the object of the attack was to kill him or to do him great bodily harm, and he should have been unable to withdraw himself from this imminent danger, and therefore have been compelled to kill his assailant to protect himself. A man will not, however, be responsible for a mistake in supposing a deadly design which does not exist. But he must be actually assailed, and show reasonable ground for supposing that his only resource is to kill his assailant. People v. Cole, 4 Parker, 35.

641. On a trial for murder, a charge to the jury that if they found that the prisoner was justified in defending himself, and carried that protection further than was necessary for his defense, he was guilty of manslaughter, was held erroneous, the true question for the jury being, whether the prisoner had reasonable ground to believe himself in danger of great bodily harm or loss of life, and not whether such danger actually existed. Uhl v. People, 5 Parker, 410.

642. Where it was proved on the trial that the accused was followed in the night by an excited mob, threatening his life; that he was near sighted, and while trying to get away he was seized by an officer, whom, after telling to let go, and the officer's refusal to do so, he shot and killed; and the only proof that the officer was known to be such was the fact that he had on his uniform, it was held that the evidence was insufficient to sustain a conviction for murder. Yates v. People, 32 N. Y. 500.

643. **In Pennslyvania.** To excuse homicide on the ground of self-defense, it must appear that the slayer has no other possible, or at least probable means of escaping, and that his act was one of necessity. To justify the killing of an assailant, it must be done under a reasonable apprehension of loss of life or of great bodily harm, and the danger must appear so imminent at the moment of the assault as to present no alternative of escaping its consequences but by resistance. Then the killing may be excusable, even if it turn out afterward that there was no actual danger. Logue v. Com. 38 Penn. St. 265. If the assailant's object appears to be only to commit an ordinary assault and battery, it requires a great disparity of size and strength on the part of the slayer, and a very violent attack on the part of his assailant, to excuse the taking of the assailant's life with a deadly weapon. Com. v. Drum, 58 Ib. 9.

644. **In Missouri.** To justify a homicide, the defendant must have good grounds to apprehend immediate danger. State v. O'Connor, 31 Mo. 389. When a person apprehends that some one is about to do him great bodily harm, and there is reasonable ground for believing the danger imminent, he may kill his assailant, if that be necessary to avoid the apprehended danger, and the killing will be justifiable, although it may afterward turn out that the appearances were false. State v. Sloan, 47 Mo. 604; State v. Keane, 50 Ib. 357.

645. But evidence that the deceased was a dangerous, vindictive man, and had threatened the defendant, without proof that he had so conducted as to cause a well-grounded belief in the mind of the defendant of imminent bodily danger, will not excuse the homicide. State v. Harris, 59 Mo. 550.

646. **In Kentucky.** A reasonable belief on the part of the defendant that the person wounded or killed by him intended to do him bodily harm will excuse the act on the ground of self-defense. Rapp v. Com. 14

B. Mon. 614; Meredith v. Com. 18 Ib. 49; Payne v. Com. 1 Metc. Ky. 370. There need not have been actual impending danger. If the defendant believed, and had reasonable ground to believe, that there was immediate impending danger, and had no other apparent and safe means of escape, he had a right to strike, although the supposed danger may not have existed. Coffman v. Com. 10 Bush, 495. It is the same in Texas. Munden v. State, 37 Texas, 353. But a sudden heat and passion produced by mere words, or any similar provocation, will not excuse. Wilson v. Com. 3 Bush, 105.

**647.** A homicide occurring in a personal conflict held excusable where, although the defendant had no apprehension of serious injury from deceased when he agreed to fight him, yet, during the fight, something occurred to create a reasonable belief that he was then in danger of death or great bodily harm from deceased, and on account of such fear stabbed and killed him. Berry v. Com. 10 Bush, Ky. 15.

**648.** If A. has reason to apprehend, and does apprehend, that B. will shoot him unless he can run away or shoot B. first, the law does not require A. to run, and perhaps be shot. And if A. believed that B. was drawing out a pistol to shoot him, the fact afterward developed that B. had then no pistol, but was only maneuvering to make him run, will not make A. culpable for doing what he had good reason to believe was necessary for the security of his life. Phillips v. Com. 2 Duvall, Ky. 328; Smaltz v. Com. 3 Bush, Ky. 32; Young v. Com. 6 Ib. 312; Carico v. Com. 7 Ib. 124. See Bohannon v. Com. 8 Ib. 481.

**649. In Tennessee.** Where a person who is in no great danger of bodily harm, through fear, alarm, or cowardice, kills another under the impression that great bodily injury is about to be inflicted upon him, he will not be guilty of manslaughter, nor of murder, but it will be self-defense. Grainger v. State, 5 Yerg. 459.

**650. In Louisiana.** The court declined to charge the jury that a person believing his life to be assailed, and in immediate danger from another, is excusable in resisting and killing a third person who interferes to disarm him forcibly, with a view to bring about a fight between the other two without weapons, after being warned to stand off. *Held* that such refusal of the court was proper, for the reason that the instruction asked made the party's justification depend upon his mere belief of danger, and not upon a reasonable ground for such belief, and also for the reason that it did not present the case of a third person, confederating with the first assailant, or aiding him to make a dangerous assault upon the accused. State v. Chopin, 10 La. An. 458.

**651. In Michigan.** The necessity for taking life, in order to excuse or justify the slayer, need not arise out of actual and imminent danger, but he may act upon a belief from appearances which give him reasonable cause for it, that the danger is actual and imminent, although it may turn out that he was mistaken. Pond v. People, 8 Mich. 150; Patten v. People, 18 Ib. 314; Hurd v. People, 25 Ib. 405.

**652. In Minnesota.** To justify a killing on the ground of self-defense, it is not enough that the defendant believed himself in danger, unless the facts and circumstances were such that the jury can say he had reasonable grounds for his belief. State v. Shippey, 10 Minn. 223.

**653. In Iowa.** If, under the circumstances, there was no reason for the belief by the defendant that his person was in danger of death or great bodily harm, he cannot lawfully take the life of his assailant. State v. Thompson, 9 Iowa, 188. But, in order to justify a homicide on the ground of self-defense, it is not necessary that the danger should in fact exist, but that there be actual and real danger to the defendant's comprehension as a reasonable man. State v. Collins, 32 Iowa, 36.

**654.** A party may repel force by force in defense of his person, habitation or property, against one who manifestly intends, or endeavors by violence or surprise, to commit a felony on either; and if a conflict ensues, and he takes life, the killing is justifiable. State v. Thompson, 9 Iowa, 188; but not if the assault is not felonious, and there is no

reason for a belief on the part of the person assailed that the danger is actual. State v. Kennedy, 20 Ib. 569. An instruction held erroneous which omitted to give the defendant the benefit of the plea of self-defense, if he took his assailant's life to save himself from imminent and enormous bodily injury felonious in its character. State v. Benham, 23 Ib. 154; State v. Burke, 30 Ib. 331.

**655. In North Carolina.** One who has reasonable ground to believe that there is a design to destroy life, to rob, or commit a felony, will be justified in killing the offender to arrest such design. State v. Harris, 1 Jones, 190.

**656.** But the belief that another intends to take my life will not justify my killing him, unless he is making some attempt to carry out his design, or is in an apparent situation to do so, and thereby causes me to think that he intends to do it immediately. Where, therefore, the deceased having threatened the prisoner's life about three weeks before, sought a fight with the prisoner, without weapons, in a public street, on a starlight night, and the latter drew his knife without notice to the deceased, and inflicted upon him a mortal wound, it was held murder. State v. Scott, 4 Ired. 409.

**657. In Alabama.** Where a person has a reasonable belief of great personal injury, he may protect himself from violence even at the expense of his assailant's life, when necessary. Holmes v. State, 23 Ala. 17. But in order to justify a homicide there must be, on the part of the slayer, either an actual necessity to kill to prevent the commission of a felony or great bodily harm, or a reasonable belief that such necessity exists. Noles v. State, 26 Ib. 31; Taylor v. State, 48 Ib. 180.

**658.** Though every citizen may resist attempts upon his liberty by illegal restraint, the resistance must not be in great disproportion to the injury threatened. He has no right to kill to prevent a trespass, unless accompanied by extreme danger of bodily harm, or which does not produce a reasonable belief of such danger. Noles v. State, *supra*.

**659.** On a trial for murder, the prisoner asked the court to charge "that if the jury were satisfied from the evidence there was a reasonable belief in the prisoner's mind of some great bodily harm from the deceased," or "that he had reasonable ground to believe that he was in danger of great bodily harm from the deceased, whether it actually existed or not, the killing would be excusable." The court refused to give the charge, "except with the qualification that, if the danger appeared to be imminent or threatening, the prisoner would be excused." *Held*, that neither the refusal of the charge as asked, nor the qualification added to it, was erroneous. Dupree v. State, 33 Ala. 380.

**660. In Mississippi.** The mere fear or belief, however sincerely entertained by one man that another designs to take his life, will not excuse or justify the killing of the latter by the former. Where the danger is neither real nor urgent, to render a homicide excusable or justifiable, there must be some attempt to execute the apprehended design, or there must be reasonable ground for the belief that such design will be executed, and the danger imminent. Wesley v. State, 37 Miss. 327; Evans v. State, 44 Ib. 762; Head v. State, Ib. 731.

**661. In California.** A person may defend himself by taking life, whether his danger be real or not, if the danger be apparently so imminent and pressing that a prudent man might suppose himself in such peril as to deem the taking of the life of his assailant necessary for self-preservation. People v. Campbell, 30 Cal. 312. In such case the use of a deadly weapon by the person assailed, superior to the weapon possessed by the assailant, would not be evidence of malice; and the act done in self-defense would be justified, although the intent to take the life of the assailant as a necessity preceded the act which resulted in his death. People v. Barry, 31 Ib. 357.

**662. In Virginia.** To render a killing justifiable on the ground of self-defense, the act done or threatened must be of such a character as to afford a reasonable ground for believing there is a design to commit a felony, or to do some serious bodily harm, and danger of carrying such design into

immediate execution. Stoneman v. Com. 25 Gratt. 887.

**663. In Illinois.** Actual danger is not indispensable to justify self-defense, but only a reasonable and well grounded belief of losing life or suffering great bodily harm. Campbell v. People, 16 Ill. 17; Hopkinson v. People, 18 Ib. 264; Schnier v. People, 23 Ib. 17; Maher v. People, 24 Ib. 241; Adams v. People, 47 Ib. 376. An instruction that, to justify killing in self-defense, there must have been a reasonable belief in the mind of the defendant of "the most serious bodily harm," is erroneous; an apprehension of great bodily harm being sufficient. Reins v. People, 30 Ib. 256.

**664. In Wisconsin.** To justify the killing of another on the ground of self-defense, it is sufficient that the appearances of the attack upon the defendant, made or threatened by the deceased, were such as to give the defendant reason to apprehend a design to do him some great personal injury, and that there was imminent danger of such design being accomplished. State v. Martin, 30 Wis. 216.

**665. In Kansas.** To render a homicide justifiable self-defense, the prisoner must have had a reasonable ground to believe that the deceased intended to kill him; and there must have been some attempt to execute such a design; or the deceased must have been in an apparent situation to do so, and thus have induced a reasonable belief that he intended to do it immediately. State v. Horne, 9 Kansas, 119; s. c. 1 Green's Crim. Reps. 718. The defendant need not prove that the deceased actually had a deadly weapon, but only that the defendant had reason to believe that he had one. State v. Potter, 13 Kansas, 414.

**666. In Nevada.** In order to justify homicide, it must appear to the defendant's comprehension as a reasonable man, that he was actually in danger of his life, or of receiving great bodily harm, and that to avoid such danger it was absolutely necessary for him to take the life of the deceased. State v. Ferguson, 9 Nev. 106; State v. Hall, Ib. 58; State v. Stewart, Ib. 120.

**667. In Oregon.** Where a person has reasonable ground to believe that he is in danger of being killed, or of great bodily harm from another, and acting on such belief kills the other, he is excusable; and he is not required to wait until an assault was actually committed. Goodall v. State, 1 Oregon, 333; State v. Conolly, 3 Ib. 69.

**668. Attack may be anticipated.** A person interposing the plea of self-defense need not show that the danger was immediate and impending at the very moment of killing. He may anticipate the attack of his antagonist, if necessary for his own protection. Cotton v. State, 31 Miss. 504.

**669.** It is erroneous to charge the jury that if death resulted from the use of a deadly weapon by the defendant, though to repel an attack made by the deceased upon the defendant which endangered his life, or which would have resulted in great bodily harm to him, the homicide, though it might be reduced to manslaughter, would nevertheless be criminal. Kingen v. State, 45 Ind. 519.

**670.** A charge that "if the jury believe from the evidence, that the defendant killed the deceased by shooting him with a pistol, the law presumes it was done with malice," when the evidence tended to show that the pistol was used in self-defense, is erroneous. Martin v. State, 47 Ala. 564.

**671.** On a trial for murder, held that the following instruction which was asked and refused, should have been given: "If the blows which caused the death of the deceased were given in self-defense, and other blows were afterward given which were not given in self-defense, not mortal, you should find the defendant not guilty." Miller v. State, 37 Ind. 432.

**672. Defendant must not have been to blame.** The necessity that will justify the slaying of another in self-defense, must not not have been occasioned by the slayer. Vaiden v. Com. 12 Gratt. 717.

**673.** A party who seeks and brings on a difficulty cannot avail himself of the rights of self-defense in order to shield himself from the consequences of killing his adversary, however imminent the danger in which he may have found himself in the progress

of the affray. State v. Underwood, 57 Mo. 40; State v. Linney, 52 Ib. 40; s. c. 1 Green's Crim. Reps. 753.

**674.** When it is proved on a trial for murder, that the prisoner sought the deceased with a loaded gun, with the view of provoking a difficulty, and that a difficulty ensued, he cannot without some proof of change of conduct or action, excuse the homicide on the ground that the deceased fired the first shot. State v. Neeley, 20 Iowa, 108; State v. Stanley, 33 Ib. 526. See State v. Benham, 23 Ib. 154. When, however, he has wholly withdrawn from the conflict, he is again remitted to his right of self-defense, and may oppose force to force, even to the taking of the life of his adversary. Stoffer v. State, 15 Ohio, N. S. 47.

**675.** A homicide, even if committed upon sudden combat, is not excusable if undue advantage was taken of the deceased. People v. Perdue, 49 Cal. 425. But although a person goes into a fight voluntarily, yet if he is driven to the wall so that he must be killed or sustain great bodily harm unless he kills his adversary, which he does, it is excusable homicide. State v. Ingold, 4 Jones, 216.

**676. Duty of defendant to retreat.** An affrayer cannot excuse a homicide on the ground of self-defense, unless he quit the combat before the mortal blow is given, if he could safely do so, and retreated as far as he might with safety, and then killed his adversary to save his own life. State v. Hoover, 4 Dev. & Batt. 365.

**677.** Before a party assaulted can kill his adversary, he must have retreated as far as he safely could to avoid the assault, until his further going back was prevented by some impediment, or as far as the fierceness of the assault permitted. Vaiden v. Com. 12 Gratt. 717.

**678.** Where death ensues on a sudden provocation or sudden quarrel, in order to reduce the offense to killing in self-defense, the prisoner must prove, first, that before the mortal blow was given, he declined further combat, and had retreated as far as he could with safety, and second, that he killed the deceased through the necessity of saving his own life, or to save himself from great bodily harm Dock v. Com. 21 Gratt. 909.

**679.** Although it appear on a trial for murder, that the deceased made the first attack on the defendant with a deadly weapon, yet if the latter could reasonably have avoided killing his adversary without certain and immediate danger of his life, or of great bodily injury, the homicide is not excused as being in self-defense. But the law does not demand of the defendant the same coolness and judgment that can be exercised by the jury. If he had reason to believe, and did believe that he was in danger, it is sufficient. U. S. v. Mingo, 2 Curtis C. C. 1.

**680.** A man who assails another with a deadly weapon cannot kill his adversary in self-defense until he has notified him by his conduct that he has abandoned the contest; and if the circumstances are such that he cannot so notify him, it is his fault and he must take the consequences. State v. Smith, 10 Nev. 106.

**681.** But as retreat may be impossible or perilous, it is not always a condition which must precede the right of self-defense. Creek v. State, 24 Ind. 151. A person is not obliged to flee from his adversary who assails him with a deadly weapon, and go to the wall, before he can justify killing his assailant. Tweedy v. State, 5 Iowa, 433; s. c. Ib. 334. If there be no other way of saving his own life, he may in self-defense kill his assailant, and the killing will be justifiable. But when the attack is not felonious, the rule of law is different. State v. Thompson, 9 Ib. 188.

**682. Defendant not obliged to resort to legal protection.** The omission of a person assailed to seek protection from the authorities does not deprive him of the protection of the law, and he may defend himself in the same manner and to the same extent as if he had sought such protection. The following charge was therefore held erroneous: "If the prisoner believed that his life or person was in jeopardy and peril by the alleged repeated assaults made by the complainant, it was his duty to have invoked the aid of the authorities in saving him from

the infliction of any wrong, or punishing the offender for a wrong committed. All that the prisoner had to do was to make a complaint before a magistrate, and the complainant would have been forced to give bonds to keep the peace to deter him from the commission of any violence." Evers v. People, 6 N. Y. Supm. N. S. 81.

**683. Person defending another.** At common law, if A. is attacked by B. and in urgent and immediate peril of his life, and C. interposes to preserve the peace, or even to aid A., and it is actually necessary to kill B. to terminate the affray and save the life of A., a third party will be excused for killing him. This principle is preserved in the statute of New York. Where in such case the interference is unnecessary, the offense is manslaughter. People v. Cole, 4 Parker, 35.

**684.** Where in a mutual combat, A. knocked down and beat B., and C., who was present, supposing that the life of B. was in danger, gave him a knife to defend himself, and B. killed A. with the knife, it was held that C. was justified. Short v. State, 7 Yerg. 510.

**685. Nature of inquiry.** In determining whether or not a homicide was justifiable, the inquiry is whether there was reasonable ground for the prisoner to apprehend great personal injury, and not whether the prisoner did in fact entertain such apprehension. People v. Austin, 1 Parker, 154; People v. Doe, 1 Manning, 451; Young v. State, 11 Humph. 200; People v. Shorter, 4 Barb. 460; s. c. 2 N. Y. 193; *contra*, Grainger v. State, 5 Yerg. 459; Oliver v. State, 17 Ala. 587; Carroll v. State, 23 Ib. 28.

*(b) In protecting property.*

**686. General rule.** Although the owner may lawfully resist a forcible trespass, yet he cannot lawfully kill the intruder, unless it is necessary to prevent a felonious destruction of property, or to defend himself against loss of life or great bodily harm. Carroll v. State, *supra*.

**687.** In California, under the statute (Crimes Act, §§ 29, 30), a homicide will be justified only when the entry into a habitation is being made in a violent, riotous, or tumultuous manner, for the purpose of assaulting or offering violence to some person therein, or for the purpose of committing a felony by violence or injury. A bare fear of any of these offenses is not sufficient to justify the killing, but it must appear that the circumstances were sufficient to excite the fears of a reasonable man, and that the party killing acted under the influence of those fears. People v. Walsh, 43 Cal. 447; s. c. 1 Green's Crim. Reps. 487.

**688. Defense of dwelling.** The sense in which a man's house has a peculiar immunity is, that it is sacred for the protection of his person and family. An assault on the house can be regarded as an assault on the person, only in case the purpose of such assault be injury to the person of the occupant or members of his family; and in order to accomplish this, the assailant attacks the house in order to reach the inmates. In this view, the inmate need not flee from his house in order to avoid injury from the assailant, but may meet him at the threshold, and prevent him from breaking in, by any means rendered necessary by the exigency, for the same reason that one may defend himself from peril of life or great bodily harm by means fatal to the assailant, if rendered necessary by the exigency of the assault. State v. Patterson, 45 Vt. 308, per Barrett, J.; s. c. 1 Green's Crim. Reps. 490.

**689.** A man is not obliged to retreat, if assaulted in his dwelling, but may use such means as are absolutely necessary to repel the assailant from his house, or to prevent his forcible entry, even to taking life. It is therefore error to charge that the defendant must have done everything in his power to avoid the necessity of killing his assailant. Bohannon v. Com. 8 Bush, 481; s. c. 1 Green's Crim. Reps. 613. He must not, however, take life if he can otherwise arrest or repel the assailant. Where the assault or breaking is felonious, the homicide becomes justifiable, and not merely excusable. Pond v. People, 8 Mich. 150. See Patten v. People, 18 Ib. 314; Hurd v. People, 25 Ib. 405.

690. The defendant was warned that the deceased, the brother of the latter, and another person, were coming to his house in the night to commit violence, which they did, and broke in the door and window; and while they were in the act, the prisoner, then in his own house, struck the deceased with the poker, from which he died the next day. *Held* justifiable homicide. Brown v. People, 39 Ill. 407.

691. On a trial for murder it appeared that the defendant, returning to his house about eleven o'clock at night, found it fastened against him by another man; that after asking several times to have the door opened, he beat it down with an axe, and encountered the deceased, who had an axe handle in his hand, with which he struck the defendant on the head; and that the defendant then struck the deceased on the head with the axe, of which he died about two months afterwards. *Held* excusable homicide. De Forest v. State, 21 Ind. 23.

692. On a trial for a homicide which was committed by the defendant in his own house, the court charged that if the jury found that the deceased was lawfully in the house, and had not been ordered to leave previous to the affray, that the affray was wholly personal between the defendant and the deceased, that the defendant could only be justified under the same circumstances that would justify him had the affray not occurred in his house, with the exception that the defendant would not be obliged to retreat, but if attacked, might stand his ground, and defend himself with all the force necessary, even to the taking of life. *Held* proper. State v. Martin, 30 Wis. 216.

693. A net house, thirty-six feet from a man's dwelling, used by him not only for preserving the nets which were used in his ordinary occupation as a fisherman, but also as a permanent dormitory for his servants, though not inclosed with the house by a fence, is a dwelling which may be protected from felonious assault, even to the taking of life. Pond v. People, 8 Mich. 150.

694. **Intruder must not be pursued.** The right of self-defense, or defense of one's family or his habitation, does not justify pursuing and killing the intruder or aggressor after he has retreated, and after the necessity has ceased. State v. Conally, 3 Oregon, 69.

695. **Defending right to public property.** Where persons are on an island belonging to the United States, for the purpose of collecting birds' eggs, and others go there for the same object, but are forcibly prevented from landing by the party first there, they may lawfully oppose force to force, and if one of the opposing party is killed, it will be justifiable homicide. People v. Batchelder, 27 Cal. 69, Sawyer, J., *dissenting*.

(c) *In prevention of felony.*

696. **Belief.** A reasonable belief that a felony is about to be committed will extenuate a homicide committed to prevent it, but not a homicide committed by a private person in pursuit. State v. Rutherford, 1 Hawks, 457.

697. **Arresting felon.** To justify the killing of a felon in order to arrest him, the slayer must show both a felony committed, and that he avowed his object, and that the felon refused to submit. State v. Roane, 2 Dev. 58.

698. **Resistance of attempt.** A person may lawfully use all the force necessary to prevent the consummation of a felony. He may resist all attempts to inflict bodily injury upon himself, and detain the felon, and hand him over to the officers of the law, and it would only be by the use of unnecessary or wanton violence that he could become a wrong-doer. Ruloff v. People, 45 N. Y. 213.

699. On a trial for murder, the defendant will be justified in the killing, if it be proved that he had a reasonable ground to apprehend a design to commit a felony or to do some great personal injury to his wife, and there was imminent danger of the design being accomplished. Staten v. State, 30 Miss. 619.

700. **Suppressing riot.** Private persons may forcibly interfere to suppress a riot or resist rioters, and if they cannot otherwise suppress the riot, or defend themselves from the rioters, they may justify homicide in killing them. Pond v. People, 8 Mich. 150.

**701.** On the trial of an indictment for homicide committed by the defendant in protecting his premises from the invasion of rioters, there was evidence tending to show that owing to the feeble health of the defendant's mother he might have apprehended her speedy death from the fear and excitement caused by the conduct and threats of the rioters. *Held*, that if they had notice to that effect, or the defendant was prevented from giving it by their noise and tumult, his conduct toward them was excusable to the same extent as if the danger to her life had resulted from an actual attack upon her person or upon his. Patten v. People, 18 Mich. 314.

(*d*) *In case of shipwreck.*

**702. Must be decision by lot.** In cases of extreme peril from shipwreck, where there is a necessity that a part should be sacrificed in order to save the remainder, a decision by lot should be resorted to, unless the peril is so sudden and overwhelming as to leave no choice of means, and no moment for deliberation. U. S. v. Holmes, Wallace, Jr. 1.

(*e*) *In case of accident.*

**703. Must have been in lawful act.** The accidental taking of the life of another, to be excusable, must have been in the doing of some lawful act. If the defendant pointed a loaded gun at deceased, under circumstances which would not have justified him in shooting the deceased, and the deceased seized it, and struggled to save himself from the menaced injury, and in the struggle it went off accidentally, the defendant could not claim that the homicide was excusable; but otherwise, if the gun was discharged under circumstances in which it would have been lawful for the defendant to have shot it off purposely. State v. Benham, 23 Iowa, 154.

**704. Caused by disease.** Where a wound is inflicted which is not mortal, and the person receiving it afterward becomes ill from another cause, and death results from such illness, the party giving the wound is not liable for the death, although the symptoms of the disease were aggravated, and the fatal issue hastened by the wound. Livingston v. Com. 14 Gratt. 592.

(*f*) *Evidence.*

**705. Burden of proof.** If the prisoner claims a justification, he must take upon himself the burden of satisfying the jury by a preponderance of evidence. He must produce the same degree of proof that would be required if the blow inflicted had not produced death, and he had been sued for assault and battery, and had set up a justification. It is not sufficient for him to raise a reasonable doubt, neither is it necessary for him to establish his justification beyond a reasonable doubt. He must make his defense appear to the jury, availing himself of all the evidence in the case. People v. Schryver, 42 N. Y. 1; overruling Patterson v. People, 46 Barb. 625.

**706.** In Nevada, where a homicide is proved by the State, and no circumstances of mitigation, excuse, or justification are shown, the burden of establishing such mitigation, excuse, or justification is on the defendant. But he is not required to establish the facts constituting his defense beyond a reasonable doubt, or by evidence preponderating over that produced against him. State v. McCluer, 5 Nev. 132; disapproving State v. Waterman, 1 Ib. 132.

**707. Right of defendant to go into proof of all of the circumstances.** On a trial for a homicide committed by the defendant in the night, in repelling a riotous assembly from his premises, it appeared that there had been a similar assembly by the same parties, at the same place, the night previous. *Held*, that the defendant had a right, either by cross-examination or by witnesses introduced in his behalf, to go fully into all the proceedings and objects of both gatherings and his acts. Patten v. People, 18 Mich. 314.

## Idiocy.

**Rule of evidence in relation to.** The presumption that persons of full age are sane remains until overcome by evidence. The jury, in order to convict the prisoner, must

be satisfied not only of the doing of the acts, but that they proceeded from a responsible agent. This rule is applicable where the defense is idiocy. Com. v. Heath, 11 Gray, 303.

*See* INSANITY.

## Ignorance of Law.

**When open to inquiry.** Where the act done is *malum in se*, or where the law which has been infringed is settled and plain, the maxim *ignorantia legis neminem excusat* is applied in its rigor. But when a special mental condition constitutes a part of the offense charged, and such condition depends on the question whether or not the defendant had certain knowledge with respect to matters of law, the existence of such knowledge is open to inquiry. Cutter v. State, 36 N. J. 125; s. c. 2 Green's Crim. Reps. 589.

## Incest.

1. WHAT CONSTITUTES.
2. INDICTMENT.
3. EVIDENCE.

### 1. WHAT CONSTITUTES.

**1. Incestuous marriage.** In Iowa, under the statute (Rev. § 4369), the intermarriage of persons within the prohibited degrees of consanguinity constitutes incest, without proof of carnal knowledge. State v. Schaunhurst, 34 Iowa, 547. The terms "brother" and "sister" in the statute mean offspring of the same parents, and do not necessarily imply legitimacy of birth. Ib.

**2.** In California, the attempt to contract an incestuous marriage contemplated by the statute, must be manifested by acts which would end in the consummation of the particular offense, but for the intervention of circumstances independent of the will of the party. The declarations of the defendant of his determination to contract such a marriage, his elopement with his niece for that avowed purpose, and his request to a third person to go for a magistrate to perform the ceremony, do not constitute the attempt. People v. Murray, 14 Cal. 159.

**3. Step-daughter.** In Mississippi, it is not incest for a man to cohabit with his step-daughter. Chancellor v. State, 47 Miss. 278. The offense may be committed with a natural as well as with a legitimate daughter. Morgan v. State, 11 Ala. 289.

### 2. INDICTMENT.

**4. Averment of relationship.** In Ohio, the relation of step-father and step-daughter, within the meaning of the statutes against incest, terminates with the death or divorce of the mother. To aver this relation, therefore, is necessary to aver the marriage of the mother to the step-father, and the existence of it at the time of committing the offense. Noble v. State, 22 Ohio, N. S. 541; s. c. 1 Green's Crim. Reps. 662.

**5.** In Michigan, an information for incest need not allege that the parties are "within the degrees of consanguinity within which marriages are prohibited, or declared by law to be incestuous and void." Hicks v. People, 10 Mich. 395.

**6.** An indictment which alleges that the prisoner, "being then and there the father of B., and within the degree of consanguinity within which marriages are declared by law to be incestuous and void, and then and there knowing the said E. B. to be his daughter, did then and there live with the said E. B. in a state of adultery," is sufficient. Baker v. State, 30 Ala. 521.

**7. Time.** An indictment for incest must allege a single offense, and name the day on which it was committed. Where the crime was charged to have been committed on the 20th of September, 1860, "and on divers other days and times between that day and the 9th day of December, 1862," thus alleging a series of offenses without specifying any particular day except the first, the indictment was held bad. State v. Temple, 38 Vt. 37.

**8. Guilty knowledge.** An indictment charged that A. did unlawfully have sexual intercourse with his daughter B., the said B. then and there knowing that she, the said B., was his, the said A.'s, daughter. *Held* that the indictment was insufficient in not

alleging that A. had intercourse with his daughter, "knowing her to be such;" the word "unlawfully" not being equivalent to such allegation. Williams v. State, 2 Carter, 439.

**9.** In Alabama, an indictment for incestuous adultery, which alleges that the defendant knew of the consanguinity, is sufficient, without also charging that the other party knew it. Morgan v. State, 11 Ala. 289. And the indictment will be good, although the offense be not laid with a *continuendo*. State v. Glaze, 9 Ib. 283.

**10.** In Missouri, an indictment for incest need not allege a knowledge of the relationship on the part of the defendant. State v. Bullinger, 54 Mo. 142; s. c. 2 Green's Crim. Reps. 601. But see Williams v. State, *supra*.

**11. Charging rape.** In Massachusetts, where an indictment for rape contained all the specifications of a charge of incest, it was held competent for the jury, under the statute (R. S. ch. 137, § 11), to convict the defendant of the latter. Com. v. Goodhue, 2 Metc. 193.

### 3. Evidence.

**12. Admissions and declarations.** On the trial of an indictment for incestuous adultery, the admission of the defendants is sufficient proof of the relationship. Morgan v. State, 11 Ala. 289. Or the relationship of the parties may be proved by reputation. State v. Bullinger, 54 Mo. 142; s. c. 2 Green's Crim. Reps. 601.

**13.** In New York, on the trial of an indictment for incest, charged to have been committed by a father with his daughter, it was held that the declarations of the defendant were admissible to prove the consanguinity. The statute in such case is only applicable where the sexual intercourse is with mutual consent. When effected by force it constitutes rape. People v. Harriden, 1 Parker, 344.

**14.** On the trial of a brother and sister for incest, their relationship may be proved by their acts and declarations. Their identity may be established by admissions, identity of names, and by evidence showing that there are other persons of the same name. The mere misspelling of the first name of one of the parties in the certificate of the clergyman who celebrated the marriage, will not destroy the effect of the marriage record as evidence. State v. Schaunhurst, 34 Iowa, 547.

**15. Proof of other acts.** On a trial for incest, evidence is admissible of previous acts of sexual intercourse between the parties, as tending to show the probable commission of the act charged. People v. Jenness, 5 Mich. 305.

**16.** But where the indictment charges the defendant with having committed incest on a certain day, which is proved, the prosecution cannot show that the defendant had sexual intercourse with the prosecutrix at a subsequent time. Lovell v. State, 12 Ind. 18.

**17.** When the charge is for a single act of incestuous intercourse committed on a certain day, as the time stated is not material, the prosecution, before the evidence is introduced, may select any one act of such criminal intercourse which occurred within the jurisdiction of the court, and within the period of the statute of limitations. But when the prosecution has made its election, it cannot be allowed to prove any other act of the kind as a substantive offense. People v. Jenness, *supra*.

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# Indecency.

*See* Lasciviousness; Nuisance.

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# Indictment.

1. When it will lie.
2. Finding.
3. Venue.
4. Caption.
5. Commencement.
6. Body of indictment.
   (*a*) *Name of defendant.*
   (*b*) *Name of party injured.*
   (*c*) *Time and place.*
   (*d*) *Statement of the offense.*

7. Removal of indictment.
8. Proof required.
9. Objection to indictment.
10. Amendment of indictment.
11. Quashing indictment.

1. When it will lie.

**1. Constitutional right to.** The fifth article of the amendments to the Constitution of the United States, which declares that "no person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a grand jury," is not an inhibition upon the States, restricting them in the prosecution of capital or infamous crimes to the common-law indictments. Noles v. State, 24 Ala. 672.

**2. When in general the proper remedy.** Whenever a statute prohibits a matter of public grievance, or commands a matter of public convenience, a person who violates the statute is liable to indictment. State v. Fletcher, 5 New Hamp. 257.

**3.** Where what was not criminal before is prohibited by a statute, and in an another section a special remedy is given, an indictment or information may be maintained upon the prohibitory clause. State v. Bishop, 7 Conn. 181.

**4.** When an offense is punishable at common law, and a statute is passed giving a new remedy, either remedy may be pursued. Jenning v. Com. 17 Pick. 80. A person may be legally indicted, without first having been taken before a magistrate. People v. Page, 3 Parker, 600.

**5.** Where the statute creating the offense simply prescribes a penalty, an indictment will not lie. State v. Maze, 6 Humph. 17; State v. Corwin, 4 Mo. 609.

**6. Offenses amenable to.** Riding or going armed with unusual and dangerous weapons, to the terror of the people, is indictable at common law. State v. Huntly, 3 Ired. 418.

**7.** It is an indictable offense for a person to be publicly drunk, and one such act has been held sufficient. Smith v. State, 1 Humph. 396; but not if no one was thereby annoyed or disturbed. State v. Debury, 5 Ired. 371.

**8.** An official act done by a justice of the peace with a corrupt intent is indictable. Wickersham v. People, 1 Scam. 128.

**9.** Overseers of the poor are liable to indictment for any willful neglect of duty. State v. Hoit, 3 Fost. 355.

**10.** If A. be charged as principal and B. as accessory, the indictment will be supported if B. be found guilty as principal and A. as accessory. State v. Mairs, Coxe, 453.

**11.** Where a married woman commits a misdemeanor with the concurrence of her husband, he is liable to indictment. Williamson v. State, 16 Ala. 431.

**12. Agreement to do act.** A mere agreement between persons to do an unlawful act, without anything done in furtherance of the common design, is not usually indictable. Torrey v. Field, 10 Vt. 353.

2. Finding.

**13. Grand jury.** Quakers are competent to serve as grand jurors. Com. v. Smith, 9 Mass. 107.

**14.** In New York, where a statute provided that the supervisors should select the names of three hundred men to serve as grand jurors, and two hundred and ninety-nine only having been thus selected, an indictment for perjury was found by a grand jury drawn from them, it was held that the indictment was not for that reason bad. People v. Harriot, 3 Parker, 112.

**15.** In Maine, the grand jury as originally impaneled consisted of thirteen, but was reduced to eleven members. To supply the deficiency, three other persons were drawn and returned by order of the court. These persons were sworn and charged as grand jurors and added to the panel. *Held* that as their selection was not conformable with the laws of the State, an indictment found by the grand jury so constituted was void. State v. Symonds, 36 Maine, 128.

**16. Oath of grand jury.** It must appear from the indictment that it was found upon the oath of the grand jurors. State v. McAllister, 13 Maine, 374. But it is no objection to the indictment that it purports to be found by the grand jury "upon their

oaths," instead of "upon their oath." Com. v. Scholes, 13 Allen, 554; Jerry v. State, 1 Blackf. 395; State v. Dayton, 3 Zabr. 49.

17. Where an indictment is on the affirmation of some of the grand jurors, it must be shown that they were persons entitled by law to take affirmations instead of oaths or the indictment will be fatally defective. State v. Harris, 2 Halst. 361. And it must appear that the grand jurors who were affirmed stated that they had conscientious scruples against taking an oath. State v. Fox, Ib. 244.

**18. Proof required.** Evidence before a grand jury must be such as would be competent before a petit jury. U. S. v. Reed, 2 Blatchf. 435. The oath may be general without reference to a criminal charge against any particular person. But if the oath embraces persons by name, evidence cannot be given under it against others. Ib.

19. The grand jury ought not to find an indictment when the evidence taken together, if unexplained or uncontradicted, would not warrant a conviction. People v. Tinder, 19 Cal. 539.

20. Where an indictment was found by the grand jury upon the mere statement of a witness without oath, it was quashed for that reason. U. S. v. Coolidge, 2 Gallis. 364.

21. But a grand jury, without examining witnesses over again, may find another indictment in place of the one found by them at a previous term. Com. v. Woods, 10 Gray, 477.

22. The fact that the defendant was required by the grand jury to testify, and in pursuance of such requisition did testify before them touching the charge, vitiates the indictment. State v. Froiseth, 16 Minn. 296.

**23. Presence of stranger.** The mere fact that a stranger was present in the grand jury room when the indictment was found would not render it void, but otherwise if he participated in the proceedings. State v. Clough, 49 Maine, 573.

**24. Vacancy in office of district attorney.** Where an indictment was found while the office of district attorney was vacant, it was held that the action of the new district attorney, in arraigning and trying the prisoner upon the indictment, was an adoption of it, and evidence to the court of his concurrence in the action of the grand jury, and of his prosecution of the prisoner in the name of the United States, pursuant to the statute. U. S. v. McAvoy, 4 Blatchf. 418.

**25. Signing.** It is not a ground for arresting judgment, that the foreman of the grand jury signed the indictment with his surname and the initials of his christian name. Com. v. Hamilton, 15 Gray, 480; State v. Taggart, 38 Maine, 298; Com. v. Gleason, 110 Mass. 66; s. c. 2 Green's Crim. Reps. 260.

26. In Alabama, an indictment under the forms prescribed by the code, need not be signed by the solicitor. Harrall v. State, 26 Ala. 52.

**27. Indorsing true bill.** The words "a true bill," must be indorsed upon every indictment. Com. v. Walters, 6 Dana, 291. The foreman of the grand jury indorsed on the indictment, "A true bill. Ira Allen," but omitted the word "foreman." *Held*, that the indictment was, notwithstanding, good. State v. Brown, 31 Vt. 602.

28. The neglect of the foreman of the grand jury to certify under his hand an indictment to be a true bill, is ground for quashing the indictment before trial, but not for arrest of judgment. State v. Burgess, 24 Mo. 381.

**29. Return of indictment.** The indictment must be brought into court by the grand jurors in a body, and delivered to the court by their foreman. Com. v. Johnson, Thach. Crim. Cas. 284; State v. Cox, 6 Ired. 44; Nomaque v. People, Breese, 109. And there must be an entry of record, showing that the indictment was returned by the grand jury in open court. Brown v. State, 9 Yerg. 198; Chappel v. State, 8 Ib. 166.

30. But it is not a good objection to an indictment properly returned, indorsed, and filed, that the fact of its return is not entered on the minutes of the court. Mose v. State, 35 Ala. 421.

**31. Indorsement of prosecutor.** In Mississippi, it has been held a fatal objection

that no prosecutor is marked on the indictment. Kirk v. State, 13 Smed. & Marsh. 406. In Tennessee, it is required by the act of 1801, ch. 30, § 1. Medaris v. State, 10 Yerg. 239. In the United States courts, it is not necessary. U. S. v. Mundell, 6 Call, 245.

32. In Missouri, under the statute requiring the name of the prosecutor to be indorsed on the indictment in certain cases, it is sufficient if the name be on any part of the indictment. Williams v. State, 9 Mo. 268.

33. The name of a married woman marked on an indictment as prosecutrix, is a nullity. Mayers v. State, 11 Humph. 40.

34. An indorsement on an indictment that it "is preferred upon the testimony of the party injured, who was summoned on presentation, and by order of the grand jury," does not show that the indictment was preferred on the information of any of the grand jury, and is not a compliance with a statute requiring the indorsement of the prosecutor. State v. Denton, 14 Ark. 343.

35. In Kentucky, the name of the prosecutor (who will be answerable for costs), the town or county in which he resides, with his title or profession, must be written at the foot of every indictment for a trespass, before it is presented to the grand jury. The omission of his addition is a fatal defect, not cured by security for the costs required of and given by the prosecutor. Com. v. Gore, 3 Dana, 475; Allen v. Com. 2 Bibb, 210.

36. **Indorsement of names of witnesses.** By the common law, the names of the witnesses for the prosecution need not be indorsed on the indictment or information; and there is no act of Congress requiring it. U. S. v. Shepard, 1 Abb. 431.

37. **Filing.** Where the trial and conviction occur at the term at which the indictment is found, the court may, at any time during that term, as well after as before conviction, cause the clerk to indorse the indictment "filed," and to date the indorsement according to the fact and sign it, and may also cause an entry to be made on the minutes, that the indictment was returned into court by the grand jury, with the day on which it was so returned. Franklin v. State, 28 Ala. 9; Saunders v. Coffin, 16 Ib. 421.

38. There being no words in the statute of New York (3 R. S. 5th ed. p. 1018, § 38), indicating an intention that the indictment shall be void if not filed, the provision requiring it to be filed is to be regarded as merely directory. Dawson v. People, 25 N. Y. 399.

39. The failure of the clerk to enter on an indictment the day of its return by the the grand jury into court, is not ground for the discharge of the prisoner. State v. Clark, 18 Mo. 432.

40. **Delivery to prisoner.** A statute requiring that a copy of the indictment shall be delivered to the prisoner two days before the trial, means that the copy shall be delivered two days before the cause is tried by the jury, and not two days before the prisoner is arraigned. U. S. v. Curtis, 4 Mason, 232.

41. In Alabama, it is the constitutional right of the defendant to be furnished with a copy of the indictment before he can be compelled by the court to be put upon his trial. But in felonies not capital, this right will be held to be waived if not made at the proper time. Driskill v. State, 45 Ala. 21.

42. **Loss of indictment.** When the indictment has been mislaid, lost or destroyed, a copy cannot be substituted. Ganaway v. State, 22 Ala. 772, Goldwait and Gibbon, JJ., *dissenting;* and the prisoner cannot be tried. Bradshaw v. Com. 16 Gratt. 507. When an indictment has been abstracted from the clerk's office, the prosecution will not thereby be abated, but the pending prosecution may be dismissed with the consent of the court, and a new indictment be found. Com. v. Keger, 1 Duvall, Ky. 249. See Henry v. Com. 4 Bush, Ky. 427.

### 3. Venue.

43. **Must be laid in county.** An indictment which does not lay the venue in any county, is bad. Territory agst. Freeman, McCahon's Kansas, 56.

44. Where the county is named in the commencement of the indictment, the venue

is sufficiently laid in the county aforesaid. State v. Ames, 10 Mo. 743.

**45.** The indictment must show that the venue and any material fact alleged, was at a place within the jurisdiction of the court. But when only one county is named, the words "county aforesaid" will refer to the county in the margin. State v. Conley, 39 Maine, 78.

**46.** An indictment described the defendant as late of U., in the county of O., and then laid the offense at F., in said county, F. being, in fact, in the county of H. *Held* that this was equivalent to laying the offense in the latter county, F. being a town created by public statute. People v. Breese, 7 Cow. 429.

**47. Where a new county is created.** If a crime be committed in the county of A., and afterward the county of A. be divided, and the part of it in which the offense was committed be created a new county called B., the offense is indictable in the county of B. State v. Jones, 4 Halst. 357.

**48.** Statutes prescribing the limits of counties and towns are public acts, of which courts will judicially take notice. The county of A. was incorporated by erecting certain existing towns, by their corporate names, into a new county. P. was one of the towns named in the act, and was taken from the county of C. *Held* that an indictwhich charged the offense to have been committed in P., now in the county of A., was sufficient without alleging what county P. was in when the offense was committed. State v. Jackson, 39 Maine, 291.

### 4. Caption.

**49. Nature and office.** The caption forms no part of the indictment, and is not essential to its validity. State v. Peterson, 2 La. An. 221; State v. Lyons, 3 Ib. 154. It may be affixed by the clerk at any time, with the view to the perfecting of the record. Myers v. People, 4 N. Y. Supm. N. S. 292.

**50.** The office of the caption is to state the style of the court, the time and place when and where the indictment was found, and in some of the States, the jurors by whom it was found; and these particulars it must set forth with reasonable certainty. State v. Gary, 36 New Hamp. 359.

**51.** When an indictment is removed from an inferior to a superior court, the caption consists wholly of a history of the proceedings, naming the court where it was found, the jurors' names by whom found, and the time and place were found. People v. Bennett, 37 N. Y. 117.

**52. How entitled.** In Massachusetts, although the caption is usually entitled as of the first day of the term, yet an indictment with such a caption may be presented for an offense committed subsequent to that day, and may be proved by reference to the clerk's certificate thereon to have been returned after the day on which it alleges the offense was committed. Com. v. Hines, 101 Mass. 33; Com. v. Stone, 3 Gray, 453; Com. v. Colton, 11 Ib. 1.

**53. What it should contain.** The caption must state in what court the indictment was found, by what jurors it was returned, and the place and time where and when it was presented. State v. Williams, 2 McCord, 201; Thomas v. State, 5 How. Miss. 31; Joseph v. State, Ib. 20; State v. Sutton, 1 Murphy, 281. If it appear that the indictment was found by a grand jury not legally constituted, it will not support a conviction. Fitzgerald v. State, 4 Wis. 395. It should show the county in which the court is held, and that the grand jurors were sworn. State v. Fields, Peck, 140; though it would be sufficient if the latter fact appeared in the body of the indictment. State v. Long, 1 Humph. 386. It need not state the title of the court. Taylor v. Com. 2 Va. Cas. 940. But it should show that the grand jurors were of the proper county. Byrd v. State, 1 How. Miss. 163; Cornelius v. State, 23 Miss. 782. The averment that the grand jurors were "good and lawful men," is a sufficient averment of their qualifications. Beauchamp v. State, 6 Blackf. 299; Cornwell v. State, 1 Mart. & Yerg. 147; Bonds v. State, Ib. 143. The indictment need not state the names of the grand jurors by whom it was found. People v. Haynes, 55 Barb. 450.

**54.** In New Jersey, where the names and

style of office of the judges composing the court do not appear in the caption, the indictment will be quashed. State v. Zule, 5 Halst. 348.

**55. Indictment rendered certain by.** The caption of an indictment which shows when, where, and by whom the court was held, and who were elected and sworn as grand jurors, may be resorted to in aid of the indictment as a part of the record. Noles v. State, 24 Ala. 672.

**56.** The date of the offense may be rendered certain by referring to the year stated in the caption. Jacobs v. Com. 5 Serg. & Rawle, 315; and when the county is stated in the caption, the words "then and there" in the indictment will be referred to that county. State v. Bell, 3 Ired. 506. It is not a good objection to the caption that the dates are given in figures. State v. Smith, Peck, 165.

**57. Amendment.** A material error in the caption is not fatal, but the caption may be amended on motion at any time during the term at which it is found. State v. Creight, 1 Brev. 169; Moody v. State, 7 Blackf. 424; Allen v. State, 5 Wis. 329; State v. Emmott, 23 Ib. 632.

**58. Omission of caption.** On a hearing of a motion in arrest of judgment, defects in the caption of the indictment, or even the omission of the caption, cannot be noticed. State v. Thibeau, 30 Vt. 100.

**59.** An indictment which remains in the same court in which it was found, need not have a caption. Wagner v. People, 4 N. Y. Ct. of Appeals Decis. 509; affi'g 54 Barb. 367; s. c. 2 Keyes, 684.

### 5. Commencement.

**60. Form.** The following are all the requisites of a good commencement to an indictment: "The jurors of the people of the State of ——, in and for the body of the county of ——, upon their oaths present." People v. Bennett, 37 N. Y. 117.

### 6. Body of the Indictment.

#### (*a*) *Name of defendant.*

**61. Must be alleged.** Where an indictment against a surveyor of a public road described the road, but did not name the surveyor, it was held bad on a demurrer. Snider's Case, 2 Leigh, 744.

**62.** Where the defendant was charged with committing an offense with "divers other persons, to wit, to the number of five," and the indictment did not state that the five others were unknown, or give their names, it was held that the indictment was bad. State v. O'Donald, 1 McCord, 532.

**63.** An indictment for permitting gambling must give the names of the persons whom the defendant permitted to play, or state that they are unknown. Buck v. State, McCook, 61.

**64. Name unknown.** A defendant should be indicted by his true name when known. But if unknown, he may be indicted by any name that is sufficient to identify him. If, when arraigned, he fails to give his true name upon request, he cannot afterward complain if he is tried by the name specified in the indictment, or given by him upon arraignment, although not his true name. State v. Burns, 8 Nev. 251.

**65.** A name may be alleged in an indictment to be unknown, notwithstanding the grand jury had the means of informing themselves of, or might with reasonable diligence have ascertained it. Com. v. Stoddard, 9 Allen, 280.

**66.** It is only when the defendant's name cannot be discovered that it is proper to describe him in the indictment by a fictitious name, with the statement that his name is unknown. Where, therefore, the defendant was neither named nor described, but referred to as "a man in Turner Hall whose name to the grand jury is unknown," the indictment was held bad. Geiger v. State, 5 Iowa, 484.

**67. Christian name.** An indictment which alleges that the defendant's christian name is unknown to the grand jury is sufficient. Skinner v. State, 30 Ala. 524.

**68.** Every person is presumed to have a christian name. If unknown, it should be so stated in the indictment. If known, the allegation that the christian name is unknown would be improper. An indictment for murder was held defective which de-

scribed the deceased as "one Hardy," without averring that his name was otherwise to the jurors unknown. People v. Walters, 5 Parker, 661; s. c. 6 Ib. 15; 32 N. Y. 147.

**69.** In Kentucky, under the statute (Crim. Code, § 124), an indictment will be good although the christian name of the party charged be omitted. Com. v. Kelcher, 3 Metc. Ky. 484.

**70.** An indictment for murder is not bad for uncertainty or duplicity which charges the prisoner with the killing of T. H., *alias* T. J. Kennedy v. People, 39 N. Y. 245.

**71.** Where the prisoner's full name has been stated in the first part of the indictment, it will be sufficient afterward to refer to it by the christian name alone. State v. Cox, 6 Ired. 44; State v. Coppenburg, 2 Strobh. 273.

**72. Abbreviation.** Where a person's surname is usually abbreviated and written with a prefix, a name written in that way in an indictment will be sufficient. State v. Kean, 10 New Hamp. 347.

**73. Middle letter.** An initial letter interposed between the christian and surname being no part of either, it is immaterial whether one be introduced which the party is not accustomed to use, or one be omitted which he is accustomed to use, or whether those used by him in writing his name be transposed. State v. Manning, 14 Texas, 402; Edmundson v. State, 17 Ala. 179; State v. Martin, 10 Mo. 391. On the other hand, it has been held, that although the middle letter of a person's name need not be alleged, yet that if stated, it must be proved as laid, Brice v. State, 19 Ohio, 423; State v. Hughes, 1 Swan, 262. The improper addition of "*Junior*" to the defendant's name will not vitiate the indictment. Com. v. Perkins, 1 Pick. 388.

**74. Idem sonans.** *Hutson* for *Herdson*, in an indictment, is not a misnomer. State v. Hutson, 15 Mo. 512. But held otherwise as to *Donald* for *Donnel*. Donnel v. U. S. 1 Morris. 141.

**75.** "*Owens D. Havely*" and "*Owen D. Haverly*," also "*Blankenship*" and "*Blackenship*" are *idem sonans* as matter of law. State v. Havely, 21 Mo. 498; State v. Blankenship, Ib. 504, Scott J., *dissenting*. *Held* that it was a question of fact for the jury.

**76.** Where D. was tried separately under an indictment charging him with having committed a riot with one *Land*, and the evidence showed that the name of the latter was *Lance*, it was held that as there was no doubt of the identity of the man, the variance was not material. Davenport v. State, 38 Ga. 184. Whether a name written in an indictment is David or Daniel, is to be determined by the court. Com. v. Riggs, 14 Gray, 376.

**77. Description.** The estate, degree, and mystery of the accused, should be alleged in the indictment. State v. Hughes, 2 Har. & McHen. 479.

**78.** In Indiana, an indictment at common law need not describe the defendant by his addition. State v. McDowell, 6 Blackf. 49.

**79.** An indictment for embezzlement, under the statute of New York (2 R. S. 678, § 59), must allege that the defendant was a clerk or servant of some person (or an officer or agent of a corporation), and that the property he is charged with embezzling came to his possession, or under his care, by virtue of such employment. People v. Allen, 5 Denio, 76.

**80.** Where an indictment alleges that the name of the deceased was A. B., "a person of color," the words "a person of color," may be rejected as surplusage. Farrow v. State, 48 Ga. 30.

**81.** Partners should be indicted as individuals. Peterson v. State, 32 Texas, 477.

**82.** An indictment against overseers of the poor for neglect of duty, must allege that they were overseers of the poor of the town; that it was their duty to relieve the pauper, and that they intentionally and willfully neglected to do so. State v. Hoit, 3 Foster, 355.

**83.** An indictment which charges the defendant in one count with being an accessory before the fact, and in another count with being an accessory after the fact to the same felony, is good. So a receiver may be charged as an accessory in one count, and for a substantive felony in another count. U. S. v. Dickinson, 2 McLean, 325.

84. An indictment for extortion committed by an agent, may charge that the offense was committed by the principal. Com. v. Bagley, 7 Pick. 279.

(*b*) *Name of party injured.*

85. **Must be stated.** An indictment for an offense against the person or property of an individual, must allege the christian and surname of the person injured if known. Willis v. People, 1 Scam. 399.

86. An indictment for an assault with intent to rob, must state who was intended to be robbed, and of what. Connolly v. People, 3 Scam. 474.

87. **Name unknown.** The averment in an indictment, that the name of the person injured is unknown, is material and traversed by the plea of not guilty. Cameron v. State, 8 Eng. 712.

88. Where an indictment for retailing liquor, alleged that the liquor was sold to a person whose name was unknown to the grand jurors, and it appeared that they might have ascertained the name of the person if they had asked the witness who testified before them, it was held that the indictment could not be maintained. Blodget v. State, 3 Ind. 403.

89. **Initials.** Although the name of the person receiving the injury, when known, must be set out in the indictment, yet if he is described by the initials of his christian name, and he is as well known by that as by his full name, it is sufficient. Vandermark v. People, 47 Ill. 122.

90. An indictment is sufficiently certain, which describes third persons by the initials of their christian names. State v. Anderson, 3 Rich. 172.

91. **Addition.** The indictment need not describe by any addition, the person upon whom the offense therein set forth, is alleged to have been committed. Com. v. Varney, 10 Cush. 402.

92. Where an offense is more highly punishable when committed upon a particular class of persons, an indictment which does not allege whether the injured person belongs to that particular class, will be sustained; and upon a conviction, the court will award only the milder punishment. State v. Fielding, 32 Maine, 585.

93. **Omission of name.** Even if it is necessary (which is doubtful) to name the prosecutor in an indictment to recover a fine or penalty, the omission is not material when his right to any part of the recovery is barred by the statute of limitation. State v. Robinson, 29 New Hamp. 274.

94. **How determined.** The question whether or not the name of the deceased in an indictment for murder, is the true name, is one of fact for the jury. State v. Angel, 7 Ired. 27.

(*c*) *Time and place.*

95. **Must be stated with certainty.** Although time and place must be stated with certainty in the indictment, yet they need not be proved on the trial as stated, unless they are necessary ingredients of the offense. People v. Stocking, 50 Barb. 573; State v. Munson, 40 Conn. 475; s. c. 2 Green's Crim. Reps. 493.

96. The general rule requiring certainty in averment of time and place does not apply to those descriptive portions of the indictment whose office it is to so qualify or limit the object acted upon as to show it to be a proper subject of complaint, unless time or place is an element necessary to constitute it a proper subject, and the existence of this element would be susceptible of question if not averred. State v. Cook, 38 Vt. 437, per Steele, J.; State v. O'Keefe, 41 Ib. 691.

97. Where the averment as to time and place is repugnant or uncertain, the indictment will be bad. Jane v. State, 3 Mo. 61. But such averment need only be certain to a common intent. State v. Brisbane, 2 Bay, 451; State v. G. S. 1 Tyler, 295; State v. Thayer, 4 Strobh. 286.

98. **Words "then and there."** Where the venue is laid in the margin, the words "then and there" sufficiently show the place where the offense was committed. State v. Slocum, 8 Blackf. 315. But where time and place are charged with certainty, the words "then and there" need not be repeated. State v. Capers, 6 La. An. 267; State v. Wilson, 11 Ib. 163.

**99.** In general, the allegation of time and place, "then and there," should be repeated to every material averment. But if two places are named, and afterward a material fact be laid "then and there," the indictment will be bad for uncertainty. State v. Hardwick, 2 Mo. 226; Markley v. State, 10 Ib. 291; State v. Hayes, 24 Ib. 358; State v. Roberts, 26 Maine, 268.

**100.** But although where two distinct times and places have been mentioned, in and at which the offense has been committed, and reference is afterward made to time and place by the words "then and there," the allegation is defective, yet this is not the case where but one time and place is mentioned with reference to the commission of the offense, and the other place is spoken of as the residence of one of the parties. State v. Jackson, 39 Maine, 291.

**101.** An indictment which charges that A. B. did construct and use a public gaming place in the town of H., in the county of H., at which a game of chance was played, and that the defendant, at said town of H., did play at the said game, "and did then and there bet money with the said A. B., at and upon the said game," is insufficient in not alleging that the playing and betting by the defendant were at any public gaming place. The words "then and there" referring only to the time and to the county of H., and not to the place of gaming. State v. Braxton, 3 Ired. 354.

**102.** An indictment charged that L. D., late of the district of Maryland, mariner, on the 31st day of October, 1839, *then and there* being on board a certain brig belonging to a citizen of the United States, on the high seas, on the Atlantic Ocean, in latitude thirty-three, out of the jurisdiction of any particular State, and within the jurisdiction of the United States, did *then and there* commit, &c. *Held* that, as the word "there" first above mentioned referred to the district of Maryland, it was an allegation that the crime was committed in that district, and consequently that this allegation was repugnant to the subsequent averment in the same sentence, that it was committed "out of the jurisdiction of any particular State." U. S. v. Dow, Campbell C. C. 34.

**103. Rule as to the averment of time.** The indictment need not state the day on which it was found, or the name of the presiding judge. State v. Folke, 2 La. An. 744.

**104.** An indictment which omits to state the time when the offense was committed will be bad on demurrer. Roberts v. State, 19 Ala. 526; State v. Hopkins, 7 Blackf. 494. But when time does not enter into the offense, it need not be alleged. State v. Sam, 2 Dev. 567.

**105.** An indictment which does not state any year, is bad for uncertainty. Com. v. Griffin, 3 Cush. 523; and if the offense be laid on an impossible day or a future day, it will be fatal. State v. Sexton, 3 Hawks, 184.

**106.** The time of committing an offense (except where the time is of the essence of the offense), may be laid on any day previous to the finding of the indictment, during the period within which it may be prosecuted. Shelton v. State, 1 Stew. & Port. 208.

**107.** Where a *nolle prosequi* was entered to the first of the two counts of an indictment, and the time of committing the offense was only shown by reference to the first count, it was held that the defendant might be tried and convicted on the second count. Wills v. State, 8 Mo. 52.

**108.** When the time becomes material, either as constituting an element of the crime, or as affording the accused a bar to the proceeding, it must be accurately stated. State v. Robinson, 29 New Hamp. 274; State v. Caverly, 51 Ib. 446.

**109.** When the offense from its nature presupposes a succession of acts to constitute it, it may be charged as having been done on a given day, "and on divers other days and times between that day and the day of the finding of the indictment;" and evidence is admissible to show that acts were committed at any time during the period mentioned. State v. Cofren, 48 Maine, 364.

**110.** When an averment is made that an offense was committed between a day certain and the day of finding the indictment, and there is nothing on the record showing the

day when the indictment was found, it is equivalent to an averment that it was committed between the first day alleged and the day on which the term of the court commenced. Com. v. Wood, 4 Gray, 11.

**111.** Where an offense which may have continuance is alleged to have been committed on a day certain, and on divers other days which are uncertainly alleged, the indictment is effectual for the act alleged on the day certain, and void only as to the act alleged on the other days. Wells v. Com. 12 Gray, 326.

**112.** An indictment which charges that the offense was committed on a future day is a fatal defect which may be taken advantage of by motion in arrest of judgment, or by demurrer. State v. Litch, 33 Vt. 67.

**113.** The indictment will be good if the day and year can be collected from the whole statement, though they be not expressly averred. Gill v. People, 5 N. Y. Supm. N. S. 308.

**114.** An indictment at common law may describe the year by the initials A. D. and figures. State v. Hodgeden, 3 Vt. 481. An indictment which, in stating the year, omits the words "year of our Lord," is fatally defective. Whiteside v. People, Breese, 4; *contra*, Engleman v. State, 2 Carter, 91; State v. Gilbert, 13 Vt. 647; State v. Lane, 4 Ired. 113; Hall v. State, 3 Kelly, 18.

**115.** Although the offense is charged to have been committed after the finding of the indictment, yet if a day certain is laid before, the other may be rejected as surplusage. State v. Woodman, 3 Hawks, 384.

**116.** Where the offense was charged to have been committed the day previous to that on which the statute under which the prosecution was had went into operation, but as continuing to a day subsequent, it was held that the indictment was sufficient. Nichol's Case, 7 Gratt. 589.

**117.** An indictment which alleges that the same offense was committed on different days, is bad. State v. Hendricks, Cam. & Nor. 369.

**118.** Where a statute requires that the offense shall be prosecuted within a year, an indictment alleging its commission within the year is good on its face, and if the proof shows that the offense was committed at an anterior time, the only way the prisoner can avail himself of the objection, is by exceptions or motion for a new trial. Strawn v. State, 14 Ark. 549.

**119.** Under a statute providing that night in criminal prosecutions should be "the time between one hour after the sunsetting on one day, and one hour before sunrising on the next day," it was held that an indictment was good notwithstanding it described an offense as committed in the night between sunset and sunrise. Com. v. Lamb, 1 Gray, 493.

**120.** Where the statute limits the time for prosecuting an offense, the indictment must show that the time is within the limit. State v. Rust, 8 Blackf. 195.

**121. Use of figures.** Some of the cases hold that words, not figures, must be used in designating numbers, or in charging the date of the offense. U. S. v. Prescott, 2 Abb. 169; Chambers v. People, 4 Scam. 351; State v. Raiford, 7 Porter, 101; State v. Seamons, 1 Greene, 418.

**122.** In New Jersey it has been held error in an indictment, to express numbers or dates by figures, except where the indictment sets out the tenor of the instrument. Berrian v. State, 2 Zabr. 9. It has been held otherwise in Maine, Mississippi and Louisiana. State v. Reed, 35 Maine, 489; Kelly v. State, 3 Smed. & Marsh. 518; State v. Egan, 10 La. An. 698. A figure omitted from an indictment cannot be supplied. State v. Street, 1 Tayl. 158.

**123. Rule as to averment of place.** The place of the alleged crime must be so stated as to show that the court has jurisdiction of the offense, and when the place is matter of description, it must be particularly and truly stated, and proved as laid. State v. Cotton, 4 Foster, 143; McBride v. State, 10 Humph. 615.

**124.** The following was held a sufficient allegation of locality: "That Z. P., late of &c., at the township aforesaid, &c., one barn of the property of N. R., not parcel of the dwelling-house of the said N. R., there situate, willfully and maliciously did burn

and caused to be burned." State v. Price, 6 Halst. 203.

**125.** The place where the offense was committed must be alleged in the body of the indictment. It is not sufficient to charge it in the margin only. State v. Cook, 1 Mo. 547.

**126.** But if the town and county are distinctly averred in the indictment, it is sufficient without alleging that the offense was committed in the State; and where the county is stated in the margin, the place may be described in the town of A., "in the county aforesaid." State v. Wentworth, 37 New Hamp. 196.

**127.** An indictment was entitled in the margin, "The State of Alabama, Butler county," and in the body of the indictment, it was recited that "the grand jurors," &c., "of the county of *Buter*, upon their oaths present," &c. *Held*, that as the courts were bound to know the names of all the counties in the State, and there was no such county as Buter, the words in the county aforesaid must refer to the county stated in the margin of the indictment. Reeves v. State, 20 Ala. 33.

**128.** Under the statute of New York (2 R. S. p. 727), providing that when an offense shall be committed on the boundary of two counties or within 500 yards of the boundary, an indictment for the same may be found, and a trial and conviction had in either of such counties, an indictment found in the county of A. is good which charges the commission of the crime in the county of B., and within 500 yards of the boundary line between the county of A. and the county of B. People v. Davis, 56 N. Y. 95.

**129.** An indictment against a town for not making and opening a road, is sufficient if it describe the road as leading from one terminus in various directions, through the town, to another terminus, without giving the survey by courses and distances. State v. Newfane, 12 Vt. 422.

**130.** An indictment for extortion must state where the offense was committed. Halsey v. State, 1 South. 324.

**311.** An indictment for fraudulently mortgaging real estate before it is conveyed must state the time and place where the fraud was committed. State v. Walker, 14 Mo. 398.

(*d*) *Statement of the offense.*

**132. Must be intelligible.** The indictment is good if it contain the substance of the offense, so that the defendant have intelligible notice of the charge against him. All other defects are cured by the verdict and judgment. Thompson v. People, 3 Parker, 208. The certainty required in a declaration is sufficient for an indictment. Sherban v. Com. 8 Watts, 212; State v. McCormick, 2 Carter, 305.

**133.** When the varied aspect in which the acts of the defendant are represented in the indictment is such as to render it difficult to determine what particular offense he is legally charged with, judgment will be arrested. State v. Smith, 20 New Hamp. 399.

**134.** But if the indictment is conveniently legible, it will not be bad simply because it contains interlineations; and in the absence of anything appearing on the face of a written instrument, or being shown extrinsically, tending to prove that interlineations were made subsequently to the execution of the instrument, it will be presumed that they were made before or at its execution. French v. State, 12 Ind. 670.

**135.** An indictment is sufficient when it substantially charges every act necessary to constitute the offense in language so plain that the nature of the offense may be easily understood by the jury. Kersh v. State, 24 Ga. 191. Thus, an indictment for a conspiracy under the act of Congress of March 2d, 1867 (14 U. S. Stats. at Large, 484), was held sufficient which alleged an unlawful combination, and specified an act of one of the conspirators in relation thereto, without showing in what manner the act tended to effect the object of the conspiracy. U. S. v. Donau, 11 Blatchf. 168; s. c. 2 Green's Crim. Reps. 206.

**136.** All that is requisite to the validity of an indictment, is that it inform the defendant of the grounds of the charge against him; that it state facts sufficient to enable

the court to see that an indictable offense is alleged; and that it enable the defendant to prepare his defense, and to plead the judgment against him in bar of a second prosecution. People v. Graves, 5 Parker, 134.

**137.** It will not be presumed that a different offense is intended in the indictment from that charged in the complaint before the committing magistrate, because circumstances of aggravation set forth in the complaint in describing an assault are omitted in the indictment. State v. Bean, 36 New Hamp. 122; approved in State v. Stevens, Ib. 59.

**133.** Bad spelling which does not obscure or change the meaning will not render an indictment invalid. State v. Earp, 41 Texas, 487; Koontz v. State, Ib. 570. Therefore, an indictment charging that the offense was committed "in the year one thousand eight hundred and fifty-too," was held good. State v. Hedge, 6 Ind. 330. But the omission of a letter which makes a different word or meaning, is fatal to an indictment. Com. v. Riley, Thach. Crim. Cas. 67.

**139.** It is error in the court to leave it to the jury to determine whether certain words constitute a part of the indictment, or have been stricken from it. Com. v. Davis, 11 Gray, 4.

**140.** A count in an indictment may refer to averments in a previous count, to avoid repetition. People v. Graves, 5 Parker, 134.

**141.** In New York, an argumentative allegation of the offense, when it does not tend to prejudice the defendant, will not render the indictment invalid. 3 N. Y. R. S. 5th ed. 1019, 1020, § 54; People v. Rynders, 12 Wend. 425; People v. Charles, 3 Denio, 212; s. c. 1 N. Y. 184, 185.

**142.** The indictment need not charge whether it is for the first or second offense, although the latter is punishable differently from the former. State v. Smith, 8 Rich. 460.

**143. Averment of means.** When the act is not in itself criminal or unlawful (as cheating or defrauding a person of his property), the unlawful means by which it is to be accomplished must be distinctly set out. State v. Mayberry, 48 Maine, 218. But an indictment which alleged that the defendant "in some way and manner, and by some means, instrument and weapon to the jurors unknown, killed and murdered the deceased," was held sufficient. State v. Burke, 54 New Hamp. 92; s. c. 2 Green's Crim. Reps. 365. And the same was held of an indictment which charged that the defendant produced an abortion "with a certain instrument to the jurors unknown." State v. Wood, 53 New Hamp. 484; s. c. 2 Green's Crim. Reps. 346.

**144.** Where the principal in the second degree is charged as an aider or abettor, it is not necessary to set forth in the indictment the means or manner by which he became thus guilty, but merely to describe him generally as being present aiding and abetting. State v. White, 7 La. An. 531.

**145.** A count in an indictment may charge the use of different prohibited means to perpetrate the crime, charging all as constituting a single felony. People v. Davis, 56 N. Y. 95.

**146.** An indictment for a malicious trespass need not state the means employed. State v. Merrill, 3 Blackf. 346.

**147. Office of videlicet.** It is the office of a *videlicet* to restrain or limit the generality of preceding words, and in some instances to explain them. If what precedes be matter of direct averment and material, what is stated under a *videlicet* will be deemed material and traversable. Crichton v. People, 6 Parker, 363.

**148. One count sufficient.** An indictment which contains one good count will sustain a conviction irrespective of other defective counts. People v. Davis, 56 N. Y. 95; State v. Stebbins, 29 Conn. 463; State v. Burke, 38 Maine, 574; State v. Scripture, 42 New Hamp. 485; People v. Gilkinson, 4 Parker, 26; Crichton v. People, 6 Ib. 363; State v. Mathis, 3 Ark. 84; State v. Andrews, 17 Maine, 103; Bullock v. State, 10 Ga. 46; People v. Stein, 1 Parker, 202; U. S. v. Burroughs, 3 McLean, 405; State v. Davidson, 12 Vt. 300; State v. Miller, 7 Ired. 275; State v. Bugbee, 22 Vt. 32.

**149. Must state facts constituting an offense.** An indictment alleged that A., B.

and C., with force of arms, unlawfully and riotously did assemble to disturb the peace of the State, and did then and there being so assembled make a great noise and disturbance in and near the dwelling-house of one W. S., proclaiming that the said W. S. and his wife were persons of color, offering them for sale at auction, and calling them vulgar and opprobrious names, all of which was done in a loud voice, so that the same could be heard at a great distance, to the great damage and terror of the said W. S. and wife, and to the common nuisance. *Held* that the indictment did not charge any criminal offense, for the reason that it did not state that the said W. S. or his wife was in the house at the time. State v. Hatchcock, 7 Ired. 52.

**150.** An allegation that liquor was sold by the defendant and drank in his house is not equivalent to the averment that he sold it to be drunk there. State v. Freeman, 6 Blackf. 248.

**151.** An attempt to commit a crime necessarily includes the intent, and also an act or endeavor adapted and intended to effectuate the purpose, and both must be specifically alleged and proved. The averment that the act was by picking the pocket is uncertain and equivocal, but not that the attempt was "by thrusting the hand into the pocket," although it was not alleged that there was anything in the pocket. State v. Wilson, 30 Conn. 500.

**152.** An indictment for an assault with intent to murder must specify the acts which constituted the assault. Beasley v. State, 18 Ala. 535.

**153.** An indictment for administering a drug to a female for the purpose of procuring an abortion must charge that an abortion occurred, and that the woman was quick with child at the time. Com. v. Bangs, 9 Mass. 387.

**154.** If an offense committed on board of a vessel is of such a character that the court can entertain the case although the vessel has no national character, the possible foreign nationality of the vessel need not be negatived in the indictment. U. S. v. Demarchi, 5 Blatchf. 84.

**155.** An indictment against a justice of the peace for corruption in office must set out the facts constituting the offense. State v. Zachary, Busbee, N. C. 432.

**156.** An indictment for extortion in taking what was not due must allege that there was nothing due, and where the charge is for taking more than was due, it must be alleged in the indictment how much was due. State v. Coggswell, 3 Blackf. 54.

**157.** An indictment against an officer for misfeasance is sufficient which states that the defendant was duly elected to office by the legal voters, &c., and entered upon the discharge of his office. Edge v. Com. 7 Barr, 275.

**158.** An indictment for resisting an officer in the discharge of his duty need not allege the specific acts of resistance; charging an assault upon a deputy sheriff legally appointed and duly qualified is sufficient. State v. Copp, 15 New Hamp. 212. But the process charged to have been in the hands of an officer must be set out or alleged to have been lawful process. Cantrill v. People, 3 Gilman, 356; State v. Henderson, 15 Mo. 486; and it must be charged that he was an officer and acting in that capacity. McQuoid v. People, 3 Gilman, 76.

**159.** An indictment for obstructing public officers need not state the particular exercise of office in which they were engaged at the time, or the particular act and circumstances of obstruction. U. S. v. Bachelder, 2 Gallis. 15.

**160.** An indictment for refusing to assist an officer in securing a person whom he has arrested must set forth the authority by which the arrest was made. State v. Shaw, 3 Ired. 20.

**161.** An indictment charging that the defendant, in and upon the public highway, unlawfully did erect, build, and put up a number of wooden sheds and buildings, was held bad for uncertainty, in not stating the exact number of the sheds. Com. v. Hall, 15 Mass. 240.

**162.** Where an indictment for money lost on a bet upon the result of a game of cards, played by the defendant and others, did not state whether the bet was made with the

persons played with, or with a third person, it was held defective. State v. Stallings, 3 Ind. 531.

**163.** An indictment for keeping a ten-pin alley without a license, should charge that the defendant "was engaged in the business or employment of keeping" such an establishment. Simply alleging that he "did keep one" is not sufficient. Eubanks v. State, 17 Ala. 181.

**164.** An indictment for an act which is made criminal by statute, under certain circumstances, which does not allege the existence of those circumstances, is bad. Com. v. Clark, 2 Ashm. 105. Where a statute creates an offense, or enlarges the punishment, the indictment must state the circumstances which constitute the offense or increase the punishment. Davis v. State, 39 Md. 355; s. c. 2 Green's Crim. Reps. 381.

**165.** An indictment insufficient in not charging facts necessary to constitute a felony, may yet authorize a jury to convict for a misdemeanor. Com. v. Squire, 1 Mete. 258.

**166.** It is no defense to an indictment, that the defendant has committed a higher offense than the one alleged. Com. v. Walker, 108 Mass. 309.

**167. Charging offense in different ways.** The offense may be charged in different ways in several counts; and if the different counts are inserted in good faith, for the purpose of making a single charge, the court will not compel the prosecution to elect. Nelson v. People, 5 Parker, 39; Lanergan v. People, 6 Ib. 209.

**168.** Where the indictment shows that each count relates to the same transaction, and that they are only varied in order to meet the proof, the court will not compel the prosecutor to elect any one count upon which to proceed to trial. When an election is proper the application is addressed to the discretion of the court. People v. White, 55 Barb. 606.

**169.** On a trial for murder, it is not error in the court to refuse to require the public prosecutor to elect between the three counts in the indictment charging that the crime was committed in three different ways. Lanergan v. People, *supra*.

**170.** When a single offense is described in different counts, it is unnecessary to allege that the offense described in each count is not different from that described in the others. State v. Rust, 35 New Hamp. 438.

**171. Charging several acts.** The indictment may charge several felonious acts which in themselves separately considered are distinct offenses, when they collectively constitute but one offense, and may set forth in different counts various versions of the same charge or transaction, alleging different grades or degrees of the principal offense, provided as thus alleged, they may all be merged in one, and do not necessarily constitute different and distinct offenses. But each count should contain only one version of one offense, or of one degree of the principal offense. And there must not be alleged in the same count facts which constitute distinct offenses. State v. Smith, 31 Maine, 386; s. c. 2 Green's Crim. Reps. 462. Forging an account, and an affidavit and certificate to the same, alleged as one act, may be set forth in a single count. But if charged as separate and distinct offenses, the count will be bad for duplicity. Rosekrans v. People, 5 N. Y. Supm. N. S. 467; Harris v. People, 6 Ib. 206.

**172.** Where in defining an offense, a statute enumerates a series of acts, either of which separately or all together may constitute the offense, all such acts may be charged in a single count; as the forging of an indorsement on a draft, and uttering and passing the draft knowing the forged indorsement to be thereon; or forging an indorsement on a draft, and after it is indorsed by other persons, uttering it. People v. Frank, 28 Cal. 507; People v. De La Guerra, 31 Ib. 459. An indictment alleging that the defendant did falsely make and counterfeit a written instrument, is not bad for duplicity. State v. Hastings, 53 New Hamp. 452; s. c. 2 Green's Crim. Reps. 334.

**173.** An indictment for administering poison is not bad for duplicity, which charges that the defendant "did administer to, and cause to be administered to, and taken." Ben v. State, 22 Ala. 9.

**174.** Under a statute which forbids the

selling or offering for sale of tickets, an indictment which charged that the defendant offered for sale, and actually sold such tickets, was held bad for duplicity. Com. v. Eaton, 15 Pick. 273.

**175.** An indictment which charged in one count shopbreaking and larceny was held good. Com. v. Tuck, 20 Pick. 356.

**176.** An indictment which charged that the defendant did unlawfully, maliciously, &c., destroy and injure, and cause to be destroyed and injured, was held not objectionable. State v. Slocum, 8 Blackf. 315; State v. Kuns, 5 Ib. 314. And the same was held of an indictment which charged that the defendant sold spirituous liquors without a license, at his storehouse and dwelling-house, in P. Conlay v. State, 5 West Va. 522; s. c. 2 Green's Crim. Reps. 675.

**177.** But an indictment which alleged that the defendant, on a certain day, set fire to and burned a stack of hay, and on the same day also burned a building used as a stable and granary, was held bad for duplicity. State v. Fidment, 35 Iowa, 541; s. c. 1 Green's Crim. Reps. 632.

**178.** An indictment is not bad for duplicity which, in one count, charges the defendant with keeping a gambling house, and in another count with permitting other persons, in a place under his control, to play at cards or other games for money. State v. Bitting, 13 Iowa, 600.

**179.** An indictment charging that the defendant "did set up and promote an exhibition," is not bad for duplicity. Com. v. Twitchell, 4 Cush. 75.

**180.** Where a statute makes either of two or more distinct acts connected with the same general offense, and subject to the same punishment, indictable separately when committed by different persons, or at different times, they may, when committed by the same person, at the same time, be joined in one count, as constituting but one offense. Byrne v. State, 12 Wis. 519.

**181. Disjunctive averment.** The indictment should not charge the offense disjunctively, as that the defendant "did take or cause to be taken." State v. O'Bonnor, 1 Bail. 144; unless the word "or" is used in the sense of "to wit"—that is, in explanation of what precedes. Clifford v. State, 29 Wis. 327.

**182.** Where a statute enumerates several acts disjunctively, which separately or together constitute the offense, the indictment, if it charges more than one of them, should do so in the conjunctive; otherwise it will be bad for uncertainty. But this rule does not apply to cases where the words of the statute, which are used disjunctively, are synonymous. People v. Tomlinson, 35 Cal. 503; Blemer v. People, 76 Ill. 265. It was held not error to use the disjunctive in describing the various kinds of liquor charged in the indictment to have been sold. Cunningham v. State, 5 West Va. 508; s. c. 2 Green's Crim. Reps. 669.

**183.** Under a statute punishing the "burning, or causing to be burned," an indictment is good which charges that the defendant "burned and caused to be burned." State v. Price, 6 Halst. 203.

**184.** When the several acts specified in a statute are charged conjunctively, a conviction or acquittal is a bar to a subsequent prosecution, whether pleaded separately or together. Clifford v. State, 29 Wis. 327.

**185. Charging distinct offenses.** In cases of felony, no more than one distinct offense should be charged in the same indictment. Wright v. State, 4 Humph. 194; U. S. v. Dickinson, 2 McLean, 325; Bullock v. State, 10 Ga. 46.

**186.** Where an indictment charges two distinct offenses in the same count, it is bad for duplicity, and a conviction on it will be reversed on error. Reed v. People, 1 Parker, 481.

**187.** An indictment charging three distinct violations of a statute in one count, is bad for duplicity. State v. Shields, 8 Blackf. 151.

**188.** An indictment charging rude behavior in a meeting-house, and disturbing public worship, was held bad. Com. v. Symonds, 2 Mass. 163.

**189.** An indictment which charges the defendant with conspiring falsely to charge another with a crime of which he is inno-

cent, and with conspiring to cause him to be falsely charged with such offense by others, and with prosecuting or causing him to be prosecuted by others for such offense, is bad, the offenses being different, and a conviction not showing for which the defendants were found guilty. State v. Gary, 36 New Hamp. 359.

**190.** An indictment which charged the defendant with being an overseer of the road leading from R. to M., and that he permitted said road to be out of repair and ruinous, and that said road was not carefully measured, and marks and posts of durable wood at each mile set upon said road, was held bad for duplicity. Greenlow v. State, 4 Humph. 25.

**191. Joinder of offenses.** Offenses committed by the same person may be included in the same indictment in different counts, when they are of the same general nature, and belong to the same family of crimes, and where the mode of trial and nature of the punishment are also the same, although punishable with different degrees of severity. In Alabama, obtaining money by false pretenses, and larceny from the person, may be so included. Johnson v. State, 29 Ala. 62; also embezzlement and larceny from a storehouse. Mayo v. State, 30 Ib. 32. See also Cowley v. State, 37 Ib. 152; Sarah v. State, 28 Miss. 267; State v. Burke, 38 Maine, 574.

**192.** The joinder of the following offenses has been held proper: Murder and manslaughter; forging a check, and publishing it knowing it to be false; burglary and larceny; breaking and entering with intent to steal the goods of another person, and breaking and entering with an intent to murder; maiming another, and shooting at him with intent to kill, &c. Baker v. State, 4 Ark. 58; State v. Flye, 26 Maine, 312; People v. Austin, 1 Parker, 154; State v. Patterson, 1 Woodbury and Minot, 305; Com. v. Manson, 2 Ashm. 131; McGregg v. State, 4 Blackf. 101; State v. Colman, 5 Porter, 32; Wash v. State, 14 Smed. & Marsh. 129; People v. Baker, 3 Hill, 159; Carlton v. Com. 5 Metc. 532; State v. McAllister, 13 Maine, 374; Stephen v. State, 11 Ga. 225.

**193.** An indictment charged in the first count, that the defendant stole W., a slave, the property of A.; in the second count, the stealing of W., a slave, the property of B.; in the third count, the stealing of a gray mare, the property of C.; and in the fourth count, the stealing of a bay horse, the property of D. *Held* that the joinder of several distinct felonies was not a ground either of demurrer or arrest of judgment. Cash v. State, 10 Humph. 111. And see State v. Hogan, R. M. Charlt. 474; Com. v. McChord, 2 Dana, 243.

**194.** The rule which forbids the charging of several distinct offenses is not applicable to cumulative offenses included in the same statute. State v. Markham, 15 La. An. 498.

**195.** Although a felony and misdemeanor ought not in general to be joined, yet it is the practice in Massachusetts to sustain a joinder of such counts when they are for substantially the same offense, as for a simple assault, and a felonious assault. Com. v. McLaughlin, 12 Cush. 612–615.

**196.** In New Hampshire, where the indictment charges but one transaction, a count for a misdemeanor may be joined with a count for a felony; as embezzlement, and obtaining the same money by false pretenses. State v. Lincoln, 49 New Hamp. 464.

**197.** In Maryland, an indictment may charge a misdemeanor in one count, and a felony in another count. Burk v. State, 2 Har. & Johns. 426.

**198.** An indictment is bad in which counts for conspiracy are joined with counts for murder. U. S. v. Scott, 4 Biss. 29.

**199.** Where distinct felonies are charged, the court may compel the prosecution to elect on which charge it will proceed. But the refusal to compel such election cannot be alleged for error. State v. Hood, 51 Maine, 363; Cook v. People, 2 N. Y. Supm. N. S. 404; People v. Baker, 3 Hill, 158.

**200. Charging several with different offenses.** In general, all the defendants in a joint indictment must have been guilty of the same offense, though they may have been guilty in different degrees. White v. People, 32 N. Y. 465.

**201.** Therefore an indictment which

charges several defendants with a number of offenses committed by them independently of each other, some having been committed at one time and some at another, is fatally defective. Elliott v. State, 26 Ala. 78.

**202.** But several offenders may, in some cases, be included in the same indictment for different offenses of the same kind, the word separately being inserted which makes it several as to each of them; though the court will quash the indictment if inconvenience arise from preferring the charge in that mode. Lewellen v. State, 18 Texas, 538.

**203. Charging time of enactment of statute.** An indictment is not rendered invalid by the misstatement of the time of the enactment of a statute under which the defendant was indicted; the time of such enactment being immaterial, provided the statute was in force when the offense charged in the indictment was committed. People v. Reed, 47 Barb. 235.

**204. Recital of statute.** If the indictment purport to recite the statute, a slight variance will be fatal. Butler v. State, 3 McCord, 383.

**205.** An indictment on a public statute, need not recite it, or specially refer to it. It is sufficient to conclude "against the form of the statute in such case made and provided." Com. v. Hoye, 11 Gray, 462.

**206.** An indictment for perjury, alleging that the same was committed "in contempt of the laws of the United States of America," without referring to the statute, cannot be sustained. U. S. v. Andrews, 2 Paine, 451.

**207. Describing statutory offense.** An indictment upon a statute must allege all the facts and circumstances which constitute the statutory offense; and the prosecution is bound to prove them. Wood v. People, 53 N. Y. 511.

**208.** Where the essential ingredient of an aggravated offense charged upon the accused, is, that the alleged felony was committed after a former conviction of an offense punishable by imprisonment in a State prison and a discharge "either upon being pardoned, or upon the expiration of his sentence," the discharge in one of the ways mentioned in the statute is a fact material and necessary to be alleged and proved. Mere lapse of time will not authorize the presumption that he had been imprisoned and discharged upon the expiration of the term for which he was sentenced, so as to cast the burden of proof upon him that he was not thus discharged. Ib. Folger and Andrews, JJ., *dissenting*.

**209.** Where a statute contains a new offense unknown to the common law, and describes its ingredients, an indictment under it must conform, substantially at least, to the description thus given. Bryan v. State, 45 Ala. 86.

**210.** Where the offense is punishable at common law only, and the indictment avers it to have been committed against the form of the statute, such averment may be rejected as surplusage. But when what was a misdemeanor only at common law is made punishable as a felony by statute, or where the statute declares a common-law offense, committed under peculiar circumstances not necessarily included in the original offense, punishable in a different manner, an indictment for the statute offense, if bad for insufficient description, will not be good at common law. State v. Gove, 34 New Hamp. 510.

**211.** Where a statute prohibits an act which was before lawful, and enforces the prohibition with a penalty, and a succeeding statute, or the same statute in a substantive clause, prescribes a mode of proceeding for the penalty different from that by indictment, the prosecutor may notwithstanding, at his option, proceed by indictment under the prohibitory clause as for a misdemeanor at common law, or in the manner pointed out by the statute. Phillips v. State, 19 Texas, 158.

**212.** An indictment upon a penal statute must state all of the circumstances which constitute the definition of the offense in the act, so as to bring the defendant precisely within it. An indictment under the statute of Maine (R. S. of 1840, ch. 157, § 5), for having in possession counterfeit bank bills, which substitutes the word "similar" for "in the similitude of," which latter is the language of the statute, is insufficient; and

the bills must have the external appearance of those issued by the bank named, in order to come within the meaning of the statute. A paper containing all the words and figures upon a genuine bank bill, with no other resemblance or likeness, cannot be said to be in the similitude of the latter. State v. McKenzie, 42 Maine, 392.

213. In Maine, under the statute (R. S. ch. 51, § 36), which makes railroad companies liable to a forfeiture, for loss of life through negligence to be recovered by indictment, to the use of the widow, if no children; to the children, if no widow: and if both, to her and them equally; the indictment must allege that the person killed left a widow, or heirs, or both, and state their names. State v. Grand Trunk R. R. Co. 60 Maine, 145. The remedy by indictment under the foregoing statute is limited to cases where the person injured dies immediately; and is not applicable where the person killed was at the time an employee of the road. State v. Centr. R. R. Co. Ib. 490; s. p. 61 Ib. 114.

214. When a statute imposes a higher penalty upon a second or third conviction, it makes the prior conviction a part of the description of the offense intended to be punished; and therefore the fact of such prior conviction must be charged as well as proved. Where the defendant is found guilty on both counts of the indictment, it is erroneous to impose such a penalty on the second count. Tuttle v. Com. 2 Gray, 505.

215. In New York, an indictment under the statute in the county where the arrest was made, for an unlawful marriage in another county, must allege that the prisoner was arrested in the county in which he is indicted, and it is not enough that this fact is stated in the caption to the indictment or record of conviction. Houser v. People, 46 Barb. 33.

216. Where a statute is framed to meet the relations of parties to each other, and to prevent fraud, and the language of it is elliptical, leaving some of the circumstances expressive of the relation of the parties to be supplied by intendment, the facts and circumstances constituting such relation must be alleged in the indictment, though not expressed in the words of the statute. People v. Wilber, 4 Parker, 19.

217. Where such a statute was designed to prevent frauds upon parties supplying to other parties illuminating gas for consumption, passing by the ordinary means of conducting it through a meter provided for measuring and registering the quantity consumed, an indictment which omitted to allege that the company supplied the gas consumed at the burners, was held fatally defective. Ib.

218. An indictment under the civil rights bill of May 31, 1870, should charge that the offense was committed against a person on account of his race, color, or previous condition of servitude. U. S. v. Cruikshank, 1 Woods, 308.

219. When the want of consent is a substantive part of the offense prohibited by a statute, the indictment must allege that the act was done without consent. State v. Whittier, 21 Maine, 341.

220. Where a statute describes an offense as a crime or misdemeanor of a certain grade, the indictment need not charge the legal conclusion that such offense amounts to such crime or misdemeanor. State v. Absence, 4 Porter, 397.

**221. Charging offense in words of statute.** In an indictment for offenses created by statute, it is in general sufficient to describe the offense in the words of the statute. Lodano v. State, 25 Ala. 64. If, in such case, a defendant insists upon the insufficiency of the indictment, it is for him to show that the case falls within some exception to the rule. Where a statute against the sale of spirituous liquors without license did not contain the term "willfully," or any other equivalent expression, it was held that the term need not be employed in the indictment. State v. Abbott, 31 New Hamp. 434.

222. An indictment upon a penal statute must distinctly allege the offense and the penalty incurred. Com. v. Waters, 7 Dana, 29. Such an indictment must also be certain to every intent, and pursue the precise

language of the statute in describing the offense. Ike v. State, 23 Miss. 525.

223. Where a generic term is employed in a statute creating an offense, in connection with words more precise, the indictment must charge the offense in the language of the statute. On this principle an indictment for stealing a horse, was held not to be supported by proof of stealing a gelding. State v. Raiford, 7 Porter, 101; Bell v. State, 5 Eng. 536.

224. An indictment under a statute forbidding the running of horses on a public highway, so as to interrupt travelers thereon, which charged the defendant with running a horse, "so as to interrupt travelers," was held insufficient. State v. Fleetwood, 16 Mo. 372.

225. An indictment under a statute punishing the cutting down of a timber tree, which charged that the defendant "cut a timber tree," was held insufficient. Maskill v. State, 8 Blackf. 299.

226. An indictment under a statute against "uttering and publishing," as applied to forgery, which charged that the defendant "disposed of, and put away," was held bad. State v. Petty, Harper, 59.

227. In New Hampshire, an indictment alleged that the prisoner "broke and entered the store of one M." and divers goods "in the shop aforesaid then and there being, then and there in the shop aforesaid, feloniously did steal, take and carry away." *Held* on demurrer, that as the words "shop" and "store" in the statute (R. S. ch. 215, § 9), were not synonymous, and the larceny was not therefore alleged to have been in the place broken and entered, there must be judgment for the defendant. State v. Canney, 19 New Hamp. 135.

228. Although the offense be not alleged in the indictment in the very words of the statute, yet if the substantial facts constituting the statutory offense are well stated, it is sufficient. Frazer v. People, 54 Barb. 306; Thompson v. People, 3 Parker, 208.

229. Where in an indictment under a statute, the words "likewise," and "similitude," were substituted for the word imitation in the statute, it was held that the indictment was good. Peck v. State, 2 Humph. 78. And see State v. Vill, 2 Brev. 262.

230. Where the words of a statute are descriptive of the offense, the indictment must follow, substantially at least, the language of the statute, and expressly charge the defendant with the commission of the offense as described. When the words "willfully and maliciously" in a statute are descriptive of the offense, an indictment which charges that the act was done "feloniously, unlawfully and willfully" will be insufficient. State v. Gove, 34 New Hamp. 510.

231. It is not sufficient to pursue the words of the statute in an indictment, when the statute merely designates an offense, but does not, in express terms, prescribe its constituents. Anthony v. State, 29 Ala. 27.

232. Where a statute is not to be taken in the broad meaning of the words used, but limited by construction to a special subject or matter, the indictment should not charge the crime in the language of the statute, but should limit the case, and bring it within the construction placed upon the act. Bates v. State, 31 Ind. 72.

233. The principal exception to the general rule that statutory offenses may be charged in the words of the statute, is where the words of the statute may by their generality embrace cases falling within its literal terms, which are not within its meaning and spirit. State v. Bierce, 27 Conn. 319.

234. Where a statute defines the offense generally, and designates the particular acts constituting it, it is sufficient in charging the crime, to follow substantially the language of the statute. But where the statute defines the crime generally, without naming the particular acts constituting it, the acts done should be set out. Malone v. State, 14 Ind. 219.

235. When the prohibition and definition are both in the same section, the offense should be described in the language of the statute; and the circumstances mentioned in the statute to make up the offense cannot be supplied by the general conclusion, *contra*

*formam statuti*. But where the offense is prohibited in general terms in one section of the statute, and a penalty prescribed, and in another section entirely distinct there is a particular description, the indictment need only contain the general description. State v. Casey, 45 Maine, 435.

**236. When exceptions in statute must be negatived.** Where the exception is in the enacting clause of the statute, and enters into the description of the offense, the exception must be negatived. State v. Barker, 18 Vt. 195; State v. Palmer, Ib. 570; State v. Keene, 34 Maine, 500. Where, however, there is a proviso containing matter of excuse for the defendant, it need not be negatived in the indictment. State v. Godfrey, 24 Maine, 232; and the same is true, where the statute contains provisos and exceptions in distinct clauses. Britton v. State, 5 Eng. 299; Com. v. Hart, 11 Cush. 130; s. c. 2 Green's Crim. Reps. 247.

**237.** Where provisos and exceptions are contained in distinct clauses of a statute, it is not necessary to aver in the indictment that the defendant does not come within the exceptions, or to negative the provisos. Nor is it necessary to allege that he is not within such provisos, even though the purview should expressly notice them, as by saying that none shall do the act prohibited except in the cases thereinafter excepted. These are matters of defense. Com. v. Clanahan, 2 Metc. Ky. 8; State v. Cox, 32 Mo. 566; State v. Cassady, 52 New Hamp. 500; State v. Gurney, 37 Maine, 149; State v. Robinson, 39 Ib. 150.

**238.** In determining whether or not exceptions in a statute are to be negatived in pleading, it is immaterial whether the exception or proviso be contained in the enacting clause or section, or be introduced in a different manner. Neither does it depend upon any distinction between the words "*provided*," or "*except*," as they may be used in the statute. The question is, whether the exception is so incorporated with and becomes a part of the enactment as to constitute a part of the definition or description of the defense. State v. Abbey, 29 Vt. 60; State v. Fuller, 33 New Hamp. 259; State v. McGlynn, 34 Ib. 422; State v. Wade, Ib. 495. Where a statute provided that no person should manufacture or sell, or suffer to be manufactured or sold by any person, except for the purpose of exportation, or keep or suffer to be kept on his premises, or under his charge for the purpose of sale, wine, or strong or mixed liquors, it was held that a complaint charging a violation of the statute must set out and negative the exceptions. State v. O'Donnell, 10 R. I. 472; s. c. 2 Green's Crim. Reps. 376.

**239.** Where a statute prohibited the sale of wine and spirituous liquors otherwise than for medicinal, mechanical and chemical purposes, and the allegation was, that the defendant being licensed, did unlawfully sell contrary to the form of the statute, without alleging that the sale was not for medicinal, mechanical, or chemical purposes, it was held that the indictment was insufficient. State v. Abbott, 31 New Hamp. 434.

**240.** After words of general prohibition in a statute, whatever comes in by way of proviso or exception need not be negatived, but must be set up by the accused, whether the proviso or exception be contained in the enacting or subsequent sections. But if there be no general words of prohibition in the description of the offense, the prosecutor must show that the thing prohibited has been done. State v. Miller, 24 Conn. 522.

**241.** An indictment under a statute imposing a penalty need not negative the existence of facts which under a proviso of the statute would constitute a defense. Com. v. Fitchburg R. R. Co. 10 Allen, 189.

**242.** When a statute contains an exception of such a character that the offense defined in the statute cannot be accurately described if the exception be omitted, an indictment founded on the statute, must show that the accused is not within the exception. But if the offense may be defined without any reference to the exception, the indictment need not refer to it, but it is matter of defense. Where an officer was charged with embezzlement of public money more than two years previously, the prosecution for which, by act of Congress, must be

brought within two years from the time of committing the offense, unless the defendant was a fugitive from justice, the indictment was held sufficient on demurrer, although it did not charge that the defendant was within the exception. U. S. v. Cook, 17 Wallace, 168; s. c. 2 Green's Crim. Reps. 88.

**243.** Under a statute which makes the offense consist in threatening to accuse another of crime, "either verbally, or by any written or printed communication," an indictment which contains no averment that the threats charged were made in either form is insufficient. Robinson v. Com. 101 Mass. 27.

**244.** Where the indictment charges a series of acts, or a habit of life, the offense may be stated in general terms, unless the enacting clause of the statute specifies the acts of which the offense consists, in which case the indictment must follow the description in the statute. State v. Collins, 48 Maine, 217.

**245. Description of written instrument.** Where the tenor of an instrument is required to be set out, a limited number of abbreviations may be employed, when their meaning is obvious. State v. Jay, 5 Vroom (34 N. J.) 368.

**246.** An indictment which alleges that a note is payable to the holder, when on its face, it purports to be payable to bearer, is bad. Downing v. State, 4 Mo. 572.

**247.** A writing purporting to be an indenture, reciting that the party of the first part, for a valuable consideration, "has sold, and binds himself to deliver to the party of the second part, all of his present crop of cotton now planted, or so much of it as will satisfy his indebtedness to the said party of the second part;" that "this conveyance is intended as a security for the payment" of a debt due from the party of the first to the party of the second part, "which payment if duly made, will render this conveyance void, and if default be made in the payment of the above sum, then the said party of the second part, and his assigns, are hereby authorized to sell *his* certain crop of cotton, or as much of it as will pay all of his dues to the said party of the second part;" and signed and sealed by the party of the first part, is sufficiently described in an indictment as a "deed of trust." Oliver v. State, 37 Ala. 134.

**248. Description of property.** An indictment under a statute for making a lottery for the division of property, without specifying the property, was held insufficient. Marks v. State, 3 Ind. 535.

**249.** Where on the trial of an indictment for burglary in the house of A. with intent to steal the goods of B., it was proved that B. had no goods there, it was held material to state truly in whom the ownership of the goods was. State v. Brown, 3 McLean, 233.

**250.** In Maine, an indictment under the statute (of 1821, ch. 4, § 2), for burning a meeting-house, need not state who was the owner of the house, or its value, or that the burning was with force and arms, or that the house was being used as a place of public worship. State v. Temple, 12 Maine, 214.

**251. Guilty knowledge and intent.** Where the intent is an essential element of the offense, it must be distinctly averred by a proper affirmative allegation, and not merely by way of inference or argument. Monroe v. State, 24 Miss. 54; State v. Freeman, 6 Blackf. 248; People v. Lohman, 2 Barb. 216; McCann v. State, 13 Smed. & Marsh. 471; State v. Gove, 34 New Hamp. 510. Where in an indictment for obtaining a signature by a false pretense, the only averment of an intent to defraud was in the concluding clause, as follows: "So, the jurors aforesaid, upon their oaths aforesaid, do say and present, that said D. in the manner aforesaid, designedly and by a false pretense, and with intent to defraud, obtained the signature of the said S.," the indictment was held bad. Com. v. Dean, 110 Mass. 64; s. c. 2 Green's Crim. Reps. 259.

**252.** An indictment against the owner of a vessel, for casting away and destroying a vessel at sea, must charge intent to prejudice the underwriters. U. S. v. Johns, 1 Wash. C. C. 363.

**253.** An indictment against one for having in possession parts of bank bills, with

the intent of putting them together and making additional bills, must allege the completion of the intent. Com. v. Hayward, 10 Mass. 34.

254. An indictment for carrying and having in possession counterfeit bank bills, with intent to pass them, need not allege that the intent was to pass them in the State. State v. Cone, 2 Mass. 132.

255. An indictment at common law, for receiving property which the sheriff had distrained from a person in whose charge the sheriff had placed it, must allege that the defendant knew by what right the bailee for the sheriff held it. Israel's Case, 4 Leigh, 675.

256. Where the statement of the case necessarily includes a knowledge of its illegality, no averment of knowledge or bad intent is necessary. Com. v. Stout, 7 Monr. 247.

257. **Technical words.** In Illinois, where the indictment omitted the words, "in the name and by the authority of the people of the State of Illinois," it was held fatally defective. Whitesides v. People, Breese, 4.

258. But where an indictment commenced, "South Carolina," leaving out the words "State of," and concluded with the words, "against the peace and dignity of the said State," it was held good. State v. Anthony, 1 McCord, 285.

259. Where a statute uses the words willfully and maliciously, an indictment which charges that the offense was committed feloniously, unlawfully and maliciously, will not be sufficient. State v. Delue, 1 Chand. 166.

260. An indictment for felony is insufficient unless it alleges that the act charged was done "feloniously." State v. Feaster, 25 Mo. 324.

261. An indictment for an act which was a misdemeanor at common law, and which by statute has been made a felony, need not allege that the act was felonious. Beasley v. State, 18 Ala. 535; *contra*, State v. Murdock, 9 Mo. 730.

262. In Alabama, the statute (Clay's Digest, 442, § 26) rendered unnecessary the word "feloniously," in all indictments for crimes which were misdemeanors at common law, but were made felonies by the penal code of that State. Butler v. State, 22 Ala. 43.

263. The word "willfully," as used to denote the intent with which an act is done, is susceptible of different shades of meaning, according to the context. It sometimes signifies little more than intentionally or designedly, but is most frequently understood as conveying the idea of legal malice. State v. Preston, 34 Wis. 675.

264. Where the indictment omits the words, "at divers times," only one offense can be proved. State v. Jones, 39 Vt. 370.

265. A clerical mistake in an indictment for murder, in omitting the word "with" before the description of the weapon, does not vitiate, if the offense be sufficiently charged elsewhere in the indictment. Shay v. People, 4 Parker, 353.

266. The omission in an indictment of the word "did," in charging the commission of an offense, is a fatal defect. State v. Hutchinson, 26 Texas, 111; State v. Daugherty, 30 Ib. 360.

267. The words "*vi et armis*," are required in indictments for offenses which occasion a breach of the peace. State v. Kean, 10 New Hamp. 347.

268. Where an indictment was signed by the foreman of the grand jury, but the words, "a true bill," did not appear over his signature, the indictment was held bad. Webster's Case, 5 Maine, 432.

269. An indictment will not be bad on account of clerical or grammatical errors, unless the meaning is impaired. State v. Wimberly, 3 McCord, 190.

270. **Conclusion.** In a common-law indictment, the words *contra formam statuti*, may be rejected as surplusage. Gregory v. Com. 5 Dana, 417; State v. Wimberly, 3 McCord, 190; Com. v. Hoxey, 16 Mass. 385; Knowles v. State, 3 Day, 103; Southworth v. State, 5 Conn. 325; Cruiser v. State, 3 Harr. 206; State v. Phelps, 11 Vt. 116; State v. Straw, 42 New Hamp. 393.

271. An indictment which concludes contrary to the law, instead of contrary to the statute, is good. Hudson v. State, 1 Blackf. 317.

**272.** But an indictment concluding "against the law in such case provided," is bad for uncertainty, in not showing whether the offense was committed against the statute or common law. Com. v. Inhabs. of Stockbridge, 11 Mass. 279.

**273.** When the forged instrument is set out in the indictment, and it appears that the offense is not punishable under the statute, the conclusion "against the statute," &c., may be rejected as surplusage, and the defendant convicted of the common-law offense. State v. Lamb, 65 N. C. 419.

**274.** An indictment under two statutes, concluding in the singular, has been held bad. Francisco v. State, 1 Carter, 179; State v. Jim, 3 Murphy, 3; *contra*, U. S. v. Trout, 4 Bis. 105; State v. Dayton, 3 Zabr. 49; U. S. v. Gibert, 2 Sumner, 19.

**275.** In Rhode Island, an indictment which concluded against the form of the statute, instead of statutes, was held good, although the offense was created by several statutes. State v. Wilber, 1 R. I. 199. But in North Carolina, where there was but one statute, it was held that an indictment which concluded against the form of the statutes was bad. State v. Sandy, 3 Ired. 570; *contra*, Carter v. State, 2 Carter, 617.

**276.** Where one statute defines the offense, and another fixes the punishment, the indictment must conclude, "contrary to the form of the statute;" but it is otherwise where one statute continues a former one in part, or explains, or regulates it. King v. State, 2 Carter, 523.

**277.** Where the offense is created by statute, or the statute provides that a common-law offense, committed under certain circumstances not necessarily embraced in the original offense, shall be punished differently, or where the statute changes the common-law offense from a lower to a higher grade, the indictment must conclude "contrary to the form of the statute." But it is otherwise where the statute is only declaratory of an offense at common law, without changing the punishment. People v. Enoch, 13 Wend. 159.

**278.** Where there are two statutes for the same offense, one creating the offense and imposing a penalty, and the other making the offense indictable, the indictment must conclude "against the form of the statute." State v. Pool, 2 Dev. 202. But where there were two statutes, the first creating an offense with a penalty, and the second imposing an additional penalty, it was held that the indictment might conclude "against the form of the statute." Butman's Case, 8 Maine, 113. But where an offense is created by one statute, and a penalty imposed for its violation by another statute, the indictment must conclude in the plural. State v. Moses, 7 Blackf. 244.

**279.** In Texas, indictments are required to conclude against the peace and dignity of the State. State v. Durst, 7 Texas, 74. In Louisiana an indictment is good, although it does not aver that it is carried on "in the name and by the authority of the State," and does not conclude "against the peace and dignity of the same." State v. Russell, 2 La. An. 604.

### 7. Removal of indictment.

**280. How made.** In New York, a person having been arraigned for trial in the Court of Sessions on an indictment for burglary in the third degree, and pleaded not guilty, the court directed the indictment to be sent to the court of Oyer and Terminer for trial. The following entry was made on the indictment: "Trial of indictment to go over to next court of Oyer and Terminer." The clerk then entered in his minutes: "The defendant was arraigned before the court, and by his attorney, E. P. Hart, plead not guilty. Remanded." At the opening of the trial in the court of Oyer and Terminer, the clerk made the further entry in his minutes: "Ordered, that the trial of this indictment go over to the next court of Oyer and Terminer." *Held*, that the indictment was duly removed from the Court of Sessions to the court of Oyer and Terminer. Myers v. People, 4 N. Y. Supm. N. S. 292.

### 8. Proof required.

**281. Holding of court.** When it becomes necessary to charge that a certain term of the court was held, it must appear that at

least a quorum of the court was present. State v. Freeman, 15 Vt. 722.

282. **Authenticity of indictment.** An indictment found on file, and acknowledged to be an authentic paper, proves itself, when the question of authenticity is raised on an issue to a plea to the indictment. State v. Clarkson, 3 Ala. 378.

283. **Evidence as to the finding of the indictment.** The evidence upon which the grand jury acted in finding the indictment cannot be inquired into; and the indictment will be good although one of the grand jurors misbehaved. Turk v. State, 7 Ohio, 240.

284. Evidence is not admissible for the purpose of vitiating an indictment, either from the grand jurors, or from the witnesses before them, or from any other person required by law to be present before them. State v. Fasset, 16 Conn. 457.

285. **Time.** Although the time when an offense was committed be alleged, it need not be proved that the act was done on the precise day alleged. State v. Baker, 34 Maine, 52; Johnson v. U. S. 3 McLean, 89; Com. v. Braynard, Thach. Crim. Cas. 146; Oliver v. State, 5 How. Miss. 14; Com. v. Alfred, 4 Dana, 495; People v. Van Santvoord, 9 Cow. 655.

286. When the time of the commission of the offense is charged in an indictment under a *videlicet*, the prosecution may prove that the offense was committed at any time before the finding of the indictment within the period described. McDade v. State, 20 Ala. 81.

287. **Place.** The prosecution must prove that the offense was committed in the county where the venue is laid. Hite v. State, 9 Yerg. 382; Moody v. State, 7 Blackf. 424.

288. **Averments which might have been omitted.** It is incumbent on the prosecution to prove allegations which though unnecessary are nevertheless connected with and descriptive of that which is material, or in other words, averments which might with propriety have been omitted, but being inserted in the indictment, are descriptive of the identity of that which is legally essential to the charge. John v. State, 24 Miss. 569.

289. Under an indictment for altering a deed of assignment, the averment that the assignment was duly recorded is material, and must be proved. State v. Clark, 3 Foster, 429.

290. Where an indictment for stopping the mail set out the contract of the carrier of the mail with the post office department, it was held that it must be proved. State v. Brown, 3 McLean, 233.

291. Sums of money alleged in an indictment need not be proved as charged, unless they form part of the description of a written instrument, or are evidence of the offense. Parsons v. State, 2 Carter, 499.

292. **Must support charge.** Under an indictment for murder, it will be sufficient to prove that the deceased was killed by a different weapon than that described, or by a different kind of poisoning than that alleged. But a charge of death by poisoning will not be supported by proof of death by shooting, starving or strangling. U. S. v. Howard, 3 Sumner, 12. And an indictment for stabbing will not be sustained by proof of cutting. State v. Patza, 3 La. An. 512.

293. On the trial of an indictment for procuring persons to shoot, cut, stab and wound another, it is not competent to prove that a rape was committed by such persons after they had broken into the dwelling-house of such other, the rape being a distinct substantative offense from that charged. Watts v. State, 5 West Va. 532.

294. An indictment for concealing treasury notes, which the defendant knew had been stolen from the United States mails, described one of the notes as "a promissory note called a treasury note for the payment of fifty dollars with interest at the rate of one per centum." The evidence was, that the rate of interest was one mill per cent. *Held* that the variance was fatal. U. S. v. Hardman, 13 Peters, 176.

295. Where an indictment charges a cheating in an executed contract, and the proof shows an attempt to cheat in executing a contract which was abandoned, the variance is fatal. State v. Corbett, 1 Jones, 264.

296. A charge of stealing a pine log will not be supported by proof of the stealing of

an oak or birch log. State v. Noble, 15 Maine, 476; State v. Copp, 15 New Hamp. 212.

**297.** An indictment charging that an affidavit was sworn to, purporting to have been made by J. N. P., is not supported by proof that the affidavit was signed by J. P. Perkins v. State, 6 Ohio, 274.

**298.** Where an indictment against a woman describes her as B. C., the wife of E. G., the latter words will be deemed a mere addition, which it will not be necessary to prove. Com. v. Lewis, 1 Metc. 151.

**299.** The defendant and others were charged in an indictment with an assault and battery on Thomas Adams, a deputy sheriff. At the trial, it was proved that the person upon whom the assault and battery were committed was commissioned as a deputy sheriff by the name of Thomas Adams, Jr. *Held* that the variance was not material. Com. v. Beckley, 3 Metc. 330.

**300.** Although an indictment is good on its face, yet no conviction under it can be had when facts are proved which, if alleged in the indictment, would make it defective, and enable the defendants after conviction to arrest or reverse the judgment. Thus, if A. and B. are jointly indicted and tried for gaming, and it is proved that A. in company with others played at one time during the absence of B., and that B. in company with others played at another time when A. was not present, there can be no conviction. Elliott v. State, 26 Ala. 78.

### 9. Objection to indictment.

**301. How made.** Where a grand jury has presented an indictment contrary to law, the court can properly arrive at the fact only by a trial, and cannot on an *ex parte* showing discharge a prisoner regularly indicted. State v. Cheek, 25 Ark. 206.

**302.** The validity of an indictment cannot be tested upon demurrer to the *scire facias* issued on a forfeited recognizance, but the defendant must appear and answer to the indictment. State v. Weaver, 18 Ala. 293.

**303.** Where the sufficiency of an indictment is not involved in a decision or opinion of the court at the trial, the only way of reaching a defect in the indictment is by a motion in arrest of judgment, or by a writ of error. People v. Stockham, 1 Parker, 424.

**304.** When an indictment is indorsed "a true bill" by mistake, the fact may be shown by affidavit or otherwise, either upon a motion to quash, or by a plea in abatement. State v. Horton, 63 N. C. 595.

**305.** The objection to an indictment that other persons than the defendant are not sufficiently described, must be taken on demurrer. State v. Crank, 2 Bail. 66.

**306.** At common law, an objection on account of the misjoinder of counts can only be made by motion to quash, or to compel the prosecutor to elect on which count he will proceed. Brantly v. State, 13 Smed. & Marsh. 468.

**307.** An objection to an indictment on the ground of duplicity must be made by demurrer or motion to quash. State v. Brown, 8 Humph. 89.

**308.** Where several distinct felonies are charged in the same indictment, the court, even after the case has been submitted to the jury, upon the application of the prisoner, may compel the prosecutor to elect as to which charge he will proceed. Wash v. State, 14 Smed. & Marsh. 120.

**309.** Where the objection that distinct felonies are joined in the same indictment is not made until after plea, it is discretionary with the court whether or not to compel the State to elect on which count to try the defendant. Weinzorflin v. State, 7 Blackf. 186.

**310.** An indictment defective or bad on demurrer must be held insufficient on motion in arrest of judgment. State v. Barrett, 42 New Hamp. 466.

**311.** It is not a defense to an indictment that there was no preliminary examination of the accused before a magistrate. French v. People, 3 Parker, 114.

**312. Waiver of, not binding.** The accused cannot waive his legal rights by any consent in reference to material averments in the indictment. People v. Campbell, 4 Parker, 386.

**313.** A waiver by the prisoner of all objections to irregularity in the finding of the

indictment, and to the jurisdiction of the court, is not binding upon him. State v. Bonney, 34 Maine, 223.

**314. When too late.** It is too late after verdict to object that the record fails to show that the grand jury was regularly selected and summoned. Shaw v. State, 18 Ala. 547; Com. v. Smith, 9 Mass. 107; or that the indictment was presented by twenty-four instead of twenty-three grand jurors, as required by the statute. Conkey v. People, 1 N. Y. Ct. of Appeals Decis. 418; affi'g s. c. 5 Parker, 31.

**315.** In Alabama, although the statute (Code, § 3591) provides that an objection to an indictment on the ground that the grand jurors were not drawn in the presence of the proper officers, must be made at the term at which the indictment is found; yet if the prisoner was unable to raise the objection at that time in consequence of his confinement in jail in another county, the court may entertain the objection at a subsequent term. Russell v. State, 33 Ala. 366.

**316.** In New York, a defect in an indictment for murder, in charging the crime upon the *oath* of the grand jurors, instead of *oaths*, after verdict, is cured by the statute. Wagner v. People, 54 Barb. 367; affi'd 4 N. Y. Ct. of Appeals Decis. 509; s. c. 2 Keyes, 684.

**317.** Where an indictment is indorsed by the foreman of the grand jury, "a true bill," and the record shows it was returned into court so indorsed; and that the prisoner raised no objection, but pleaded not guilty, he cannot move in arrest of judgment, on account of any informality in the finding, returning or filing. Russell v. State, 33 Ala. 366.

**318.** An indictment on a sheet of paper was wrapped in a blank half sheet of paper of like size, and on the latter the prosecuting attorney had indorsed "Commonwealth v. Joseph Burgett, indictment," and underneath the foreman of the grand jury had written "a true bill. Robert Hamilton, foreman." *Held* too late to object to the irregularity after verdict. Burgess v. Com. 2 Va. Cas. 483.

**319.** Although it be required that a prosecutor shall be named at the foot of the indictment, yet if the defendant postpones his objection until after the jury have rendered verdict against him, he will be held to have waived that objection. Hayden v. Com. 10 B. Mon. 125.

**320.** After the plea of guilty is filed, judgment will not be arrested because a blank left in the indictment for the name of the county for which the grand jurors were sworn, has not been filled. Forrester v. State, 34 Ga. 107.

**321.** A mistake in the christian name of the prisoner is cured by verdict. Smith v. State, 8 Ohio, 294. A misnomer is only matter of abatement, and after plea of not guilty, it cannot be taken advantrge of either at the trial, or in arrest of judgment, or on motion for a new trial. Com. v. Dedham, 16 Mass. 141; State v. Thompson, Cheves, 31; People v. Smith, 1 Parker, 329.

**322.** Although an indictment charge two distinct offenses, yet objection on that ground will be waived by a failure to demur. People v. Burgess, 35 Cal. 115.

**323.** Duplicity in an indictment, whether in the same or different counts, will be cured by a verdict of guilty as to one of the offenses, and not guilty as to the other. When the indictment charges two offenses in one count, the prosecuting officer may enter a *nol. pros.* as to one charge before trial, and a conviction upon the remaining charge will be good; or he may be held to an election upon which charge he will proceed. State v. Merrill, 44 New Hamp. 624.

**324.** A motion to quash an indictment after a *nolle prosequi* has been entered, will be overruled. U. S. v. Hill, 1 Brock. 156.

### 10. Amendment of indictment.

**325. Not in general permitted.** An indictment is not the subject of amendment like a declaration; but a new indictment for the same offense is substituted. Com. v. Adcock, 8 Gratt. 661.

**326.** In Massachusetts, it has been held that in a capital case, an indictment cannot be amended, even with the consent of the prisoner. Com. v. Mahar, 16 Pick. 120.

**327.** In Alabama, an indictment cannot be amended without the consent of the ac-

cused, and against his objection, even in an immaterial particular. Gregory v. State, 46 Ala. 151; Johnson v. State, Ib. 212.

**328.** Where an indictment is defective for the reason that the name of the prosecutor is not indorsed on it, the defect cannot be remedied by amendment after trial. Moore v. State, 13 Smed. & Marsh. 260.

**329.** Where the proper attorney signed an indictment containing a single count, and afterward two other counts were added by another attorney charging different offenses, it was held that a conviction could not be sustained on either count. Hite v. State, 9 Yerg. 198.

**330.** A presentment being made by the grand jury, an indictment for the same offense was sent by the attorney for the prosecution to the grand jury, who found it "a true bill," and afterward, at a subsequent term, the prosecuting attorney entered a *nolle prosequi* on the indictment, and it then appeared that the indictment was an amendment of the presentment. *Held* that both ceased to exist. U. S. v. Hill, 1 Brock. 156.

**331.** Striking out or quashing one count in an indictment will vitiate the whole. Rose v. State, Minor, 28.

**332 When allowed.** In New Hampshire, where an indictment for burglary charges the commission of the offense subsequent to the finding of the indictment, the indictment may, under the statute (Gen. Stats. ch. 242, § 13), be amended on motion, and if not amended, the defect will be cured by the verdict. State v. Blaisdell, 49 New Hamp. 81.

**333.** Where on the trial of an indictment for arson charging the burning of thirty-five houses, the prosecution withdrew the charge except as to the house of B. The judge told the jury they must find the prisoner guilty of setting fire to that house, or acquit him. *Held* that if the allegation as to the other houses was erroneous, the error was cured by the withdrawal of such allegation. Woodford v. People, 5 N. Y. Supm. N. S. 539.

**334.** Where there were two indictments against a party, one for assault and the other for an assault with intent to murder, and by mistake he pleaded guilty to the last instead of the first, it was held that the error might be corrected, although an entry had been made on the indictment and minutes of the court. Davis v. State, 20 Ga. 674.

**335. Rejection as surplusage.** All unnecessary words in an indictment may, on the trial, be rejected as surplusage, if the indictment will be good upon striking them out. State v. Webster, 39 New Hamp. 96.

**336.** The allegation in an indictment for disinterring a dead body, that the burying ground belonged to the first congregational parish in G., may be rejected as surplusage. Com. v. Cooley, 10 Pick. 37.

**337. Mutilation.** The accidental mutilation of an indictment by cutting it into several pieces, when the parts can be so reunited that the words which have been severed may be joined so that there is no material omission of any averment, does not unfit it to be the basis of further proceedings. Com. v. Roland, 97 Mass. 598.

### 11. Quashing indictment.

**338. By prosecution.** Before the prisoner is arraigned, the prosecution may, in its discretion, enter a *nolle prosequi*, or quash the indictment. Clark v. State, 23 Maine, 261.

**339. Motion.** On a motion to quash, matters not apparent on the record must be alleged in a traversable plea, unless otherwise provided by statute. State v. Intoxicating Liquors, 44 Vt. 208.

**340. Is in discretion of court.** The court is not bound to quash a defective indictment on motion, the party having his remedy by demurrer or motion in arrest of judgment. State v. Taggart, 38 Maine, 298; State v. Burke, Ib. 575.

**341.** It is in the discretion of the court whether or not to set aside a defective indictment upon motion, or to put the prosecution to an election when more than one offense is charged, upon which it will proceed. People v. Davis, 56 N. Y. 95; Click v. State, 3 Texas, 282; State v. Dayton, 3 Zabr. 49; Bell v. Com. 8 Gratt. 600; State v. Stuart, 23 Maine, 111; State v.

Smith, 1 Murphy, 213; Com. v. Eastman, 1 Cush. 189; State v. Barnes, 29 Maine, 561.

342. Courts usually refuse to quash on the application of the defendant where the indictment is for a serious offense, unless upon the clearest and plainest ground; but will leave the party to a demurrer, or a motion in arrest of judgment, or a writ of error. People v. Walters, 5 Parker, 661; s. c. 6 Ib. 15; Bell v. Com. 8 Gratt. 600; State v. Smith and Com. v. Eastman, *supra*.

343. Where an indictment is quashed on the defendant's motion, he has no legal ground of exception to the refusal of the court to allow him afterwards to withdraw the motion; nor to the refusal of the court to allow him to withdraw his plea of not guilty to a second indictment for the same offense, and plead a former acquittal. Com. v. Gould, 12 Gray, 171.

344. When an indictment is quashed, adjudged bad on demurrer, or when judgment is arrested for a defect therein, the accused has not been in jeopardy. Ib.

345. The court may quash a defective count when it will not leave the other counts of the indictment defective. Jones v. State, 6 Humph. 435.

346. **Grounds for granting motion.** The objection that the grand jurors are not named in the caption of the indictment must be presented on motion to quash the indictment or by demurrer. After judgment, an allegation in an indictment that it was found by "a grand jury of good and lawful men," is sufficient. Dawson v. People, 25 N. Y. 399.

347. Where the sheriff summons the grand jury without a proper process, the indictment will be quashed on motion. Nicholls v. State, South. 539.

348. The objection that a bailiff of the court was present in the grand jury room while witnesses were being examined, and the grand jury were deliberating upon the defendant's case, if valid, must be raised upon a motion to set aside the indictment. State v. Kimball, 29 Iowa, 267.

349. Misconduct in the grand jury may be ground for quashing the indictment. State v. Dayton, 3 Zabr. 49.

350. Where it appears that the court is convened at a place not designated by law, the indictment will be quashed. Sam v. State, 13 Smed. & Marsh. 189.

351. An indictment will not be quashed for a defect in the caption, unless the defect is clear and decided. State v. Hickman, 3 Halst. 299.

352. An indictment which does not charge any offense may be quashed on motion. Com. v. Clark, 6 Gratt. 615; Bell v. Com. 8 Ib. 600.

353. An indictment for counterfeiting was quashed because the day of the month when the offense was committed was not alleged. State v. Roach, 2 Hayw. 552.

354. If a witness examined by the prosecutor on the trial, swears that he knows the person who is stated in the indictment to be unknown, and it appears that he gave testimony before the grand jury disclosing the name, the indictment cannot be sustained. It is the ignorance of the grand jury, and not of the petit jury, which authorizes the statement that the person is unknown. It does not sustain the objection that the evidence on the trial discloses the name, unless it at the same time appears that the name was known to the grand jury. White v. People, 32 N. Y. 465.

355. Where two or more distinct and separate felonies are contained in the same indictment, it may be quashed, or the prosecutor compelled to elect upon which charge he will proceed. But in cases of misdemeanor, several distinct offenses may be joined in the same indictment, and tried at the same time. Kane v. People, 8 Wend. 203; State v. Smith, 8 Blackf. 489.

356. An indictment for overflowing a highway will be quashed where there is no proof of any authority to lay out the highway. Pennsylvania v. Oliphant, Addis. 345.

357. **In case of several defendants.** Where an indictment is quashed as to one of several defendants, it is quashed as to all. State v. Smith, 1 Murphy, 213.

358. But where a husband and wife were jointly indicted for embezzlement and lar-

ceny, it was held that quashing the indictment as to the wife did not destroy it as to the husband. Coats v. People, 4 Parker, 662.

**359. When motion denied.** The court will not look into the evidence that was before the grand jury, with a view to quash the indictment. State v. Boyd, 2 Hill, S. C. 288; State v. Dayton, 3 Zabr. 49.

**360.** It is not a ground for quashing the indictment, that the minutes of evidence taken before the grand jury do not show sufficient facts to justify the finding of the indictment. State v. Morris, 36 Iowa, 272.

**361.** The fact that the grand jury received evidence which was incompetent, is not a sufficient ground for setting aside an indictment. State v. Tucker, 20 Iowa, 508.

**362.** An indictment will not be quashed on the ground that the name of one of the grand jurors in the caption is different from his name in the panel, if in reality he is the same person. State v. Norton, 3 Zabr. 33.

**363.** An indictment will not be quashed on the ground that the investigation of the charge was still pending before the committing magistrate when the indictment was found. People v. Horton, 4 Parker, 222; People v. Heffernan, 5 Ib. 393.

**364.** The mode of selecting the grand jury will not be a ground for quashing the indictment. State v. Balt, 7 Blackf. 9; State v. Henley, Ib. 324.

**365.** Where one of several counts in an indictment is good, a motion to quash will not be granted. State v. Wishon, 15 Mo. 503; State v. Stalker, 3 Ind. 570; Kane v. People, 3 Wend. 363; State v. Rector, 11 Mo. 28.

**366.** Where one of two counts is bad, the prosecution may enter a *nolle prosequi* as to the defective count, which will remove the grounds for the motion to quash the indictment, and leave the defendant to be tried upon the good count. State v. Buchanan, 1 Ired. 59. Or the defective count may be reached by demurrer. State v. Coleman, 5 Porter, 32.

**367.** An indictment cannot be quashed for any matter which does not appear on the face of the indictment. Com. v. Church, 1 Penn. St. 105; Wickwire v. State, 19 Conn. 477; *contra*, State v. Batcheldor, 15 Mo. 207; State v. Kitchen, Ib.; State v. Wall, Ib. 208.

**368.** In Maine the statute (R. S. ch. 172, § 38) forbids the quashing of an indictment or arresting judgment for any omission or misstatement which does not tend to the prejudice of the defendant. State v. Nelson, 29 Maine, 329.

**369.** After plea of not guilty, it is too late to move to quash the indictment. State v. Burlingham, 15 Maine, 104; State v. Barnes, 29 Ib. 561; People v. Monroe O. & T. 20 Wend. 108. But the defendant may withdraw his plea, in order to make a motion to quash. Matter of Nicholls, 2 South. 539.

**370.** An indictment will not be quashed after conviction, on the ground that during the trial a *second indictment* was found for the *same offense*. People v. Monroe O. & T. *supra*.

*See* GRAND JURY. *For indictments in the several offenses, see the titles of those offenses.*

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# Information.

**1. Nature.** In New Hampshire, an information is an official act, devolving solely on the attorney general; and his action is not limited by leave of court, or any preliminary inquiry instituted by it. State v. Dover, 9 New Hamp. 468.

**2. When it will lie.** An information will lie at common law for an exhibition that tends to corrupt the morals of the community, or shocks humanity with its indecency. Knowles v. State, 3 Day, 103.

**3.** Offenses against the laws of the United States, in all but capital and infamous crimes, may be prosecuted by information. There must first be a complaint supported by an oath or affirmation showing probable cause, followed by an arrest and examination; and if the accused is held to bail or committed, the district attorney, on filing the magistrate's or commissioner's return with the proofs, will have leave to file the information. U. S. v. Shepard, 1 Abb. 431; U. S. v. Miller, 1 Sawyer, 701.

**4. What to contain.** Where an informa-

tion for selling spirituous liquor without a license contained a hundred counts, each count having a distinct caption, and signed at the end of the last count, on the last page, but the pages were fastened together, the information was held good. State v. Paddock, 24 Vt. 312.

5. An information by the attorney general need not allege that he informs under his official oath. State v. Sickles, Brayt. 132.

6. Where an information charged, not that the defendant committed the offense, but that he was guilty as the district attorney verily believed, it was held bad on motion to quash. Vannatta v. State, 31 Ind. 210.

7. An information for being a common cheat must state particular acts. State v. Johnson, 1 Chip. 129.

8. An information for exhibiting a show, must state acts of indecency, barbarity, or immorality, in order that the court may see whether the offense is within the statute, or is an offense at common law. Knowles v. State, 3 Day, 103.

9. An information for a first offense need not allege that it is a first offense. Kilbourn v. State, 9 Conn. 500. In Massachusetts, an information for additional punishment need not set forth the previous convictions and sentences *in extenso*, but it should aver them with sufficient particularity to identify them, and to show the character of the offense charged. Wilde v. Com. 2 Metc. 408.

10. In Massachusetts, under the statute (of 1832, ch. 73, and 1833, ch. 85) inflicting additional punishment on convicts who had been discharged from former sentences "in due course of law," it was held sufficient for an information for such punishment, to allege that the convict had been discharged from a former sentence by a pardon. Evans v. Com. 3 Metc. 453. But see Wilde v. Com. 2 Ib. 408.

11. In general, an information for an offense created by statute, is sufficient which sets forth the offense in the language of the statute; and if the defendant insists upon greater particularity, he must show that the case falls within some exception to the general rule. Therefore, where an information under the statute of Connecticut, prohibiting the sale of spirituous liquors without license, alleged in the language of the statute, that the defendant at a certain time and place, sold spirituous liquors to A. B. without license, not stating the kind, quantity, or value of the liquor sold, or the terms of sale, nor the delivery of the liquor, it was held that as the statute did not specify either the kind, quantity, or value of the liquors, the sale of which constituted the offense, and as these facts did not affect either the jurisdiction of the court, or the nature or degree of punishment, the information was sufficiently certain. Whiting v. State, 14 Conn. 487.

12. **Amendment.** An information cannot be amended by adding charges to it. Com. v. Rodes, 1 Dana, 595. A variance between the presentment and information may be taken advantage of by objecting to the filing of the information, or by motion to quash it. Jones's Case, 2 Gratt. 555.

13. In New Hampshire, criminal informations which are not found upon the oath of a jury, may be amended by the court, or by a single judge at chambers. State v. Weare, 38 New Hamp. 314.

14. **Plea.** Under an information against two, the defendants may put in separate pleas, one putting themselves on the court, and the other on the jury. State v. Taylor, 1 Root, 226.

15. **Conclusion.** Where an information concludes "against the form of the statute," and the offense charged is not prohibited by any statute, these words may be rejected as surplusage. Southworth v. State, 5 Conn. 325.

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# Innkeeper.

1. **Who is.** To constitute an innkeeper, tavern keeper, or hotel keeper, the party so designated must receive and entertain as guests those who choose to visit his house; and a restaurant, where meals are furnished, is not an inn or tavern. People v. Jones, 54 Barb. 311.

2. A man may be an innkeeper, although he keeps an inn imperfectly, or combines that employment with others. If he is pre-

pared and holds himself out to the public, as ready to entertain travelers, strangers, transient guests with their teams, although he may sometimes make special bargains with his customers, may not keep his house open in the night, and may not keep the stable at which he puts up the horses, at his house. Com. v. Wetherbee, 101 Mass. 214.

**3. Right to detain horses.** The right of an innkeeper to detain horses for their keeping does not extend to the horses of individuals which are employed in carrying the United States mail. U. S. v. Barney, 2 Wheeler's Crim. Cas. 513.

**4. Indictment.** It is not enough in an indictment against an innholder for permitting persons to play at cards and other unlawful games in his house, to aver that the defendant was duly licensed as an innholder, without also alleging that the defendant was actually keeping an inn at the time of the playing cards in his house. State v. Balkom, 3 Pick. 281.

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# Insanity.

1. When a defense.
2. Evidence.

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1. When a defense.

**1. Partial insanity.** Partial insanity is not necessarily an excuse for crime, and can only be so when it deprives the party of his reason in regard to the act charged. State v. Huting, 21 Mo. 464.

**2.** A state of partial insanity will not excuse from responsibility if the person have reason sufficient to enable him to distinguish between right and wrong as to the particular act he is doing. Bovard v. State, 30 Miss. 600.

**3. Moral insanity.** It has been denied that moral insanity has any foundation in law. Choice v. State, 31 Ga. 424; affi'd Humphreys v. State, 45 Ib. 190. In Kentucky, it has been held that to render moral insanity an excuse there must be proved the existence of an habitual tendency developed in previous cases, becoming in itself a second nature; but it need not have manifested itself in former acts of similar character to the act charged. But it must have overwhelmed the mental faculties to such an extent as to render the accused incapable of governing his actions at the time. Scott v. Com. 4 Metc. Ky. 227.

**4. Test of responsibility.** It is erroneous to charge that "when the jury, from evidence, entertain a rational doubt on the question of insanity, they should always find in favor of insanity." The proper test of responsibility is, whether the defendant had sufficient reason to distinguish between right and wrong, and sufficient power of control to govern his actions. Smith v. Com. 1 Duvall, Ky. 224; Kriel v. Com. 5 Bush, Ky. 362; People v. McDonnell, 47 Cal. 134; s. c. 2 Green's Crim. Reps. 441.

**5.** The test of responsibility for criminal acts, where unsoundness of mind is interposed as a defense, is the capacity of the accused to distinguish between right and wrong at the time of, and with respect to the act. A criminal act cannot be excused upon the notion of an irresistible impulse to commit it, where the offender has the ability to discover his legal and moral duty in respect to it. Flanagan v. People, 52 N.Y. 467; s. c. 1 Green's Crim. Reps. 377.

**6.** The unsoundness of mind which will entitle the defendant to an acquittal under the plea of insanity must be of such a degree as to create an uncontrollable impulse to do the act by overriding the reason and obliterating the sense of right and wrong as to the particular act. Hopps v. People, 31 Ill. 385; Spann v. State, 47 Ga. 553; s. c. 1 Green's Crim. Reps. 391.

**7.** The jury must be satisfied beyond a reasonable doubt of the defendant's mental capacity to commit the crime charged. If he was moved to the act by an insane impulse controlling his will and judgment, he is not guilty, and if he was a monomaniac on any subject, it is immaterial on what subject, so that the insane impulse led to the commission of the act. Stevens v. State, 31 Ind. 485.

**8.** Where homicidal insanity is relied on, it ought not to be regarded as sufficient to exculpate, unless the jury believe, from the

evidence, that the propensity to commit the act existed in such violence as to subjugate the intellect, control the will, and render it impossible for the accused to do otherwise than to yield to the insane impulse. State v. Felter, 25 Iowa, 67.

9. The following charge upon the defense of insanity was held proper: "If the prisoner had power of mind enough to be conscious of what he was doing at the time, then he was responsible to the law for that act." Brown v. Com. 78 Penn. St. 122.

10. On a trial for murder, the following charge of the court was held unexceptionable: "To be a subject of punishment, an individual must have reason and understanding enough to enable him to judge of the nature, character, and consequences of the act charged against him. He must not be overcome by an irresistible impulse arising from disease. Every one of mature years is presumed to be of sound mind. If a person charged with crime be shown to have been insane a short time before the commission of the act, the evidence should show sanity at the time, or the jury should acquit." State v. Johnson, 40 Conn. 136; s. c. 2 Green's Crim. Reps. 487.

11. **How determined.** When, after the jury are impaneled, there is reasonable ground to doubt the sanity of the accused, it is the duty of the court to suspend the trial and to cause another jury to be impaneled to inquire into the fact of such insanity. If the latter jury find that the prisoner is insane, they should inquire whether or not he was insane at the time of the alleged offense. But if they find that the accused is sane, his trial should proceed. Gruber v. State, 3 West Va. 699.

### 2. Evidence.

12. **When introduced contrary to wishes of defendant.** Whenever a prisoner's soundness of mind is in question, the rule that he may control or discharge his counsel at pleasure, is so far relaxed as to permit them to offer evidence as to his insanity, against his will. State v. Patten, 10 La. An. 299.

13. **Importance of, to defense.** Every one must be held accountable for the consequences of his acts consciously and deliberately performed, unless he can show that he is in that condition which stamps him as an irresponsible being, and proof of his intellectual capacity is improper. Patterson v. People, 46 Barb. 625.

14. **What proof required.** The law demands such evidence in support of the defense of insanity as will satisfy the jury that when the defendant committed the act he was insane. Graham v. Com. 16 B. Mon. 587; State v. Smith, 53 Mo. 267; s. c. 2 Green's Crim. Reps. 597. It must be proved that at that time the accused was laboring under such a defect of reason as not to know the nature and quality of the act he was doing, or that he did not know he was doing wrong. Kelly v. State, 3 Smed. & Marsh. 518; and this must be clearly established. People v. McDonnell, 47 Cal. 134; s. c. 2 Green's Crim. Reps. 441.

15. It is not erroneous to charge the jury that "a man is not insane who knows right from wrong; who knows the act he is committing is a violation of law, and wrong in itself." Willis v. People, 5 Parker, 621.

16. The following instruction was held proper: "Before you can acquit on the ground of insanity, you must be clearly satisfied that at the time the defendant committed the homicide, he was laboring under a mental delusion or monomania, such as irresistibly and uncontrolably forced him to commit the crime. Fouts v. State, 4 Greene, 500.

17. Whether there is such a mental disease as dipsomania, and whether the accused had that disease, and whether a homicide was the product of such disease, are questions of fact for the jury. State v. Pike, 49 New Hamp. 399; State v. Jones, 50 Ib. 369.

18. An irritable temper and excitable disposition of mind do not of themselves prove insanity. If a person, when he kills another, knows that the deed was unlawful and morally wrong, he is responsible. Willis v. People, 32 N. Y. 715.

19. **Reasonable doubt.** The jury must be satisfied beyond a reasonable doubt that the prisoner was sane. Wagner v. People,

4 N. Y. Ct. of App. Decis. 509; affi'g 54 Barb. 367; s. c. 2 Keyes, 684.

**20.** The defendant is not bound to prove that he is insane by a preponderance of evidence; but if there is a reasonable doubt whether he is sane or insane, he must be acquitted. State v. Crawford, 11 Kansas, 32; s. c. 2 Green's Crim. Reps. 638; Polk v. State, 19 Ind. 170. It is erroneous to charge the jury that "the proof of insanity must be as clear and satisfactory as the proof of the crime ought to be to find a sane man guilty," or to charge that "if the jury have a reasonable doubt as to the insanity of the defendant, they ought to convict." Dove v. State, 3 Heisk. 348; s. c. 1 Green's Crim. Reps. 412.

**21.** Where the prisoner relies on the defense of insanity, he must prove it to the satisfaction of the jury. If upon the whole evidence they believe he was insane when he committed the act, they should acquit him; but not upon any fanciful ground that though they believe he was then sane, yet as there may be a rational doubt of such sanity, he is therefore entitled to an acquittal. Boswell v. Com. 20 Gratt. 860.

**22.** The defense of insanity must be established to the satisfaction of the jury by clear and convincing proof. But if they entertain a reasonable doubt of the sanity of the prisoner, he must be acquitted. State v. Marler, 2 Ala. 43; People v. McCann, 16 N. Y. 58.

**23.** Insanity must be established by evidence in the case with the same clearness and certainty as any other fact alleged in defense; that is to say, the proof must be such in amount, that if the single issue of the sanity or insanity of the defendant should be submitted to the jury in a civil case, they would find that he was insane. People v. Coffman, 24 Cal. 230; People v. Best, 39 Ib. 690.

**24.** The following instruction, on a trial for murder, was held correct: "It is not necessary, in order to acquit, that the evidence upon the question of insanity should satisfy you beyond all reasonable doubt that the defendant was insane. It is sufficient, if, upon a consideration of all the evidence, you are reasonably satisfied that he was insane. If the weight or preponderance of the evidence shows the insanity of the defendant, it raises a reasonable doubt of his guilt." State v. Felter, 32 Iowa, 49. But the sanity of the accused being once established in the case, the accused can only avoid it by a preponderance of proof. Ib.

**25. Acts and declarations of accused.** Where on a trial for murder, the defense is insanity, witnesses for the prisoner may testify as to the acts, declarations and conversations of the prisoner, shortly previous to, at the time of, or after the homicide. State v. Hays, 22 La. An. 39; but not as to the impression the prisoner's conduct made on the mind of another person, the day before the homicide. Lake v. People, 1 Parker, 495; affi'd 12 N. Y. 358.

**26.** Upon the question of sanity at the time of committing an offense, the acts, conduct, and habits of the prisoner at a subsequent time, to be admissible in evidence, must be so connected with a disordered or weakened mental condition preceding the time of the offense as to lead to the inference of its continuance; or else they must indicate unsoundness to such a degree or of so permanent a nature as to have required a longer period than the interval for its production or development. Com. v. Pomeroy, 117 Mass. 143.

**27.** Where the defense is insanity, and the coolness and unconcern of the prisoner at the time he did the fatal act are made a prominent feature in the case, it is competent for the prosecution to show that several years before the commission of the crime charged, he was engaged in smuggling, which demanded at all times, great coolness and hardihood. Hopps v. People, 31 Ill. 385.

**28.** It is not error for the judge, on a trial for murder, to say to the jury: "If you find the prisoner at the time Dr. B. was observing him through the hole in the wall, as described by the witnesses, was watching to see whether he was observed, and was regulating his conduct accordingly, it would raise a very strong presumption that the prisoner was feigning insanity, and indeed

such evidence of design and calculation on his part, as to be in my opinion, entirely fatal to his defense of insanity." McKee v. People, 36 N. Y. 113.

29. **Character of prisoner.** Where the defense is insanity, evidence is admissible of the uniform good character of the accused as a man and a citizen. Hopps v. People, 31 Ill. 385.

30. Where on a trial for murder the question was whether the act was the product of insanity, or of a naturally malignant and vicious heart, it was held competent to introduce evidence relative to the prisoner's conduct at various times during many years before the homicide, tending to show his disposition and character. State v. Jones, 50 New Hamp. 369.

31. **Opinions.** In Ohio, it was held that on a question of insanity, non-professional witnesses might give their opinion in connection with the facts on which such opinion was based. Clark v. State, 12 Ohio, 483. In Iowa, on a trial for murder, a witness having testified that the prisoner "never was just right," it was held proper for the prosecution to ask the witness whether in his opinion the prisoner was not intelligent enough to know right from wrong. State v. Porter, 34 Iowa, 131; s. c. 1 Green's Crim. Reps. 241.

32. But in New York, it was held proper to exclude questions put to non-professional witnesses who had testified to facts tending to show the mental unsoundness of the accused, as to what they thought of his state of mind. Real v. People, 42 N. Y. 270.

33. A party seeking to establish the defense of insanity cannot prove by an expert that he entertained doubts upon the question. Sanchez v. People, 22 N. Y. 147.

34. **Rumor.** Where on the trial of a husband for the murder of his wife, the defense of insanity was set up, and it was sought to be proved that the prisoner labored under the insane delusion that his wife had been guilty of adultery, it was held competent to prove the existence of such a rumor in the village where the prisoner and his wife lived. State v. Jones, 50 New Hamp. 369.

35. **Hereditary taint.** Where on a trial for murder, there is evidence tending to show the insanity of the accused, it is competent for the defense to prove that his parents and other near relatives were insane. People v. Smith, 31 Cal. 466.

36. Where the insanity of the defendant is in issue, it is competent to prove that his brother became insane from a cause similar to that which it was alleged had induced the destructive act of the defendant. People v. Garbutt, 17 Mich. 9.

37. Where insanity is relied on as a defense, evidence of hereditary taint is not admissible without some proof that the prisoner was affected by some form of mental alienation. State v. Cunningham, 72 N. C. 469.

38. On an inquisition as to the sanity of a person found guilty of murder, an inquiry into his past life, to see if he had been insane before, is only admissible after proof that since his conviction he has given evidence of insanity. Spann v. State, 47 Ga. 549; s. c. 1 Green's Crim. Reps. 393.

39. **Presumption from previous derangement.** Where it is shown that the intellectual faculties were so impaired as to produce a general habitual derangement of them, not traceable to some temporary cause, the law will presume the mind to have continued in the same condition until the contrary is shown. People v. Francis, 38 Cal. 183.

40. Where habitual unsoundness of mind is once shown to exist, it is presumed to continue to exist until the presumption is rebutted beyond a reasonable doubt. But temporary insanity does not draw after it such a presumption. State v. Reddick, 7 Kansas, 143.

41. But the finding of a jury upon a preliminary issue that the accused was then sane, cannot be considered upon the question of insanity alleged as a defense upon the trial. Freeman v. People, 4 Denio, 9.

42. **Presumption from proof of insanity at trial.** Where a person was tried for murder four months after it was charged to have been committed, it was held that to establish the defense of insanity, it was competent for the defense to prove that the

prisoner was insane at the time of the trial. Freeman v. People, *supra*.

**43.** A verdict on an issue as to the sanity of the prisoner, that he is insane, is competent evidence upon the question whether the defendant was insane at the time of the commission of the alleged offense. People v. Farrell, 31 Cal. 576.

**44. Burden of proof.** Sanity is presumed to be the normal state of the human mind, and it is not incumbent on the prosecution to give affirmative evidence that such state exists in a particular case. Walter v. People, 32 N. Y. 147. But when any evidence is given which tends to overthrow that presumption, the burden of proof is upon the prosecution. People v. Garbutt, 17 Mich. 9; Bradley v. State, 31 Ind. 492.

**45.** Although sanity is the normal condition of the human mind, and in dealing with acts there can be no presumption of insanity, yet upon the traverse of an indictment for murder when the homicide is admitted and the defense of insanity interposed, the burden is with the prosecution to show sanity which is requisite to constitute the crime. People v. McCann, 16 N. Y. 58; O'Brien v. People, 48 Barb. 274; Hopps v. People, 31 Ill. 385; overruling Fisher's Case, 23 Ib. 293, Walker, J., *dissenting; contra*, Lake v. People, 1 Parker, 495; McKenzie v. State, 26 Ark. 334.

**46.** In New Hampshire, on a trial for murder, the prisoner's counsel asked the court to charge the jury that sanity was a fact to be proved by the prosecution beyond a reasonable doubt; that there was no legal presumption of sanity as a matter of law, or as affecting the burden of proof in criminal cases. The court declined so to charge, and instructed the jury that every person of mature age is presumed to be sane, until there is evidence tending to show insanity; but that when there was evidence tending to show insanity, the prosecution must satisfy the jury beyond reasonable doubt, that the prisoner was sane. *Held* correct. State v. Pike, 49 New Hamp. 399.

**47.** In Maine, Massachusetts and Ohio, when insanity is interposed as a defense, the burden of proof is on the defendant, and he must satisfy the jury by a preponderance of evidence. State v. Lawrence, 57 Maine, 574; Com. v. Eddy, 7 Gray, 583; Loeffner v. State, 10 Ohio, N. S. 598; Bond v. State, 23 Ib. 349.

**48.** In Minnesota, the following instruction was held proper: "The plea of insanity is one for the defendant to establish. The sanity of mankind being the rule, the burden of proof is on the defendant to show that an exception exists in his case." Bonfanti v. State, 2 Minn. 123; approved, State v. Gut, 13 Ib. 341.

**49.** In Pennsylvania, when a homicide is admitted, and insanity alleged as an excuse, the prisoner will be presumed to have been sane, until the contrary is made to appear in his behalf. The evidence to establish insanity as a defense, must be satisfactory, and not merely doubtful. Ortwein v. Com. 76 Penn. St. 414; Lynch v. Com. 77 Ib. 205.

**50.** In Missouri, the burden of establishing the insanity of the accused is on the defense. State v. McCoy, 34 Mo. 531. But it need not be established beyond a reasonable doubt. It is sufficient if the jury is reasonably satisfied by the weight or preponderance of the evidence that the accused was insane at the time of the commission of the act. State v. Klinger, 43 Mo. 127; State v. Hundley, 46 Ib. 414; State v. Smith, 53 Ib. 267; State v. Holme, 54 Ib. 153.

**51.** In New Jersey, where the defense is insanity, the burden of proof is on the prisoner; and the jury must be satisfied of the insanity beyond a reasonable doubt. State v. Spencer, 1 Zabr. 197.

**52.** In California, where insanity is relied on as a defense, the burden of proof is on the defendant. People v. McDonell, 47 Cal. 134; and if it be a question whether it was the result of intoxication immediately indulged, or was caused by long continued intemperance, the burden is on the prisoner of proving it to be of the latter character. People v. Bell, 49 Ib. 485.

**53.** The jury ought not to return a verdict of guilty so long as a reasonable doubt rests in their minds of the prisoner's capacity to commit the offense charged, whether the proof of insanity comes from the govern-

ment or the accused, or part from each; and it is incumbent upon the prosecution to satisfy them beyond a reasonable doubt of the existence of all the elements that constitute the offense, including the necessary soundness of mind. State v. Bartlett, 43 New Hamp. 224; approved, State v. Jones, 50 Ib. 369.

*See* HOMICIDE.

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# Intoxication as an Excuse for Crime.

**1. Will not in general excuse.** Drunkenness is no excuse for crime, and the person who is voluntarily in that condition, takes the consequences of his own acts. Lanergan v. People, 50 Barb. 266; Friery v. People, 54 Ib. 319; 2 N. Y. Ct. of App. Decis. 215; State v. Harlow, 21 Mo. 446; Shanahan v. Com. 8 Bush, 463; s. c. 1 Green's Crim. Reps. 373; the rule being that a man cannot avail himself of his intoxication to exempt him from any legal responsibility that would attach to him if sober. Com. v. Hawkins, 3 Gray, 463. So long as the offender is capable of conceiving a design, he will be presumed, in the absence of proof to the contrary, to have intended the natural consequences of his act. Kenny v. People, 31 N. Y. 330.

**2.** Where without intoxication the law would impute to the act a criminal intent, as in the case of wanton killing without provocation, drunkenness is not available to disprove such intent. Rafferty v. People, 66 Ill. 118.

**3.** It is no excuse for crime committed in a state of intoxication that a person by constitutional infirmity, or accidental injury to the head, is more likely to be maddened by liquor than another person. Choice v. State, 31 Ga. 424; affi'd Humphreys v. State, 45 Ib. 190.

**4.** On a trial for murder, the court are not required to charge that the jury may infer from the presence of intoxication the absence of premeditation. O'Brien v. People, 48 Barb. 274; 36 N. Y. 276.

**5.** The following instruction on a trial for murder was held proper: "If the jury are satisfied from the evidence that the prisoner intended to kill the deceased, the circumstance of his being drunk at the time is not sufficient to repel the inference of malice and premeditation or to mitigate the offense." State v. Cross, 27 Mo. 332, Richardson, J., *dissenting*.

**6.** In Alabama, where on a trial for an assault with intent to murder it was proved that the prisoner was so much intoxicated when he committed the offense as to be reduced to a state of temporary insanity, it was held that that fact should have no influence with the jury. State v. Bullock, 13 Ala. 413.

**7.** The following instruction was held correct: "Insanity produced by intoxication does not destroy responsibility where the party when sane and responsible made himself voluntarily intoxicated, and drunkenness forms no defense whatever to the fact of guilt. Evidence of drunkenness can only be considered by the jury for the purpose of determining the degree of crime." People v. Lewis, 36 Cal. 531.

**8. When entitled to consideration.** Where the circumstances are such as to raise the question whether the act was the result of design or the impulse of sudden passion, the intoxication of the accused is a proper subject of consideration. State v. Gut, 13 Minn. 341; Kelly v. State, 3 Smed. & Marsh. 518; Golden v. State, 25 Ga. 527; Jones v. State, 29 Ib. 594. When intoxication so clouds the intellect as to deprive it of the power to think and weigh the nature of the act committed, it may reduce the grade of offense. Jones v. Com. 75 Penn. St. 403.

**9.** It is erroneous to charge the jury that "drunkenness can never be received as a ground to excuse or palliate a crime," how far it should be so received depending on its effect upon the mind. Golliher v. Com. 2 Duvall, Ky. 163; Smith v. Com. 1 Ib. 224.

**10.** Although where malice is an ingredient of the charge, intoxication is admissible in evidence to rebut it, yet this does not

apply to intention. Dawson v. State, 16 Ind. 428.

**11.** If a man without provocation kill another, no degree of intoxication short of that which shows that he was at the time utterly incapable of acting from *motive* will shield him from conviction. But in cases of homicide, the fact that the accused was under the influence of liquor may be given in evidence in his behalf, and the effect it ought to have on the verdict will depend upon the other circumstances of the case. People v. Rogers, 18 N. Y. 9; rev'g s. c. 3 Parker, 632; s. p. Lanergan v. People, 6 Parker, 209.

**12.** It is erroneous to charge the jury that "in cases of homicide without any provocation, the fact of drunkenness is entitled to no consideration," and that "temporary insanity which has followed as the immediate result of voluntary drinking to intoxication is no excuse for crime." If the jury believe from the evidence that the defendant at the time of the killing was in a state of intoxication, brought on by drinking for the purpose of gratifying a sensual appetite, or indulging his feelings of social hilarity, without any premeditated crime, they ought in determining the question of malice and mitigation to take into consideration the defendant's condition. Smith v. Com. 1 Duvall, Ky. 224; Curry v. Com. 2 Bush, Ky.67; Kriel v. Com. 5 Bush, Ky. 362; Blimm v. Com. 7 Ib. 320; Shanahan v. Com. 8 Bush, Ky. 463.

**13.** On a trial for murder charged to have been committed by the accused with a club in an affray, it may be shown that the accused was intoxicated at the time, and for this purpose a witness who was well acquainted with the accused may state his opinion as to whether or not the accused was intoxicated. Eastwood v. People, 3 Parker, 25; s. c. 14 N. Y. 562.

**14.** In case of homicide, intoxication is not such an excuse as will allow a less than ordinarily adequate provocation to palliate the offense, unless it rendered him unable to form a willful, deliberate and premeditated design to kill, or incapable of judging of his acts or their legitimate consequences. Keenan v. Com. 44 Penn. St. 55.

**15.** On a trial for murder, the question whether the prisoner was intoxicated is material in order that the jury may determine whether threats used were the deliberate words of a sober and bad man, or the idle and coarse language of one who was drunk. People agst. Eastwood, 14 N. Y. 562.

**16.** On a trial for murder, it is competent to prove that the deceased was intoxicated at the time of the homicide, as tending to show that he was incapable of attack or defense. State v. Horne, 9 Kansas, 119; s. c. 1 Green's Crim. Reps. 718.

**17. Where defendant was unconscious of his act.** If the accused was so drunk as not to know what he was doing, it may be proved to show absence of intention. But the question of malice must be determined aside from the fact of intoxication. Nichols v. State, 8 Ohio, N. S. 435.

**18.** On the trial of a servant for stealing the property of his master intrusted to him, the court charged the jury that if the defendant at the time he converted the property to his own use was so drunk as not to know what he was doing, he ought to be acquitted, unless the evidence showed that the felonious intent existed when he was in the full and undisturbed possession of his mental faculties. *Held* correct. State v. Schingen, 20 Wis. 74.

**19.** On the trial of an indictment for an assault with intent to do great bodily harm, defendant's counsel asked the court to charge that "if the jury believed from the evidence that the defendant was in such a state of mind from any cause that he did not know what he was doing, they could not rightfully convict." This instruction was given with the qualification that "if the defendant did not know what he was doing from being in a state of insensibility, the jury could not convict; but otherwise, if from excitement or madness, the immediate consequence of indulgence in strong drink." *Held* error, for the reason that if the defendant was so drunk as not to know what he was doing, he was incapable of forming an intention. State v. Garvey, 11 Minn. 154. See State v. Gut, 13 Ib. 341.

20. But in Michigan, it was held proper for the court to refuse to charge the jury that if they believed that the defendant was intoxicated to such an extent as to make him unconscious of what he was doing at the time of the commission of the offense, the defendant must be acquitted. People v. Garbutt, 17 Mich. 9; s. p. Boswell v. Com. 20 Gratt. 860.

21. **Where intoxication causes madness.** Although evidence of intoxication is admissible on a trial for murder, because it may tend to cast light upon the acts, observations, or circumstances attending the homicide, yet intoxication must result in a fixed mental disease of some continuance or duration, before it will have the effect to relieve from responsibility for crime. Lanergan v. People, 50 Barb. 266; s. c. 6 Parker, 209; People v. Williams, 43 Cal. 344; s. c. 1 Green's Crim. Reps. 412.

22. While the temporary want of reason, resulting from intoxication, affords no excuse for crime, it is otherwise as to habitual madness caused by long continued drunkenness. Cromwell v. State, 1 Mart. & Yerg. 147; U. S. v. Drew, 5 Mason, 28; State v. McGonigal, 5 Harring. 510.

23. The rule that intoxication creates no exemption from criminal responsibility, does not apply to *delirium tremens*, which although the result of prior vicious indulgence, is always shunned, and not voluntarily assumed. Maconnekey v. State, 5 Ohio, N.S. 77.

24. Where delirium tremens deprives a person of the capacity of knowing what he is doing, or of distinguishing right from wrong, it will save him from criminal responsibility for his acts. O'Brien v. People, 48 Barb. 274, per Leonard, J.

25. **Proof must be confined to date of offense.** Evidence that the accused was in the habit, at times, of drinking to excess, and the effect of this habit upon his mind, is not proper, unless confined within a period of a few days of the transaction. On a trial for murder, the prisoner's counsel offered to prove that the prisoner was addicted to hard drinking; that he sometimes drank to great excess, and continued on drunken sprees for days and weeks at a time, and had had delirium tremens and insanity. The court asked whether the counsel proposed to show that within two or three days previous to the homicide, he had one of those fits on him. The counsel replied that he did not propose to show that by the witness, but to lay a foundation to prove it. The court ruled out the question, and afterward told the counsel that if he could show that the prisoner had *delirium tremens* at or about the time of the homicide, he could show it by this or any other witness; to which the counsel replied that he proposed to show the drinking first. *Held* no error. Real v. People, 55 Barb. 551; affi'd 42 N. Y. 270.

# Jeopardy.

*See* FORMER ACQUITTAL OR CONVICTION.

# Judgment.

1. NATURE AND REQUISITES.
2. ARREST OF JUDGMENT.

## 1. NATURE AND REQUISITES.

1. **On demurrer.** A judgment against the defendant on demurrer to an indictment for a misdemeanor is final. State v. Rutledge, 8 Humph. 32. But see Ross v. State, 9 Mo. 687.

2. **Of conviction.** A judgment of conviction should be certain and final, and subject to no future decision or contingency. Morris v. State, 1 Blackf. 37.

3. A judgment reciting that the jury were selected and sworn to try the prisoner, who was indicted for murder, and that he was thereupon arraigned and pleaded "not guilty" to the indictment, is erroneous. It should have stated that the plea of the prisoner preceded the selection and swearing of the jury. State v. Hughes, 1 Ala. 655.

4. **Date may be given in figures.** The day of the sentence and day of execution may be given in figures, instead of letters. Noles v. State, 24 Ala. 672. In California, the practice of designating in a judgment of death, a day for carrying it into effect, is not

in conformity with the statute, which requires that the day should be designated in the warrant for the execution, and not in the judgment. People v. Bonilla, 38 Cal. 99; People v. Murphy, 45 Ib. 137; s. c. 2 Green's Crim. Reps. 414.

**5. Reversal.** A judgment against the prisoner will not be reversed by default, but it must be shown to the court that there was error in the record or proceedings of the court below. Barron v. People, 1 Barb. 136.

**6.** A judgment may be erroneous in part, and valid as to the residue. Taff v. State, 39 Conn. 82; Matter of Sweatman, 1 Cow. 144.

### 2. Arrest of judgment.

**7. Nature and object of motion.** A motion in arrest is a proceeding in behalf of a prisoner after verdict and before sentence, and designed to stay sentence and judgment for error appearing on the face of the record. It is grounded upon the same objections as will support a writ of error; and no defect in evidence or improper conduct on the trial can be urged at this stage of the proceedings. When, however, judgment is once given, the writ of error is the only remedy for error of record. The decision of the court upon the motion in arrest, if erroneous, is not of itself ground of error; for the same objections can be raised upon the writ as upon the motion in arrest, and are not waived by the omission to urge them before judgment. After judgment, the remedy by motion in arrest is gone, and the case is to be determined by the record, as though no such motion had been made. People v. Allen, 43 N. Y. 28.

**8.** A motion in arrest of judgment is not limited to the indictment, but may be made upon the whole record, which includes the verdict. People v. Bruno, 6 Parker, 657.

**9.** In Kentucky, the only ground for arrest of judgment under the statute (Crim. Code, § 270) is that the facts stated in the indictment do not constitute a public offense within the jurisdiction of the court. Walston v. Com. 16 B. Mon. 15.

**10. When the motion may be made.** A motion in arrest of judgment can only be entertained for matter apparent upon an inspection of the record. State v. Bangor, 38 Maine, 592; State v. Carver, 49 Ib. 588; Terrell v. State, 9 Ga. 58. Whether the facts are properly alleged or constitute a crime may be inquired into on motion in arrest of judgment. State v. Hart, 34 Maine, 36. Such a motion is proper after conviction under an indictment charging two distinct offenses. State v. Howe, 1 Rich. 260. Where the record did not show that the grand jury had returned the indictment into court, it was held that the judgment must be set aside. Rainey v. People, 3 Gilman, 71.

**11.** It is too late after verdict to interpose a motion in arrest of judgment founded upon proper service of the warrant. Com. v. Gregory, 7 Gray, 498.

**12. Where the offense is barred.** In Alabama, where the date of the commission of the offense was left blank, and it did not not appear whether the statute of limitations barred the prosecution or not, judgment was arrested. State v. Beckwith, 1 Stewart, 318. But in New York, where it appeared from the indictment that the offense was barred by the statute of limitations, it was held not a ground for arresting judgment. People v. Van Santvoord, 9 Cow. 654. The contrary was held in Georgia. McLane v. State, 4 Ga. 335.

**13. When the motion will be denied.** The improper conduct of the jury after they have retired to deliberate on their verdict is not a ground for a motion in arrest of judgment. Brister v. State, 26 Ala. 107.

**14.** The neglect of the clerk to enter the verdict on the minutes, it being written on the indictment, which is filed in the proper office, is not a ground for arrest of judgment. Hall v. State, 3 Kelly, 18.

**15.** Where the indictment alleged that goods charged to have been stolen were the property of persons whose names were unknown, and a witness who appeared before the grand jury swore that he owned a part of the goods, it was held to be no cause for arresting judgment, and that the objection should have been made by special plea. U. S. v. Stetson, 3 Woodb. & Minot, 164.

**16. Presumption where no exception taken.** Where no exception is taken to the denial of a motion in arrest of judgment, and the record does not set out the evidence on which the motion was made, the appellate court will presume that the motion was properly overruled. Robin v. State, 40 Ala. 72.

*See* NEW TRIAL; TRIAL.

# Jurisdiction.

1. OF COURTS IN GENERAL.
2. WITH REFERENCE TO THE PLACE OF TRIAL.
3. JURISDICTION OF STATE COURTS.
4. JURISDICTION OF UNITED STATES COURTS.

## 1. OF COURTS IN GENERAL.

**1. Cannot be conferred by consent.** The court cannot acquire jurisdiction to try an offense by consent; nor can its jurisdiction over an offense be changed by consent so as to embrace any other than that presented by the grand jury. People v. Campbell, 4 Parker, 386.

**2.** Consent by the defendant, whether given directly, or inferred from his acts or omissions, cannot confer jurisdiction upon the court to try the defendant for any other crime than such as is charged in the indictment as found and returned by the grand jury. People v. Granice, 50 Cal. 447.

**3.** But where parties upon being brought before a magistrate on a charge of keeping a disorderly house, elected to be tried by a Court of Special Sessions, it was held that they thereby waived all objection to the jurisdiction of the court. Gill v. People, 5 N. Y. Supm. N. S. 308.

**4.** So, where the defendant having been indicted for gambling, and pleaded guilty, sought to reverse the judgment because no indictment would lie at the time for the offense, it was held that as he voluntarily submitted himself to the jurisdiction, the judgment would not be reversed. State v. Coover, 49 Mo. 432.

**5. Judge de facto.** Where a conviction was had before a person who was appointed to the office of circuit judge by the governor without authority, it was held that he was a *de facto* judge, so as to render his acts in trying and sentencing the accused valid. State v. Bloom, 17 Wis. 521.

**6. Absence of judge.** Where after the jury had been impaneled, and a portion of the evidence taken on a trial in a Court of Sessions, one of the associate justices absented himself, and a justice of the peace, by the direction of the county judge, took his place and the trial proceeded, it was held error. Blend v. People, 41 N. Y. 604.

**7.** But when a session of court is in progress with a quorum in actual attendance, the casual and temporary absence of one of the judges from his seat, does not impair the validity of the proceedings. Tuttle v. People, 36 N. Y. 431.

**8.** Where the record of conviction shows that one judge was "absent through disability," it is a statement of a jurisdictional fact which if untrue might have been controverted. For it is well settled that "no court or officer can acquire jurisdiction by the mere assertion of it, or by falsely alleging the existence of the facts on which jurisdiction depends." People v. Davis, 61 Barb. 456.

**9. Judge interested.** Where the interest of the judge was not only minute, but contingent, and dependent upon the decision of another tribunal, it was held that it did not disqualify him. State v. Intoxicating Liquors, 54 Maine, 564.

**10. Irregularity in issuing precept.** Where a statute required the district attorney to issue a precept to the sheriff, at least twenty days before the holding of a Court of Oyer and Terminer, it was held merely directory, and that an omission to obey such direction, did not invalidate judgments rendered at such a court; but that if it did, the only way in which advantage could be taken of the want of such a precept would be by a motion to the same court to quash the indictment or for a new trial or in arrest of judgment. People v. McCann, 3 Parker, 272. Such an omission is not an irregularity of which anybody can take advantage. People v. Cummings, Ib. 343, per Harris, J.

**11. End of term.** On a trial for murder, the jury received the charge on Saturday, the last day of the term, and did not agree on their verdict until the following Tuesday, the court being meanwhile adjourned from day to day. *Held* that the jurisdiction of the court did not end with the term, but continued until the verdict was delivered and the sentence passed. Briceland v. Com. 74 Penn. St. 463; s. c. 2 Green's Crim. Reps. 523.

**12. How determined.** When the question of jurisdiction depends upon the construction and effect of charters, grants and records, it is to be determined by the court, which may refer to the same, to the histories of deceased authors, and to the census taken under the laws of the United States; and the officer who took the census may testify as to the place of residence of a person when the record does not show it. When the State authorities have claimed and exercised jurisdiction over a particular place, the State courts will acquiesce therein. State v. Wagner, 61 Maine, 178.

**13.** The title of justices of sessions to their office cannot be collaterally inquired into, but only by a direct proceeding against them by information in the nature of a *quo warranto*. Nelson v. People, 5 Parker, 39.

**14.** On the trial of an indictment for obtaining property under false pretenses, doubts as to jurisdiction may be solved in favor of the court, unless by so doing some established rule of law will be violated. Smith v. People, 47 N. Y. 330.

**15.** As the jurisdiction of justices of the peace is wholly derived from the statute, it cannot be enlarged by presumption or implication. State v. Hall, 49 Maine, 412.

**16.** In pleading the judgments or proceedings of inferior courts of special and limited jurisdiction, and of magistrates and officers acting under a statute or special authority, a general averment of jurisdiction is not sufficient, but the facts upon which it depends must be averred. People v. Weston, 4 Parker, 226.

### 2. With reference to the place of trial.

**17. Designation of place by court.** Where the power to fix the times and places of holding courts is committed by statute to all the judges, it is not in the power of a single judge, after all the judges have united in making the appointments, to adjourn his court to be held at a different place. Northrup v. People, 37 N. Y. 203.

**18. Where the offense is committed out of the State.** Where an offense is committed in one State, by the procuration of a resident of another State, who is not personally present, such non-resident offender can be punished by the courts of the first mentioned State, if jurisdiction can be obtained of his person. State v. Grady, 34 Conn. 118; *contra*, State v. Wyckoff, 2 Vroom, 65.

**19.** An indictment which alleges that the defendant committed a felonious assault and battery in New York, and that the person assaulted went to New Jersey and died there of his wounds, does not charge a crime cognizable by the courts of New Jersey. State v. Carter, 3 Dutch. 499.

**20.** But where a person sold property in Ohio which he did not own, falsely and fraudulently representing that he was the owner, and the money was paid and bill of sale executed in Kentucky, where the person defrauded lived, it was held that the courts of the latter State had jurisdiction to try the indictment for obtaining money by false pretenses. Com. v. Van Tuyl, 1 Metc. Ky. 1.

**21.** Where on the trial of an indictment for unlawfully solemnizing a marriage, and it appeared that the ceremony was performed in the middle of the Ohio river, it was held that as the State of Ohio had never by its legislation claimed jurisdiction over the place where the marriage was solemnized, the offense was cognizable by the laws of Kentucky. McFall v. Com. 2 Metc. Ky. 394.

**22. County.** Where a body of water in which the tide ebbs and flows is situated between a range of islands and the main shore, and all are so near to each other that a person with the ordinary power of vision, can see with the naked eye from point to point, on every part of the connecting line, what is doing on each, it is included within

the county, according to the rule which extends the jurisdiction of the county to a line running from one to the other of the *fauces terræ*. People v. Wilson, 3 Parker, 199, per Strong, J.

**23. Boundary between two counties.** In New York, for the purposes of criminal jurisdiction, an offense is committed on the boundary between two adjacent counties, if perpetrated within five hundred yards of the boundary line. People v. Davis, 36 N. Y. 77.

**24. Where the offense is committed on board of a vessel.** Upon the high seas every vessel is, for jurisdictional purposes, a part of the territory of the nation of its owners. An offense committed on board of such vessel is an offense against the sovereignty of that nation. But when a private ship enters a foreign jurisdiction, it becomes at once, with all on board (in the absence of treaty stipulations to the contrary), subject to the municipal laws and control of the country it visits. People v. Tyler, 7 Mich. 161; s. c. 8 Ib. 320. See *post*, *sub.* 52.

**25.** Where A. shot B. on an American vessel on the St. Clair river, within the limits of Canada, and B. died of the wound on land, within the county of St. Clair, in the State of Michigan, it was held that the offense was not cognizable by United States law. Ib.

**26.** In order to give the court jurisdiction to try an offense committed on board of a canal boat, it must be alleged in the indictment that the crime was committed on board the boat or vessel, and that the boat or vessel, on that trip or voyage, had passed through some part of the county in which the indictment was found; and also to prove both facts upon the trial. Larkin v. People, 61 Barb. 226.

**27.** A person was indicted, tried and convicted in the Court of Sessions of Erie county, New York, for a crime charged in the indictment to have been committed on board a canal boat which was navigating the Erie canal, at L., in the county of Herkimer. It was proved on the trial that the boat had passed from Buffalo on the canal through a part of Erie county; but there was no evidence that the crime charged had been committed at the place named in the county of Herkimer, on board the canal boat, as charged. *Held* that this was sufficient to reverse the judgment on the ground of want of jurisdiction upon the facts proved. Ib.

3. Jurisdiction of State courts.

**28. In case of unlawful arrest out of State.** It is not a defense to an indictment charging the parties with the commission of crime in Iowa, that they were wrongfully arrested in another State and taken to Iowa. State v. Ross, 21 Iowa, 467.

**29. Indians.** Indians living on a reservation within the limits of a State must be prosecuted in the State courts for offenses committed by them away from the reservation and within the State. U. S. v. Sa-Coo-Da-Cot, 1 Abb. 377.

**30. Offenses against the United States.** The fact that the defendant will be liable to prosecution in the courts of the United States, will not exclude the jurisdiction of the State courts. State v. Moore, 6 Ind. 436.

**31.** The New York Court of Oyer and Terminer has jurisdiction to try an indictment for murder committed within the State by a soldier in the military service of the United States in time of war, insurrection, or rebellion. People v. Gardiner, 6 Parker, 143.

**32.** The act of Congress of March 3, 1863, which declares that in time of war, insurrection or rebellion, murder and other enumerated offenses shall be punishable by the sentence of a general court martial or military commission, when committed by persons who are in the military service of the United States and subject to the articles of war, although constitutional, does not divest the State courts of jurisdiction in similar cases. Ib.

**33.** The liability of a party to be punished under the United States bankrupt act (of 1867, § 44), for obtaining goods on credit, with intent to defraud, within three months before the commencement of proceedings in bankruptcy, does not take away the jurisdiction of the courts of Massachusetts under an indictment for conspiring to obtain the

goods by false pretenses. Com. v. Walker, 108 Mass. 309.

**34.** But the State tribunals have no power to punish crimes against the laws of the United States *as such*. The same act may, in some instances, be an offense against the laws of both, and it is only as an offense against the State laws that it can be punished by the State. People v. Kelly, 38 Cal. 145.

**35.** Congress has no power to give the courts of the States criminal jurisdiction in respect to offenses against Federal laws, and a State Legislature has no power to constitute such offenses cognizable by the courts of the State. State v. Tuller, 34 Conn. 280.

**36.** The State tribunals have not jurisdiction to grant relief in case of an unlawful imprisonment by an officer of the United States under color of the authority of the United States. State v. Zulich, 5 Dutch. 409.

**37.** It is incompetent for a State court or judge, by a writ of *habeas corpus*, or otherwise, to take a party out of the hands of an officer held by him under the authority of the United States, whether retained by judicial process in the strict sense of that term, or simply by authority of law. The remedy is by application to a judge of the United States courts. Matter of Hopson, 40 Barb. 34.

**38. New York Supreme Court.** The Supreme Court of New York cannot review the action of the Oyer and Terminer in granting or refusing a new trial on the merits, or on the ground of misconduct of the jury, but are confined to errors appearing on the record or in the bill of exceptions. People v. Hartung, 4 Parker, 319.

**39. New York Oyer and Terminer.** In New York, the Oyer and Terminer is a permanent and continuous court in each of the counties of the State, and not a distinct and independent court, the existence of which commences with the first and terminates with the last day of the session. Quimbo Appo v. People, 20 N. Y. 531.

**40.** In New York, a judge of the Supreme Court, who has been selected under the Constitution and laws to be a judge of the Court of Appeals, is not thereby deprived of authority to preside in a court of Oyer and Terminer. McCarron v. People, 13 N.Y. 74.

**41.** Where the Court of Sessions, at which an indictment is found, sends it to the next court of Oyer and Terminer for trial, the indictment may be tried at any term of the court subsequent to the making of the order. Real v. People, 42 N. Y. 270.

**42.** The New York Courts of Oyer and Terminer have no authority to grant a new trial upon the merits after conviction in a capital case. Quimbo Appo v. People, 20 N. Y. 531.

**43.** But although in New York these courts have no jurisdiction to grant a new trial upon the merits, yet they may entertain a motion to set aside the verdict on the ground of the want of indifference of a juror. Willis v. People, 32 N. Y. 715.

**44. New York Court of Sessions.** The act of New York of 1870, which provides for the organization of the Court of Sessions in the city and county of New York, designs that generally the court shall be held by two justices jointly; and it provides for filling a vacancy. But it also contemplates that, though the office be not vacant, it may happen that one of the justices will be disabled from sitting, and in such cases the other is authorized to hold alone while such disability continues. People v. Davis, 61 Barb. 456.

**45.** As the statute does not declare any particular thing as being the disability to which it refers, anything that disables the justice from holding the court will be embraced by the term. Sickness, absence from the city, inability to reach the court-house though in the city, would disable the judge from holding the court; and if not present he would be "disabled" from acting, within the meaning of the statute. Ib. Ingraham, P. J., *dissenting*.

**46.** In New York, where neither of the two designated justices of the peace attend the Court of Sessions, the county judge may call upon the bench two other justices, and afterward the two first named justices may appear and take their seats. Cyphers v.

People, 31 N. Y. 373; affi'g s. c. 5 Parker, 666.

47. In New York, the right to appeal or to demand a trial at the General Sessions is gone when the accused has demanded in writing a trial at the Special Sessions. People v. Riley, 5 Parker, 401.

**48. Supreme Court of Louisiana.** In Louisiana, the appellate jurisdiction of the Supreme Court in criminal cases is confined to questions of law. State v. Peterson, 2 La. An. 221; State v. Muldroon, 9 Ib. 24. And the jurisdiction does not attach until after sentence or judgment. State v. May, Ib. 69; State v. Pratt, Ib. 157; State v. Ross, 18 Ib. 340; State v. Bruington, 22 Ib. 9.

4. Jurisdiction of United States courts.

**49. Of offenses in general.** The authority of Congress to provide for the punishment of crime is limited to such subjects and circumstances as are peculiar to the Federal government. It may punish murder when it is committed under certain circumstances, or in certain places; as when the murdered person is its officer, and at the time of the homicide was in the discharge of his official duties; or when the homicide was committed in some place over which the national government had sole and exclusive jurisdiction. U. S. v. Ward, 1 Wool. C. C. 17.

**50.** The act of Congress punishing murder does not embrace an accessory before the fact to murder. U. S. v. Ramsay, Hemp. 481. But see U. S. v. Douglass, 2 Blatchf. 207. Robbery committed on land is not punishable by any act of Congress. U. S. v. Terrell, Hemp. 411.

**51.** To give the court jurisdiction within the 6th amendment to the Constitution of the United States, the district in which the trial is had must have been ascertained by law before the commission of the crime, and not merely before the trial. U. S. v. Maxon, 5 Blatchf. 360.

**52.** A person having committed an assault with a dangerous weapon on the high seas, was put in irons, and so kept, until the vessel arrived at the lower quarantine anchorage in New York harbor, in the eastern district of that State, where she lay at anchor five days. The offender was then delivered to the United States marshal for the southern district of New York, to whom a warrant for the offender's arrest was afterward duly issued. *Held* that the Circuit Court of the United States for the southern district of New York had jurisdiction of the case under the act of Congress of April 30th, 1790, which provides that such an offense shall be tried in the district where the offender is apprehended, or into which he may first be brought. U. S. v. Arwo, 19 Wall. 486; s. c. 2 Green's Crim. Reps. 134.

**53. Offenses against State laws.** Congress has no power to confer upon the United States courts jurisdiction to try indictments found in the State courts. People v. Murray, 5 Parker, 577.

**54.** The necessity for martial law must be shown affirmatively by the party assuming to exercise it. Where a farmer of South Carolina, some eighty years of age, who had never been engaged in military service, was arrested and tried before a military commission, convicted of murder, and sentenced to the penitentiary for life, seven months after the termination of the Rebellion, on a charge of killing a negro boy, and, for aught that appeared, the courts of South Carolina were, at the date of the trial, in the full exercise of their judicial functions, the prisoner was discharged on *habeas corpus*. Matter of James Eagan, 6 Parker, 675.

**55.** Two indictments were found against a person who held a license to sell liquors under the internal revenue laws of the United States, one charging him with being a common seller of intoxicating liquors, and the other with keeping a nuisance by reason of the illegal keeping and sale of intoxicating liquor. *Held* that they could not be removed into the Circuit Court of the United States under U. S. Stat. of 1833, ch. 57, § 3, or of 1864, ch. 173, § 50. State v. Elder, 54 Maine, 381.

## Jury.

**1. Right to trial by.** In Alabama the

constitutional guaranty of a trial by jury "in all prosecutions by indictment or information" (art. 1, § 10), applies to no offenses created by statute since the adoption of the Constitution, except in the specified cases; but the Legislature can make such offenses triable before the justice of the peace without indictment. The provision contained in the 28th section of the same article, declaring that "the trial by jury shall remain inviolate," does not extend the right of trial by jury to cases unknown at the time of the adoption of the Constitution, either to the common or statute law. Tims v. State, 26 Ala. 165.

2. The statute of New York having made intoxication in a public place a crime, the accused is entitled to a trial by jury. Hill v. People, 20 N. Y. 363.

3. **Defendant cannot waive.** It is not in the power of the prisoner, on a trial for felony, to waive a trial by jury. Williams v. State, 12 Ohio, N. S. 622.

4. **Who may serve on.** Members of a league, the object of which is to prosecute for violations of the liquor law, and who mutually contribute money to defray the expenses of such prosecutions, are not incompetent to sit as jurors on the trial of such a prosecution, when, for aught that is shown, each of them may have paid, before the prosecution, the full sum which he had subscribed. Com. v. O'Neil, 6 Gray, 343.

5. Jurors who have previously, and at the same term of the court, convicted the defendant of a crime, are not thereby disqualified for sitting as jurors for the trial of another indictment against him for a similar offense. Com. v. Hill, 4 Allen, 591.

6. A person is not disqualified from serving as a juror on a trial for murder by the fact that he officiated as clergyman at the funeral of the deceased, and preached his funeral sermon. State v. Stokely, 16 Minn. 282.

7. The fact that a juror married the widow of the prosecutor's uncle, does not render him incompetent to sit. O'Neal v. State, 47 Ga. 229.

8. It is not a good objection to an indictment for an offense to which the law annexes a fine for the use of the town, that the foreman of the grand jury who found the indictment is a taxable inhabitant of such town. Com. v. Ryan, 5 Mass. 90.

9. M., several years prior to 1866, was a resident of, and in business in, Ohio. In that year he rented a house in Kentucky and removed his family there, but continued his business in Ohio, giving his personal attention to it every day. He had no intention of becoming a citizen of Kentucky, but during his sojourn there regarded himself as a citizen of Ohio, always voting there as such, without objection or challenge, and never voting, or attempting to vote, in Kentucky. Having returned to Ohio, it was held that he had not forfeited any of his rights of citizenship in that State, and that he was qualified to serve on the jury in a court of the United States sitting in Ohio. U. S. v. Thorpe, 2 Bond, 340.

10. **Persons incompetent to serve as jurors.** The members of an association combining for the purpose of enforcing or withstanding the execution of a particular law, and binding themselves to contribute money therefor, are not competent to sit as jurors on a trial for the violation of that law. Com. v. Livermore, 4 Gray, 18.

11. On the trial of an indictment for secreting records, it was held that a juror belonging to the town whose book of records was alleged to have been secreted by the accused, was properly excluded from the panel. State v. Williams, 30 Maine, 484.

12. In Connecticut, where it was discovered after verdict that one of the jurors was not a freeholder, it was held a sufficient ground for arrest of judgment. State v. Babcock, 1 Conn. 401.

13. Where one of the jurors was on the grand jury that found the indictment, it was held that the defendant might challenge him, but that he could not on that ground, move for a new trial, after a verdict of guilty, if he knew of the objection when the jury was impaneled. Barlow v. State, 2 Blackf. 114.

14. Whether if a juror should express a determination not to follow the instructions

of the court in matters of law, if they should differ from his own opinion, he would be incompetent—*query*. Com. v. Abbott, 13 Metc. 120.

**15. Exemption from service on.** In Indiana, under the statute of 1824, persons above sixty years of age are exempt from serving on juries. But the prisoner cannot object to them on that ground. State v. Miller, 2 Blackf. 35.

**16. Struck jury.** There may be a struck jury in a criminal as well as in a civil case. Sutton v. State, 9 Ohio, 133.

**17. Jury de medietate linguæ.** In New York, where the prisoner, on his arraignment, suggests that he is an alien, and claims the privilege of a trial by a jury *de medietate linguæ*, the court of Oyer and Terminer may direct such a jury to be summoned forthwith. People v. McLean, 2 Johns. 381.

**18. Venire.** In New York, a *venire* without the seal of the court was held void. People v. McKay, 18 Johns. 212. In Alabama, a *venire* for summoning a grand jury was held sufficient without the seal of the clerk issuing it. Maher v. State, 1 Porter, 265.

**19.** In Mississippi, in a capital case, the prisoner has a right to a jury summoned by a special *venire*, and to be furnished with a list of the jurors. Boles v. State, 24 Miss. 445. The other cases in which a special *venire* may be issued, is where there are none of the regular *venire* in attendance upon the court. Baker v. State, 23 Ib. 243.

**20.** If a jury cannot be formed from the original panel, nor from the bystanders, the court may award a *venire facias* commanding the sheriff to summon an additional number of jurors to attend the court then in session. Gibson v. Com. 2 Va. Cas. 111.

**21. Summoning.** A grand jury and petit jury should be separately summoned, and not included in the same panel. Forsythe v. State, 6 Ohio, 19. In Georgia, where the grand jury and petit jury were summoned by the sheriff, and returned without a *venire*, it was held not a ground for arrest of judgment. Bird v. State, 14 Ga. 43.

**22.** Where it appeared that certain of the jurors had not been summoned by any legal authority, and that their names had been put upon the list of jurors by the clerk of the court, at the request of those persons themselves, without any order of the court being entered requiring such jurors to serve, it was held good ground of challenge to the array. McCloskey v. People, 5 Parker, 308.

**23.** In Massachusetts, a juror was put on the panel, upon his testifying that he had been summoned, the officer having omitted his name in the return. Case of Patterson, 6 Mass. 486.

**24.** On a trial for murder, the panel being exhausted, the court directed three hundred additional jurors to be summoned. *Held* that it was not error in the court to deny the application of the prisoner's counsel for two or three days' delay, to enable them to examine such list of additional jurors. Colt v. People, 1 Parker, 611; s. c. 3 Hill, 432.

**25. Officer's return.** The return of the precept, directed to the sheriff, commanding him to summon a jury, need not show that the jury have been drawn according to law; but it will be presumed that such is the case, until the contrary is shown. Com. v. Green, 1 Ashm. 289.

**26.** Where a *venire facias* directed the officer to cause a juror to be drawn not more than twenty nor less than six days before the sitting of the court, and he returned that the juror was drawn as above directed, but without date, the return was held sufficient. Fellows' Case, 5 Maine, 333.

**27. Objection to venire.** An objection to the issuance or direction of the *venire* to summon the petit jury must be made before the jurors are sworn. Brown v. State, 7 Eng. 623; Samuels v. State, 3 Mo. 50; State v. Cole, 9 Humph. 626; People v. Robinson, 2 Parker, 235.

**28.** A *venire* will not be quashed on the ground that it states only the initial letter instead of the full christian names of several of the jurors, when it appears that the prisoner was not deceived or misled by the list furnished him, or that the jurors were not as well known by their initials as by their

full christian names, nor on the ground that the *venire* does not state that the jurors "were summoned to try his case," when it is shown that it was entitled "a list of the jury summoned for A." (stating the prisoner's surname), and that the sheriff read the list over to him, and at the same time told him that it was the list of the jury summoned to try him for the homicide with which he was charged. Aikin v. State, 35 Ala. 363.

29. When the writs of *venire* by which the grand and petit jurors were summoned are void, the judgment will be arrested. State v. Williams, 1 Rich. 188.

30. **Drawing jury.** On the 23d of September the court, at a stated term of the Oyer and Terminer, made an order adjourning the term until the 10th of November, and also directing the sheriff to summon "for the adjourned term of the court sixty additional jurors, to be drawn by the clerk in the usual way." The sixty jurors were accordingly summoned, and a jury to try an indictment for murder was drawn from them and from the panel of the September term promiscuously. No objection was made to the regularity of the proceedings until after the prisoner was convicted. It was held that although the order in question was informal, it was not a ground for setting aside the verdict. People v. Cummings, 3 Parker, 343. In Pennsylvania, where after the jurors' names were selected and placed in the wheel, the wheel was sealed with but one seal instead of three seals as required by the statute, it was held ground for quashing the indictment. Brown v. Com. 73 Penn. St. 321; s. c. 2 Green's Crim. Reps. 511.

31. Under the act of Congress of July 20th, 1840, there need only be substantial conformity, and that only as far as is practicable, to the mode of selecting and drawing jurors prescribed by the State laws. U. S. v. Tallman, 10 Blatchf. 21; s. c. 1 Green's Crim. Reps. 418.

32. In New York, where part of the jurors had been drawn on a trial for murder before the court had information that the clerk had omitted in 1863 to take the names out of the box and deposit therein the names on the list of jurors returned and filed for the town in that year, it was held proper for the clerk, by direction of the court on the trial, to make the proper change of the names of the jurors in the box that the clerk should have made in 1863. Gardiner v. People, 6 Parker, 155.

33. **Talesmen.** Persons were summoned as talesmen who were not in the court house. *Held* that the calling them into court was a sufficient summoning, since when they came in they were bystanders. State v. Lamon, 3 Hawks, 175.

34. In Indiana, if there be no jurors on the return of the *venire*, a new one must issue. But if any number, however small, appear, and they be set aside on challenge, talesmen may be sworn. Fuller v. State, 1 Blackf. 63.

*See* GRAND JURY; VERDICT. *For challenges and other matters relating to jurors, see* TRIAL.

## Kidnapping.

1. **Nature.** Kidnapping is at common law an aggravated kind of false imprisonment. Click v. State, 3 Texas, 282.

2. **What constitutes.** Procuring the intoxication of a sailor with the design of getting him on board ship in that condition without his consent, and thus taking him on board, is kidnapping within the statute of New York; and it is immaterial whether the prisoner did the acts in person or caused or advised their being done. And it was held that if the intent and expectation were that the sailor would be carried in the ship against his will to a foreign port, the offense was complete, although the destination of the ship was not in fact any place out of the State. Hadden v. People, 25 N. Y. 373.

3. **Indictment.** An indictment for kidnapping must charge an assault and the carrying away of the party injured from his own country into another, unlawfully and against his consent, and set forth the facts and circumstances constituting the offense. Click v. State, *supra*.

4. **Evidence.** On a trial for kidnapping

a sailor, it was held competent to prove the destination of the vessel by parol evidence, notwithstanding there was written evidence on the subject in the custom house. Hadden v. People, *supra*.

5. In order to sustain a charge of forcibly confining and detaining negroes on board of a vessel with intent to make them slaves, within the meaning of the act of Congress of May 15th, 1820, § 5 (3 U. S. Stats. at Large, 601), it is not necessary to prove the employment of physical or manual force. It is sufficient that the negroes were under moral restraint and fear, and any person participating in that sort of detention would be a principal in the offense. U. S. v. Gordon, 5 Blatchf. 18; U. S. v. Westervelt, Ib. 30.

6. The general reputation of a kidnapper may be proved, to show the intent with which the defendant aided him. State v. Harten, 4 Harring. 582.

## Larceny.

1. The taking.
2. The intent.
3. Subjects of larceny.
4. Warrant.
5. Place of indictment.
6. Indictment.
7. Evidence.
   (*a*) *Proof of taking.*
   (*b*) *Evidence as to property taken.*
   (*c*) *Proof of place of offense.*
   (*d*) *Proof of ownership of property.*
   (*e*) *Proof of value of property.*
   (*f*) *Presumptive evidence.*
   (*g*) *Admissions, declarations and confessions.*
   (*h*) *Guilty knowledge and intent.*
   (*i*) *Former conviction.*
8. Charge of court.
9. Verdict.
10. Sentence.

### 1. The taking.

**1. Must be against will of owner.** To constitute larceny, the property must have been taken against the will of the owner, and it must have been either in his actual or constructive possession. Hite v. State, 9 Yerg. 198, 357. Violence is not necessary. Fraud may supply the place of force. Com. v. James, 1 Pick. 375.

**2. Must be removal.** There must have been a taking or severance of the goods from the possession of the owner. If a person entice a horse or other animal, by placing food in such a situation as to operate on its volition, and assumes dominion over it, and has it once under his control, the taking is complete. State v. Wisdom, 8 Porter, 511. But the mere upsetting of a barrel of turpentine with a felonious intent, is not sufficient. State v. Jones, 65 N. C. 395. And the merely looking at a dead hog lying in the corner of a fence covered with leaves, and running away on being hailed, is not sufficient to sustain a conviction of larceny. State v. Wilkerson, 72 N. C. 376.

**3. Slight removal sufficient.** The thief need only have had a momentary possession. State v. Wilson, Coxe, 439; State v. Wisdom, 8 Porter, 511; State v. Jackson, 65 N. C. 305. The least removal of an article with intent to steal it, if the taker thereby for an instant obtain the entire and absolute possession of it, is a sufficient asportation to constitute larceny, though the property be not removed from the premises of the owner, nor retained in the possession of the taker; and a return of the article, will not purge the offense, though the possession be retained but for a moment. Therefore on a trial for stealing money from a drawer, it was held not erroneous to charge that if the defendant took the money into his hand, and lifted it from the place where the owner had placed it, so as to sever it from the spot, with the intention of stealing it, he was guilty of larceny, although he dropped it upon being discovered, and never had it out of the drawer. Eckels v. State, 20 Ohio, N. S. 508.

4. Where it was proved that the prisoner thrust his hand into the complainant's pocket, seized a pocket-book with money and securities in it, and lifted it about three inches from the bottom of the pocket when he was discovered by the complainant,

it was held that he was properly convicted of larceny. Harrison v. People, 50 N. Y. 518.

5. On the trial of an indictment for an attempt to commit larceny of a pocket-book form the person, it was proved that the prisoner having put her hand into the pocket of a lady, was seized by the wrist while her hand was in the pocket, and that in the struggle, the dress and pocket were torn, and the pocket-book dropped on the ground. The following instruction was held correct: That if the jury were satisfied beyond a reasonable doubt, that the hand of the defendant had been thrust into the woman's pocket with a felonious intent, and was arrested in the pocket while attempting to execute that intent, and before her hand reached or disturbed the pocket-book, they might convict; but not if the defendant's hand had reached or seized the pocket-book before it was arrested, and she altered the position of the pocket-book. Com. v. Luckis, 99 Mass. 431.

6. On the trial of an indictment for horse stealing, the following instruction was held proper: "If the defendant took, or led the horse away any distance, with a felonious intent, the asportation is complete, as much so, as if the party had succeeded in removing the horse away altogether; and it makes no difference that the horse had not been removed from the inclosure or lot." State v. Gazell, 30 Mo. 92. In Texas, asportation is not essential to constitute larceny. Prim v. State, 32 Texas, 157.

7. **Delivery of property by owner.** If the owner of goods alleged to have been stolen, parts with the possession and title to the thief, neither the taking nor the conversion is felonious. An officer having levied upon property belonging to the judgment debtor, delivered it to the judgment creditor, and shortly afterward, with the consent of the judgment creditor, took the goods away and sold them at private sale, receiving therefor $55, which he converted to his own use. *Held*, that the officer was not guilty of larceny under section 71 of the criminal code of Illinois, which provides that the felonious conversion of property by a bailee shall be deemed larceny; the general property in the goods after the levy, until a sale according to law, remaining in the judgment debtor, and the proceeds of the sale not being the property of the judgment creditor until paid over to him. Zschocke v. People, 62 Ill. 127; s. c. 2 Green's Crim. Reps. 560.

8. An indictment for larceny cannot be maintained when it appears that the goods charged to have been stolen, were transferred, so as to create any trust or right of property; and this is a question of fact for the jury. Wilson v. State, 1 Porter, 118. Where property is voluntarily delivered to a person who has not generally the care of his employer's property, and such person converts the property to his own use, it is embezzlement and not larceny. Ennis v. State, 3 Greene, 67; State v. Fann, 65 N. C. 317.

9. **Where the owner parts with the possession, but not with the title.** But although the owner parts with the possession voluntarily, yet if he does not part with the title, but expects that the same thing shall be returned to him, or that it shall be disposed of on his account, the taking and conversion may constitute larceny. Welsh v. People, 17 Ill. 339; Stinson v. People, 43 Ib. 397; State v. Watson, 41 New Hamp. 533.

10. A person while stopping at a hotel, was handed a gun by the landlord, who told him he might go and shoot birds with it, which he did for a short time, and then went off with the gun and traded it away. *Held* larceny. Richards v. Com. 13 Gratt. 803.

11. Where the obligee of a bond, at the request of the obligor, handed him the bond to look at, when the obligor immediately threw it into the fire, where it was destroyed, it was held that if the obligor intended to benefit himself by depriving the obligee of his property, it was larceny. Dignowitty v. State, 17 Texas, 521.

12. Where a five dollar bill, which was handed to a person to procure change, and to pay himself twenty-five cents out of it, was appropriated by him, it was held that

he was guilty of larceny. Farrell v. People, 16 Ill. 506.

**13.** The prosecutor handed the prisoner, who was a bar-tender in a saloon, a fifty dollar bill, to take ten cents out of it in payment for a glass of soda water. The prisoner put down a few coppers on the counter; and when asked for the change he put the prosecutor out of doors and kept the money. *Held* larceny. Hildebrand v. People, 56 N. Y. 394; s. c. 3 N. Y. Supm. N. S. 82; 8 Ib. 19.

**14.** The refusal of a magistrate, upon discharging a person accused of larceny, to return to him the property which when examined he had taken from him, is an indictable offense at common law. Hiss v. State, 24 Md. 556.

**15.** In Connecticut, a person having a note left with him for collection applied to the maker of the note for payment. The latter asked to see the note, and upon its being handed to him left the room with it, and hid or destroyed it. *Held* that the jury were justified in finding that the maker obtained possession of the note with a felonious intent, and that the act was larceny. State v. Fenn, 41 Conn. 590. In New York, where the holder of a promissory note, having received part payment, handed it to the maker to indorse the payment, and he took it away and refused to give it up, it was held that he was guilty of larceny, although when he first received the note he had no felonious intent. People v. Call, 1 Denio, 120.

**16.** A person left his room and trunk unlocked but closed, in charge of the defendant, telling him there was money in the trunk and to keep the room secured. In his absence the defendant took some of the money. *Held* larceny. Robinson v. State, 1 Cold. Tenn. 120.

**17.** In Virginia, where the defendant was charged with stealing a free mulatto boy, knowing at the time that he was free, it was held that the offense was complete under the statute, by the taking without an actual sale. Davenport's Case, 1 Leigh, 588.

**18. Where the owner of goods parts with them for a special purpose.** If the owner of goods parts with them for a special purpose, and the person who receives them avowedly for that purpose has a fraudulent intention at the time to convert the goods to his own use, and does so convert them, it is larceny. Lever v. Com. 15 Serg. & Rawle, 93; State v. Gorman, 2 Nott & McCord, 90.

**19.** Where a miller having received barilla to grind, fraudulently kept part of it, returning a mixture of barilla and plaster of paris, it was held to be larceny. Com. v. James, 1 Pick. 375.

**20.** It is the usual course of business for a factor to mix the proceeds of his sales with his own funds, and to use them indiscriminately. To make out larceny from the mere use of the article, it must appear that the use was fraudulent, and that it was used under such circumstances as to show an intent to deprive the owner of his property. Snell v. State, 50 Ga. 219. Where stolen money is mingled with that of another person, the fact that it is not distinguishable will not prevent a conviction. People v. Williams, 24 Mich. 156. There may be a conviction of larceny, although the stolen goods are not found. State v. Kent, 65 N. C. 311.

**21.** If a carrier or other bailee opens a package of goods, and takes away and disposes of them to his own use, *animo furandi*, it is larceny; but not if he takes away and disposes of the entire package. State v. Fairclough, 29 Conn. 47.

**22.** But in Massachusetts, it has been held that if a person to whom a wagon load of goods consisting of several packages is delivered to be transported, fraudulently takes away one of the packages, such taking is larceny. Com. v. Brown, 4 Mass. 580.

**23.** The wrongful taking from a canal boat by the captain and owner of the boat, of bars of iron which had been intrusted to him for transportation, is larceny, and not embezzlement. Nichols v. People, 17 N. Y. 114, Denio, J., *dissenting*.

**24.** In Pennsylvania, where personal property having been sold on execution was bought by a friend of the execution debtor, who loaned it to him to use until demanded,

and the execution debtor sold and consumed it, it was held that he was guilty of larceny under the statute (Act of March 30th, 1860, § 108). Com. v. Chathams, 50 Penn. St. 181.

**25. Taking by servant.** Where property when appropriated by a servant is in the actual or constructive possession of his master, the offense is larceny, and not embezzlement; the distinction being between custody and possession. Com. v. Berry, 99 Mass. 428; State v. Jarvis, 63 N. C. 556.

**26.** A servant who has the care of horses in a livery stable, does not have such custody of them as to prevent his conviction of larceny in taking them away. People v. Belden, 37 Cal. 51.

**27.** Where a servant who is intrusted by his master with property converts it to his own use, he is guilty of larceny, although at the time of receiving the property the felonious intention did not exist in his mind; and an offer by the servant to sell the property will be sufficient proof of the conversion. State v. Schingen, 20 Wis. 74.

**28. Taking by clerk.** Where a clerk who has possession of goods in a store, and is salesman and general manager of the store, abstracts a part of the goods with a fraudulent intent to convert the same to his own use, he is guilty of larceny. Walker's Case, 8 Leigh, 743; Marcus v. State, 26 Ind. 101; State v. White, 2 Tyler, 352.

**29.** Where goods were feloniously taken from the owner's shop by their clerk and packer, who was not a salesman, though he had occasionally sold when the regular salesmen were absent or busy, an entry being effected by keys which he had, it was held larceny and not embezzlement. Com. v. Davis, 104 Mass. 548.

**30.** In Texas, where a clerk left in charge of a store at night carried away from the store money and goods, and the next day was arrested while leaving the country, at some distance from the store, with the property in his possession, it was held that he was properly convicted of larceny under the statute (Paschal's Dig. art. 2421), which provides that if a clerk shall embezzle, or misapply, or convert to his own use, without the consent of his principal, any money or other property of such principal or employer, which shall have come into his possession or under his control by virtue of his employment, he shall be punished as for theft. Cobletz v. State, 36 Texas, 353; s. c. 1 Green's Crim. Reps. 646.

**31.** Where a clerk of the State treasurer who had the custody of the State securities, and whose duty it was to deposit them in a bank, feloniously appropriated to his own use a draft which came into his hands as such clerk, it was held that he was guilty of larceny. Phelps v. People, 13 N. Y. Supm. N. S. 401.

**32.** Where although the teller of a bank was intrusted with funds of the bank while engaged in transacting its business, yet at night they were withdrawn from him and placed in such custody that he could not lawfully resume possession until the return of business hours and the concurrence of the cashier, it was held, that in wrongfully abstracting the funds at night, and converting them to his own use, he was guilty of larceny and not embezzlement. Com. v. Barry, 116 Mass. 1.

**33. Consent of wife of owner.** It is a felony for a man who runs away with another's wife, to take his goods, though with the consent and at the solicitude of the wife. People v. Schuyler, 6 Cow. 572. Where on a trial for grand larceny in stealing a bond belonging to A., which the prisoner claimed was taken with the consent of A.'s wife, it was proved that the prisoner knew that A. owned the bond, and that A. was in the vicinity of the house and would return to it in a short time, it was held not erroneous to submit the question to the jury, whether upon all the evidence the prisoner believed the wife had any right to dispose of the bond, and to instruct them that if the wife had no such right, and the prisoner did not believe that she had any, her consent to his taking the bond furnished no defense to him. People v. Cole, 43 N. Y. 508; affi'g 2 Lans. 370.

**34. In committing trespass.** If a person by committing a trespass, tortiously and unlawfully acquires possession of the personal

property of another, and afterward conceives the purpose of fraudulently depriving the owner of it, and in pursuance of that design, with a felonious intent, carries it away and converts it to his own use, he is guilty of larceny. Com. v. White, 11 Cush. 483.

35. Where A. agreed to get stone from the land of another, upon a contract to have half for getting them, it was held that while they remained on the land undivided A. was neither a tenant in common with the owner of the land nor a bailee of them, and that therefore he, or any other person with his connivance, might be guilty of larceny in taking them. State v. Jones, 2 Dev. & Batt. 544.

36. Every larceny must include a trespass, and the taking must have been under such circumstances as that the owner might maintain an action of trespass. The prosecutor having a draft for gold coin drawn upon a banking house, the prisoner undertook to get it cashed for him, and they went for that purpose to the office of a broker, where it was agreed that the prisoner should indorse it, and that the broker should get the money and have it at his office the same day for the prosecutor. The prisoner, in the prosecutor's absence, went to the broker's office, obtained from him the money, and carried it away, and when arrested shortly afterward he had only a portion of it, having disposed of the balance. *Held* that if the prisoner when he received the draft had the felonious intent of converting it and the proceeds to his own use, and that in pursuance of that intent he received and carried away the gold, he was guilty of larceny. People v. McDonald, 43 N. Y. 61.

37. In Iowa, the statute (§ 4241), has done away with the common-law rule that there can be no larceny without a trespass, and no trespass where there was a consent by a party authorized to give it, even though such consent was obtained by fraud. State v. Brown, 25 Iowa, 561.

38. **Is included in robbery.** Larceny is included in robbery, and the prosecution may elect to try the accused of the former, though by so doing it deprives itself of the right to prosecute for the latter. Hickey v. State, 23 Ind. 21.

39. **When taking from person deemed larceny, and not robbery.** Snatching money out of another's hand, and instantly running away with it, is larceny, and not robbery. Bonsall v. State, 35 Ind. 460; State v. Henderson, 66 N. C. 627.

40. A. was standing in a public street counting money, which he held in his open hand. B., passing along, took the money out of his hand, using no more force than was necessary to withdraw it, and walked away. A. called to her several times to return the money, which she would not do. *Held* larceny. Johnson v. Com. 24 Gratt. 555.

41. On the trial of an indictment for robbery, it appeared that while A. was traveling in a wagon on the public highway he was overtaken about nine o'clock in the evening by B., who, after some conversation, requested A. to examine a bank bill, which B. said he had found; that while A. was looking at the bill he felt B.'s hand in his pocket, on his pocket-book, and immediately seized his arm, the prisoner at the same time snatching the bill; and that thereupon a scuffle ensued, in which A. was thrown out of the wagon, and the prisoner escaped with the pocket-book and bank bill. *Held* larceny, and not robbery. State v. John, 5 Jones, 163, Battle, J., *dissenting*.

42. On the trial of an information for the robbery of H., it was proved that H. was discovered by a policeman lying on the ground at night in an unconscious state from intoxication, with his pockets turned inside out, and the defendant standing astride his body, taking from his pockets property, and putting it in his own. *Held* not robbery, but larceny. Brennon v. State, 25 Ind. 403.

43. **Attempt to steal from the person, when complete.** An attempt to steal from the person is complete when an act is done with intent to commit the crime which is adapted to the perpetration of it, whether the purpose fails by reason of interruption, or because there was nothing in the pocket, or for other extrinsic cause. State v. Wilson, 30 Conn. 500.

44. **Suing for fictitious demand.** If a

person having no cause of action sues out a writ for a fictitious demand, and thereby gets possession of the property of another, which he converts to his own use, with intent to defraud the owner, it is larceny. Com. v. Low, Thach. Crim. Cas. 477.

**45. Acquiring possession through mistake.** Where personal property is left in the possession of another through inadvertence, and the latter knowing the owner, *animo furandi* conceals it, he is guilty of larceny. People v. McGarren, 17 Wend. 460.

**46.** A person who, upon receiving from another money to which he knows he is not entitled, and which he knows has been paid to him by mistake, conceals such overpayment, and appropriates the money to his own use, intending thus to cheat and defraud the owner, is guilty of larceny. Wolfstein v. People, 13 N. Y. Supm. N. S. 121.

**47. Obtaining property by trick.** If, by trick or artifice, the owner of property is induced to part with the custody or naked possession to one who receives the property *animo furandi*, the owner still meaning to retain the right of property, the taking will be larceny. Smith v. People, 53 N. Y. 111.

**48.** A. having left his watch at a watchmaker's to be repaired, B. went there pretending to be A., asked for the watch, paid for the repairing, and took the watch with a felonious intent. *Held* that this constituted larceny at common law. Com. v. Collins, 12 Allen, 181.

**49.** The prisoner sent an order to K. & Co., jewelers, for six pairs of gold bracelets, which they sent to him. The prisoner was also a jeweler, and the order was designed and understood to be an application for the bracelets for the purpose of showing them to a customer and enabling him to inspect them, and select which, if either, he would take, and the money for that, together with the remainder of the bracelets, was to be returned to K. & Co. But the prisoner did not return to K. & Co. either the bracelets or the money for either of them. *Held* that as the title to the bracelets until sold remained in K. & Co., the prisoner was guilty of larceny. Weyman v. People, 6 N. Y. Supm. N. S. 696.

**50.** Fraudulently obtaining property by the device known as "the five cent trick," is larceny. Defrese v. State, 3 Heisk. 53; s. c. 1 Green's Crim. Reps. 356.

**51.** But where the maker of a note, claiming that the title to land for which he had given the note was not good, obtained possession of the note by trick, for the purpose of canceling it, it was held that he was not guilty of larceny. State v. Deal, 64 N. C. 270, Rodman, J., *dissenting*.

**52.** A person may commit larceny, although the property is obtained through the connivance of a servant of the owner, and the servant is guilty of embezzlement. State v. McCartey, 17 Minn. 76.

**53. Obtaining goods by false pretenses.** Where a person gets possession of goods by false pretenses, intending to convert them to his own use, which he afterward does, it is larceny. State v. Ludenthall, 5 Rich. 237; Anable v. Com. 24 Gratt. 563; Watson v. State, 36 Miss. 593; unless it appear that a temporary trust or possession was extended to the party. Wilson v. State, 1 Porter, 118.

**54.** Where the owner of goods was prevailed upon by false pretenses, by the prisoner, who had engaged to sell them on commission, to send them to R. H. & Co., who did not mean to buy the goods, and had never agreed to do so, and the prisoner afterwards took the goods away from the store of R. H. & Co., and converted them to his own use, it was held that he was guilty of larceny. People v. Jackson, 3 Parker, 590.

**55.** The clerk in a store referred the defendant to the owner, who refused to sell him certain articles except upon his father's order, which was not obtained. Subsequently telling the clerk in the absence of the owner that he had made it all right with the latter, he took the goods. *Held* larceny. Com. v. Wilde, 5 Gray, 83.

**56.** On the trial of A. and B., for grand larceny, it was proved that A. ordered some goods at a store, and directed them to be sent to a certain place where they would be paid for; that the goods were sent by a

clerk, and on his going into the house, B. took the goods, saying, "These are the goods my sister ordered;" that asking the clerk to take a seat, she went into the next room, saying she would look at the goods; that after some time, the clerk discovered that she had left the house, and that some of the goods were afterward found in another house, where A. lived. *Held* that as the transaction was a mere fraud and trick, and not the obtaining of goods under a purchase, the defendants were properly convicted. The following instruction was held proper: That in order to convict, the jury must be satisfied that at the time A. went to the store, ordered the goods, and said the bill would be settled at the house, she had the felonious intent to steal the goods; and in like manner, that B. must have had a felonious intent to steal when she obtained possession of the goods. St. Valerie v. People, 64 Barb. 426.

57. A person who obtains possession of the discharge paper of a soldier, by falsely personating the owner, and converts it to his own use, may be convicted of larceny of the paper. Com. v. Lawless, 103 Mass. 425.

58. If the owner be deceived into a surrender of the title as well as the possession of his goods, by means of fraudulent representations, the offense will not be larceny, but false pretenses. Kelly v. People, 13 N. Y. Supm. N. S. 509; Ross v. People, 5 Hill, 294.

**59. Obtaining property by borrowing or hiring.** If A. borrow a horse from B., with the felonious intent to deprive B. of it, and to appropriate it to his own use, and does so, A. is guilty of larceny; and the offense is not purged by returning the horse to the owner. State v. Scott, 64 N. C. 586. If, however, A. borrow of B. twenty dollars, with the same intent, it is not larceny, but fraud. But if the money be obtained by A., by trick or contrivance, with the intent at the time to steal it, it is larceny. State v. Bryant, 74 N. C. 124.

60. If A. hire a horse, and either at the time he gets possession of the animal or afterward, conceives the design of stealing it, and carries the horse away with that design, he is guilty of larceny. Norton v. State, 4 Mo. 461; Starkie's Case, 7 Leigh, 752; *contra*, Felter v. State, 9 Yerg. 397.

61. Where a person hired a horse, pretending that he wished to go a short distance, and promising to return in a few hours, but in fact having no intention to restore the horse to the owner, and used the horse for a different purpose from that for which he hired him, it was held larceny, although he did not sell or dispose of the horse. State v. Humphrey, 32 Vt. 569.

62. A person hired a mule for a day or two, promising to return it at a specified time; but instead of doing so, he traded the mule off for a horse, and then attempted to deceive the owner by falsely telling him that the mule had broken away from him and escaped. *Held* larceny. Smith v. State, 35 Texas, 738.

63. A bailee who obtains possession of property by delivery under the pretense of hiring it, but with the intent to convert it to his own use, is guilty of larceny. State v. Williams, 35 Mo. 229. At common law, a bailee of goods could not be guilty of larceny by a fraudulent conversion of them. Wright v. Lindsay, 20 Ala. 428.

**64. Fraudulent taking of goods by owner.** If the general owner of property which has been attached, takes and carries the whole, or part of it, away, with the intent to defraud the attaching creditor of his security, it is larceny, but not if his design is merely to prevent other creditors from attaching the goods, and he has no intent to defraud the officer or attaching creditor. Com. v. Greene, 111 Mass. 392; see *post*, *sub.* 99.

65. To make a joint owner or tenant in common guilty of larceny by taking and disposing of the whole property to his own use, he must have taken it out of the hands of a bailee with whom it was left for safe keeping. Kirsey v. Fike, 29 Ala. 206.

**66. When finder of property is guilty of larceny.** A person who finds personal property, knowing, or having the means of knowing, the owner, and instead of restoring, appropriates it to his own use, is guilty

of larceny. State v. Weston, 9 Conn. 527; People v. McGarren, 17 Wend. 460.

67. Proof that the defendant picked up bank bills which had been dropped by the owner, and with an unlawful intent converted them to his own use, without the knowledge of the owner, will sustain an indictment for larceny; and the genuineness of the bills will be presumed. State v. Pratt, 20 Iowa, 267.

68. Where a person found a pocket-book containing money, in the highway, it was held that if at the time of finding the pocket-book, and before he removed the money, he knew it to be the property of the prosecutor, the conversion was larceny. State v. Ferguson, 2 McMullan, 502; s. p. State v. Weston, 9 Conn. 527; *contra*, Porter v. State, 1 Mart. & Yerg. 226.

69. Where the owner of a watch having left it at a watchmaker's for repair, it was placed in a window, and afterward blown with other watches into the street, where it was picked up by a person who retained it and gave a false account of the manner in which he got it, it was held that he was properly convicted of larceny. Pritchett v. State, 2 Sneed, 285; see Pyland v. State, 4 Ib. 357.

70. A person in changing his clothes in the office of his livery stable, unintentionally left his purse containing money lying on an old saddle behind the door, and while he was gone to dinner, the purse and its contents were picked up by a boy in the presence of the defendant, and by his direction, and handed to him. *Held* larceny. Pyland v. State, 4 Sneed, 357; approving Pritchett v. State, 2 Ib. 285.

71. The owner of a ring in the District of Columbia, left it by accident in a tub where she had been washing. In ten or fifteen minutes, knowing where it was, she went to get it; but meanwhile, it had been taken by the prisoner, who denied the taking of it, concealed it, carried it to Connecticut, and offered it for sale as her own. *Held* larceny at common law. State v. Cummings, 33 Conn. 260.

72. In Vermont, the finder of lost goods must advertise them, and if he conceal or convert them, he is guilty of larceny. State v. Jenkins, 2 Tyler, 379.

73. **When finder of property justified.** The finder of lost goods may lawfully take them into his possession, and if he does so without any felonious intent at that time, a subsequent conversion of them to his own use, by whatever intent that conversion is accompanied, will not constitute larceny. Com. v. Titus, 116 Mass. 42; Ransom v. State, 22 Conn. 153; State v. Roper, 3 Dev. 473.

74. Where a person in good faith finds upon the highway a lost article, as a trunk containing goods, he is not guilty of larceny by any subsequent act in hiding or converting it to his own use. People v. Anderson, 14 Johns. 293.

75. A person having lost a carpet bag containing several articles, on the highway, requested the defendant to find it, and give it to one H. The defendant having obtained the bag, hid it, and denied having found it. *Held* not larceny. State v. England, 8 Jones, 399.

76. Where on the trial of an indictment for the larceny of a pocket-book containing bank bills, which had been lost on the highway, the court charged the jury that if the defendant, when he found the property, knew or had the means of knowing the owner, and did not restore it to him, but converted it to his own use, he was guilty of larceny, it was held error, for the reason that if the defendant, when he found the property, meant to act honestly with regard to it, no subsequent felonious intention could make him guilty of larceny. Ransom v. State, 22 Conn. 153.

77. Where a person finds lost property which has no marks upon it by which the owner can be ascertained, he is not guilty of larceny, though he take it *animo furandi*. State v. Conway, 18 Mo. 321. It would be otherwise if the finder knew the owner, or had the means of knowing him. Randal v. State, 4 Smed. & Marsh. 349.

78. Where a pocket-book containing bank bills, with no mark about it showing who the owner was, was found in the highway, and there was no proof that the finder, at the

time, knew who the owner was, it was held that he could not be convicted of larceny, though he fraudulently, and with intent to convert the property to his own use, concealed the same immediately afterward. People v. Cogdell, 1 Hill, 94; s. p. People v. Anderson, 14 Johns. 293.

79. To charge the finder of lost goods with larceny, it is not enough that he has the general means, by the use of diligence, of discovering the owner. He must know the owner at the time of the finding, or the goods must have some mark upon them, understood by him, by which the owner can be ascertained; and he must intend to appropriate them to his own use at the time of finding them. People v. Cogdell, *supra*; Hunt v. Com. 13 Gratt. 757; Tanner v. Com. 14 Ib. 635.

80. The placing of a pocket-book upon a table, and neglecting or forgetting to take it away, is not losing it in the sense in which the authorities speak of lost property. Mayor v. Beasly, 21 Ala. 240.

81. **Taking from house or building.** A person may be guilty of larceny from a house, although the original entry was not felonious or with an intent to steal. Perry v. State, 10 Ga. 511.

82. But to constitute larceny by entering into and stealing from a house, the entry must have been against the consent of the owner, unless the crime was meditated at the time of an entry with consent. State v. Chambers, 6 Ala. 855.

83. In Massachusetts, breaking and entering a dwelling-house in the day time, with intent to steal, and stealing in a dwelling-house, whether by breaking and entering or otherwise, are distinct offenses subject to separate punishment. But any one act of breaking, entering, and stealing necessarily constitutes both of these offenses. Com. v. Hope, 22 Pick. 1.

84. Stealing the money of a lodger which is in his trunk, and the key of the trunk in a pocket of his clothes, while he is in bed undressed and asleep, constitutes larceny in a dwelling-house. Com. v. Smith, 111 Mass. 429. In Alabama, it is not larceny in a dwelling-house, within the statute (Code, § 3170), to steal clothes from the railing of a piazza. Henry v. State, 39 Ala. 679.

85. A small slight building, 21 feet by 15, in a garden, used for the storage of garden tools, seeds, and manures, is not a warehouse or granary within the statute of New Hampshire (Comp. Stat. ch. 229, § 10) punishing larceny in a warehouse or granary after entrance therein in the night, or breaking and entering in the day time. State v. Wilson, 47 New Hamp. 101.

### 2. The intent.

86. **Felonious intent essential.** The criminal intention is what distinguishes larceny from trespass. The fact that the property is taken clandestinely, or that there is an attempt to conceal it, is evidence of a felonious intent. Long v. State, 11 Fla. 295.

87. Where a person having obtained possession of property from the owner by a false and fraudulent pretense of buying it for cash, carries it away without the consent or knowledge of the owner, he is not guilty of larceny, unless he obtained the property and carried it away with a felonious intent. Blunt's Case, 4 Leigh, 689.

88. Where, upon a settlement between a landlord and tenant, under which an unexpired lease was to be surrendered by the landlord, upon the payment of a sum of money by the tenant, a misunderstanding arose as to the amount of the money, and the tenant carried away the lease, the receipt for the money, and the money offered in payment, it was held that such taking was not larceny. Com. v. Robinson, Thach. Crim. Cas. 230.

89. Where it was shown that property was delivered to the defendants under a contract of sale, and that they were in possession of it several months holding and using it under the contract, and it did not appear that they had any other than an honest intent at the time they contracted for and received the property, it was held that in carrying it away without paying for it they were not guilty of larceny. State v. Shermer, 55 Mo. 83.

90. Where goods are taken and carried

away without the intention to convert them to the taker's own use, it is only a trespass; and the fact that they were taken openly and in the presence of the owner or of other persons, would be evidence of the absence of a felonious intent. McDaniel v. State, 8 Smed. & Marsh. 401.

**91.** Where, on a trial for larceny it appeared that the defendant's mind was so far destroyed by his long-continued habit of drunkenness as to render him mentally incompetent intentionally and knowingly to commit the larceny, it was held that he ought to have been acquitted. Bailey v. State, 26 Ind. 422.

**92. Must have been intent to deprive owner of property.** The goods must have been taken fraudulently and secretly, with the felonious intent of permanently depriving the owner of them. Dodd v. Hamilton, 2 Taylor, 31; State v. Hawkins, 8 Porter, 461; Smith v. Schultz, 1 Scam. 490; Com. v. Low, Thach. Crim. Cas. 477; Felter v. State, 9 Yerg. 397; State v. Ledford, 67 N. C. 60; Johnson v. State, 36 Texas, 375; s. c. 1 Green's Crim. Reps. 347; U. S. v. Durkee, 1 McAllister C. C. 196.

**93.** On the trial of an indictment for stealing a horse, it was held that if the defendant took the horse with intent to convert him to his own use, and wholly to deprive the owner of his property, it was larceny; but otherwise, if he took the horse to facilitate his escape, and left him at a livery stable, without any intention to deprive the owner of his property. State v. York, 5 Harring. 493. In the latter case it would only be a breach of trust. State v. Self, 1 Bay, 242.

**94.** A person who, with a felonious intent, takes a purse from a store, where it has been accidentally left, is guilty of larceny. State v. McCann, 19 Mo. 249.

**95.** The taking of money with the design to apply it on a debt which the person from whom it is taken owes the taker, is larceny. Com. v. Stebbins, 8 Gray, 492.

**96.** In Virginia, it was held that the defendant might be convicted of the larceny of a free negro boy, eight years of age, notwithstanding the boy consented to go, whether the defendant knew he was free or not, and that the charge of knowledge in the indictment might be rejected as surplusage. Davenport's Case, 1 Leigh, 588.

**97. Intent to destroy property not sufficient.** It is not enough that the property is taken for the purpose of destruction. Such an offense would be punishable as malicious mischief; but it would want one of the essential ingredients of larceny—the *lucri causa*. State v. Hawkins, 8 Porter, 461.

**98.** Where, on a trial for stealing a deed, it appeared that the defendant had contracted verbally to sell certain land to B., and agreed upon a final meeting for that purpose; that, in the mean time, the defendant handed B. a deed, that he might ascertain its correctness, neither party considering the business settled; that B. gave the deed to his counsel to examine the title, and if satisfactory, to leave it at the registry to be recorded, which was done; that when the parties met for the final settlement, at the registry office, a dispute arose between them on a collateral point, and the defendant asked the register for the deed, and on receiving it destroyed it, calling upon those present to witness the act, it was held that if the defendant actually supposed that he had a right to the paper, he could not be convicted of larceny. Com. v. Weld, Thach. Crim. Cas. 157.

**99. Intent to deprive owner of property temporarily.** The taking of the property of another, with the intent of only depriving the owner of the use of it temporarily, is not larceny. State v. South, 4 Dutch. 28.

**100.** But where a person takes another's horse while trespassing upon his premises, with the intention to conceal it until the owner shall offer a reward, and then to return it and claim the reward, or until the owner shall be induced to sell it to him for less than its value, it is larceny. Com. v. Mason, 105 Mass. 163.

**101. Intent to charge another.** Larceny may be committed by stealing one's own property, where the intent is to charge another with the value of it. Palmer v. People, 10 Wend. 166. See *ante*, *sub.* 64.

**102.** A person may steal his own property by taking it with intent to charge a bailee with it. People v. Thompson, 34 Cal. 671. Where a mortgagee is entitled to possession, a felonious taking of the property by the mortgagor constitutes larceny. People v. Stone, 16 Ib. 369.

**103. Need not be intent to convert property.** It is not necessary to constitute larceny that the taking should be in order to convert the thing stolen to the pecuniary advantage or gain of the taker. It is sufficient if the taking be fraudulent, and with an intent wholly to deprive the owner of the property. Hamilton v. State, 35 Miss. 214; People v. Juarez, 28 Cal. 380.

**104.** To constitute larceny, the taker need not intend to convert the property to his own use in the county where it is taken. State v. Ware, 10 Ala. 814.

**105. Time of forming intent.** To constitute larceny there must have been a felonious intent at the time of the taking. Fulton v. State, 8 Eng. 168; McDaniel v. State, 8 Smed. & Marsh. 401. It is therefore error on a trial for larceny to charge that it is not necessary, in order to find a verdict of guilty, that the felonious intent existed at the time of the taking of the property, but that it would be sufficient if such intent existed at the time the prisoner actually converted the same to his own use. Wilson v. People, 39 N. Y. 459.

**106.** Where goods alleged to have been stolen, were delivered to the defendant under a contract of sale, and after keeping and using them several months under the contract, he carried them away without paying for them, it was held that he could not be convicted of larceny. State v. Shermer, 55 Mo. 83; s. c. 2 Green's Crim. Reps. 613.

**107.** A tailor received goods from a firm to be manufactured into coats for the firm; but after making the coats, instead of sending them to his employers, sold them, and ran away with the proceeds. *Held*, that unless he intended to convert the goods to his own use when they were delivered to him, he was not guilty of larceny. Abrams v. People, 13 N. Y. Supm. N. S. 491.

**108.** The following instruction was, however, held correct: "If the prisoner obtained possession of the team, by falsely and fraudulently pretending that he wanted it to drive to a certain place, to be gone a specified time, when in fact he did not intend to go to such place, but to a more distant one, and to be absent longer, without intending at the time to steal the property, a subsequent conversion of it to his own use, with a felonious intent while thus using it, would be larceny." State v. Coombs, 55 Maine, 477.

**109. Where owner is unknown.** It is larceny, although the owner of the stolen goods is unknown; the only object of naming the owner in the indictment being to identify the offense so that the defendant shall not be subjected to a second trial for it. State v. Bell, 65 N. C. 313.

### 3. Subjects of larceny.

**110. Must be of some value.** To constitute larceny, or receiving stolen goods, it is sufficient if the thing stolen or received is of some value, however small. People v. Wiley, 3 Hill, 194. But it is not larceny to take another's letter which has no value, and does not import any property in possession of the person from whom it is taken. Payne v. People, 6 Johns. 103.

**111. Bonds and notes.** By the common law, bonds, bills, or notes, being of no intrinsic value, and not importing any property in possession, but only the evidence of property, were not the subjects of larceny. U. S. v. Davis, 5 Mason, 358; Greeson v. State, 5 How. Miss. 33; State v. Casados, 1 Nott & McCord, 91. To be the subjects of larceny, they must be, at the time of the taking, valid and subsisting securities. Wilson v. State, 1 Porter, 118.

**112.** In South Carolina, previous to the acts of 1736–7, notes of hand being choses in action, and not deemed to possess any value in themselves, were not the subjects of larceny; but these acts placed them on the same footing as the money they were intended to secure. State v. Wilson, 3 Brev. 196.

**113. Bank bills or notes.** An indictment will not lie for stealing bank notes under a

statute making promissory notes the subject of larceny. Culp v. State, 1 Porter, 33. But see Damewood v. State, 1 How. Miss. 262.

**114.** In Alabama, bank bills and United States treasury notes may be the subject of larceny. Sallie v. State, 39 Ala. 691. In Missouri a bank note is personal property, and the subject of larceny within the meaning of the statute (Act of 1835, art. 3, § 32), concerning crimes and punishments. McDonald v. State, 8 Mo. 283. Abstracting bank notes from a justice's court where they were regularly filed as part of the papers, was held larceny within the penal code of Arkansas. Wilson v. State, 5 Ark. 513.

**115. Receipt.** A receipt for the payment of money may be the subject of larceny. But taking a receipt or other instrument from the hands of the person who has given it, before it has taken effect by delivery, is not larceny. Where, therefore, a creditor got his debtor to sign a receipt, and under pretense that he was about to pay him, and then took it from him with a criminal intent, without paying him, it was held that he was not guilty of larceny. People v. Loomis, 4 Denio, 380.

**116.** Larceny cannot be predicated of a simple receipt under the statute of New York. But it is otherwise as to accountable receipts, or receipts for money to be accounted for, receipts for property in store, and ship receipts. People v. Bradley, 4 Parker, 245. A note payable in lumber, though not negotiable, is the subject of larceny. Ib.

**117.** Where A. promised B. to pay him for work, it was held that a certificate given by B. to C., stating that C. had paid for the work, and that B. had no claim therefor on A., was a receipt or release within the statute of South Carolina (Rev. Stats. ch., 126, § 17), and the subject of larceny. State v. Wilcox, 3 Brev. 96.

**118. Book of accounts.** In Massachusetts, a memorandum book of accounts is the subject of larceny within the statute. Com. v. Williams, 9 Metc. 273.

**119. Mail matter.** Under the act of Congress of March 3d, 1825 (4 U. S. Stat. at Large, 108), making it an offense to steal the mail, or steal or take from the mail, or from any post office, a letter or packet, a post office may be a desk, trunk, or box carried about a house, or from one building to another. U. S. v. Marselis, 2 Blatchf. 108. A clerk employed in the post office may be convicted under the act; and a person may be found guilty of stealing a letter from the post office, although he merely puts the letter in his pocket, and does not remove it beyond the post office building. Ib.

**120.** A decoy letter prepared and mailed by an officer of the government, for the purpose of entrapping the accused, is within the act of Congress of March 3d, 1825, § 21 (4 U. S. Stat. at Large, 107), making it an offense to open a letter and steal money therefrom. U. S. v. Cottingham, 2 Blatchf. 470.

**121.** The act of Congress (of March 3d, 1825, 4 U. S. Stat. at Large, 108), making it an offense to open, secrete, embezzle or destroy a letter before it is delivered to the person to whom it is directed, does not apply where the letter is not obtained wrongfully from the post office or from a mail carrier. U. S. v. Parsons, 2 Blatchf. 104.

**122. Mortgaged property.** The mortgagor of personal property who is left in possession of it, with a right to sell it and hold the proceeds for the benefit of the mortgagee, has such an interest in the property that it may be the subject of larceny. State v. Mullen, 10 Iowa, 451.

**123. Domestic animals.** A person who drives off, and converts feloniously to his own use, the stray cattle of another, is guilty of larceny, although he is ignorant of the true owner. State v. Martin, 28 Mo. 530. Charging the jury, that if cattle escaped from the lot where they were at pasture and were on the highway, the defendant was guilty of larceny if he drove them to the city of New York with intent to convert them to his own use, was held correct. People v. Kaatz, 3 Parker, 129.

**124.** Bees in the possession of the owner, are the subjects of larceny. State v. Murphy, 5 Blackf. 498. And the same is true of poultry, or their young or eggs. Com. v. Beeman, 8 Gray, 497. Larceny may be committed by taking pea fowls. Ib.

125. At common law a dog was not the subject of larceny. But it is otherwise under the Revised Statutes of New York, which recognize dogs as property by subjecting them to taxation. People v. Maloney, 1 Parker, 593; People v. Campbell, 4 Parker, 386. In Alabama, dogs are not the subject of larceny. Ward v. State, 48 Ala. 161.

126. **Animals of a wild nature.** At common law, bears, foxes, monkeys, ferrets, cats, &c., are not the subjects of larceny, although there may be a property in them which the law will protect by a civil action. Norton v. Ladd, 5 New Hamp. 203; and they may be the subject of larceny when confined or killed. State v. House, 65 N. C. 315. It has been held that a sable caught in a trap in the woods, is not the subject of larceny. Norton v. Ladd, *supra*. Doves are not subjects of larceny, unless they are in the custody of the owner, as when in a dove cote or pigeon house, or in the nest before they are able to fly. Com. v. Chace. 9 Rich. 15.

127. **Property unlawfully obtained.** An indictment may be sustained for the larceny of money, which was taken from a person who had obtained it by the use of intoxicating liquor contrary to law. Com. v. Rourke, 10 Cush. 397. Articles kept and used for gambling may be the subject of larceny. Bales v. State, 3 West Va. 685.

128. **Things which savor of the realty.** The rule that larceny cannot be committed of things savoring of the realty only applies to such annexations as adhere to the soil, and does not include such as are constructively annexed, like leathern belts applied and used to propel machinery. Jackson v. State, 11 Ohio, N. S. 104.

129. To constitute larceny in taking and carrying away articles severed from the realty, no particular space is necessary, only the two acts must be so separated by time as not to constitute one transaction. State v. Berryman, 8 Nev. 262.

130. When nuggets of gold are separated from the original veins by natural causes, there is no severance from the realty; and consequently they are not the subjects of larceny. State v. Burt, 64 N. C. 619.

131. Charging the larceny of "six hundred and ten pounds of silver-bearing ore," sufficiently shows that the property alleged to have been stolen savored of the realty, and was therefore not the subject of larceny. State v. Berryman, 8 Nev. 262; s. c. 1 Green's Crim. Reps. 335.

132. The defendant was indicted for stealing copper pipes which were a part of a steam engine attached to a manufacturing establishment. *Held*, that if the pipes were severed at one time, so that they became personal property, and were afterward taken and carried away by the defendant, with a felonious intent, it was larceny; otherwise, only a trespass. State v. Hall, 5 Harring. 492.

133. Where a woman secretly and with an intent to deprive a gas company of their gas, and to appropriate it to her own use, severed a portion of that which was in a service pipe of the company, by taking it into her house and there consuming it, it was held that she was guilty of larceny. Com. v. Shaw, 4 Allen, 308.

134. Turpentine which has run from the trees into boxes is the subject of larceny. State v. Moore, 11 Ired. 70; and the same is true of ice in an ice house. Ward v. People, 3 Hill, 395. A key in the lock of the door of a house may be the subject of larceny. Hoskins v. Tarrence, 5 Blackf. 417. In South Carolina, under the statute of 1826, corn growing in a field is the subject of larceny. State v. Stephenson, 2 Bail. 334.

### 4. Warrant.

135. **For arrest.** In New York, a warrant issued by a justice for the arrest of a person charged with larceny is not void by reason of the omission of an allegation as to the value of the property, the only effect of such an omission being that the offense charged will be petit instead of grand larceny. Payne v. Barnes, 5 Barb. 456.

136. **Commitment.** A mittimus which does not state the time, place and subject of an alleged larceny is void. State v. Brady Ga. Decis. (pt. 2), 40.

5. Place of indictment.

**137. Where property is stolen abroad.** A foreigner who steals goods abroad, and takes them to the State of New York, may be indicted, convicted and punished in that State the same as if the larceny had originally been committed there. People v. Burke, 11 Wend. 129.

**138.** Where property was stolen in New Brunswick and taken into Maine, it was held that the thief might be indicted and convicted in that State. State v. Underwood, 49 Maine, 181. But stealing goods in a British province and carrying them into Massachusetts is not larceny in that State. Com. v. Uprichard, 3 Gray, 434.

**139.** In Ohio, the rule that a person having in his possession in that State property which had been stolen by him in another State of the Union may be convicted of larceny in Ohio, does not extend to cases where the property was stolen in a foreign and independent sovereignty. Stanley v. State, 24 Ohio, N. S. 166.

**140. Where property is stolen in another State.** A person who steals goods in another State and takes them to Massachusetts may be indicted in the latter. Com. v. Cullins, 1 Mass. 116; Com. v. Holder, 9 Gray, 7. It is the same in Connecticut, Ohio, Alabama, Missouri, New York and Oregon. State v. Ellis, 3 Conn. 185; Hamilton v. State, 11 Ohio, 435; State v. Seay, 3 Stew. 123; Hemmaker v. State, 12 Mo. 453; People v. Burke, 11 Wend. 129; State v. Johnson, 2 Oregon, 115.

**141.** Whether a person committing theft in another State or country and carrying the stolen property into Michigan would be guilty of larceny in Michigan at common law, *query*, the court being equally divided on the question. Morrisey v. People, 11 Mich. 327. The statute of Michigan making it larceny is constitutional. People v. Williams, 24 Ib. 156, Campbell, C. J., *dissenting*.

**142.** When property is stolen in the jurisdiction of a sister State and taken to Iowa, the offense is commenced and consummated in the State where the property is stolen. It is punishable by the laws of Iowa upon the principle that the continued possession of the property stolen is itself larceny, every act of the thief in the removal of the property and keeping it from the possession of the owner being in contemplation of law an offense. State v. Bennett, 14 Iowa, 479.

**143.** The stealing of goods in another State and taking them to Mississippi is larceny in the latter State, and the thief may be indicted in any county to which he has carried the goods. Watson v. State, 36 Miss. 593.

**144.** If a person steals goods in another State and carries them into Nevada, where he makes a removal or asportation of them, intending to steal them, he is guilty of larceny in the latter State. State v. Newman, 9 Nev. 48.

**145.** Where a larceny is committed in another State and the stolen goods taken to Indiana, it is not an offense punishable there, but only to enable the authorities to return the thief to the proper vicinage for trial. Beal v. State, 15 Ind. 378.

**146.** Where property is stolen in another State and taken by the thief to Louisiana, where he sells it, he does not thereby commit larceny in the latter State. State v. Reonnals, 14 La. An. 278. Stealing property in another State and carrying it to New Jersey is not larceny in the latter. State v. Blanch, 2 Vroom (31 N. J.) 82. It is the same in Nebraska. People v. Loughridge, 1 Neb. 11.

**147. Where goods stolen in one county are carried into another county.** By the common law, the legal possession of stolen property continues in the owner, and the taker is guilty of larceny at all times while he retains possession of the stolen goods. Upon this principle, a person stealing goods in one county and carrying them into another county is deemed guilty of larceny in the latter, and the rule is the same notwithstanding the goods have been altered in their character before being carried from one county into another. State v. Somerville, 21 Maine, 14. The doctrine has been held not confined to cases of stealing property which is the subject of larceny at common law, but to extend to bank notes, the

stealing of which is made larceny by statute. Com. v. Rand, 7 Metc. 475.

**148.** Where the original taking is felonious, every act of possession continued under it by the thief is a felonious taking wherever the thief may be, and he may be indicted, convicted and punished in any place where he carries the stolen property. Stinson v. People, 43 Ill. 397; Aaron v. State, 39 Ala. 684; Henry v. State, 7 Cold. Tenn. 331. But if the thief be tried in one county, such trial will be a bar to a trial in every other county. Ib.

**149.** A person who aids and abets in a larceny in one county, and afterward is concerned in the possession and disposal of the stolen property in another county, though the goods were removed to this latter county without his agency or consent, may be convicted of larceny in the latter county. Com. v. Dewitt, 10 Mass. 154.

**150.** In New York, it has been held that where property stolen in one county is taken into another county, and through different towns of the latter county into a city therein, a local court of the city has jurisdiction to try the offense. People v. Smith, 4 Parker, 255.

**151.** In South Carolina, the defendant, who owned a boat in the Santee river, agreed to carry cotton from O. district to C. Before arriving at C., and while passing down the river, he told one of the hands on board that he intended to convert the cotton to his own use. Subsequently, at E., in C. district, he burned a portion of the cotton, and destroyed the marks upon the other bales. He then shipped the cotton to C., sold it, and pocketed the proceeds. Upon the trial of an indictment in O. district, the court charged the jury: That in order to find the defendant guilty of grand larceny, there must have been a taking and carrying away of the cotton with a felonious intent, in the district of O.; that if the defendant, when he received the cotton, meant to deliver it to the consignee in C., his afterward converting it to his own use did not constitute larceny; but that if when the cotton was delivered to him, he received it intending to steal it, it was larceny from the beginning, as laid in O. district. *Held* correct. State v. Thurston, 2 McMull. 382.

**152. Offenses against United States.** Although larceny is committed in a place not under the sole and exclusive jurisdiction of the United States, yet it may be made the subject of punishment under the 3d section of the act of Congress of 1825, ch. 270. U. S. v. Davis, 5 Mason, 356.

**153.** Where a clerk or servant, who is authorized to take from the post office all letters arriving by mail to the address of his employer, after receiving them, embezzles or destroys them, the offense is to be looked into by the authorities of the State, and not of the United States. U. S. v. Driscoll, 1 Low, 303.

### 6. Indictment.

**154. Thief cannot be punished without process of law.** One whose goods have been stolen cannot lawfully punish the thief himself, without process of law, by maliciously threatening to accuse him of the offense, or to do him an injury, with intent to extort property from him. State v. Bruce, 24 Maine, 71.

**155. Who liable.** A person who is deaf and dumb may be convicted of larceny. Com. v. Hill, 14 Mass. 207; but not a *feme covert* for a larceny committed by her jointly with her husband. Com. v. Trimmer, 1 Mass. 476.

**156. Acquittal, when not a bar.** An acquittal of the larceny of certain property is not a bar to an indictment for the larceny of certain other property, notwithstanding that the last mentioned property is such that the language of the first indictment might describe it. Com. v. Sutherland, 109 Mass. 342; s. c. 1 Green's Crim. Reps. 189.

**157. Statement of venue.** An indictment, after the words "State of Texas, county of Fayette," and the usual commencement, alleged that "James Cain, late of Travis county, aforesaid, with force and arms, in the county aforesaid, on, &c., did then and there feloniously steal, take, and carry away," &c. *Held* bad for repugnancy and uncertainty in stating the venue. Cain v. State, 18 Texas, 391.

**158. Joinder of defendants.** Where sev-

eral persons unite in an attempt to steal from the person, they may be jointly indicted; and under an indictment alleging that they all thrust their hands into the pocket, they may all be convicted, though the proof shows that only one of them did so. Com. v. Fortune, 105 Mass. 592.

**159.** Where several combine to commit larceny, it is immaterial whether they were previously acquainted, if they were then confederating for the felonious purpose, or whether they designed to procure the property in order to share it, or for the benefit of one of them. Stinson v. People, 43 Ill. 397.

**160.** In Massachusetts, one who steals goods, and the receiver of them, may be jointly indicted. Com. v. Adams, 7 Gray, 43; Com. v. O'Connell, 12 Allen, 451. But in California, it has been held that an indictment which charges one person with the larceny of certain goods, and another person with feloniously receiving, having, and aiding in concealing the same, knowing them to be stolen, is bad in charging two distinct offenses against different parties. People v. Hawkins, 34 Cal. 181.

**161.** Where several are jointly indicted for grand larceny, they have no right to require that another whose name is included in the indictment shall be tried with them. Armsby v. People, 2 N. Y. Supm. N. S. 157.

**162. Averment of guilty knowledge and intent.** An indictment for stealing bank bills and promissory notes must charge that the defendant knew that the papers stolen were bank bills and notes. Rich v. State, 8 Ohio, 111; Gatewood v. State, 4 Ib. 386.

**163.** The indictment must allege that the property was taken with intent to deprive the owner of it, and to appropriate it to the use of the defendant. State v. Sherlock, 26 Texas, 106; Ridgeway v. State, 41 Ib. 231; and also that it was taken without the consent of the owner. Johnson v. State, 39 Ib. 393. But the latter averment is unnecessary where the person from whom the property was stolen had possession of it with no other authority than to keep it. Burns v. State, 35 Ib. 724.

**164.** An indictment charged that one P. had possession of a watch, the property of the defendant, by virtue of his lien for repairs, and that the defendant fraudulently took it without the consent of P., to deprive him of the value of said repairs, by depriving him of the said watch, and in order to appropriate it (the value of the repairs) to the defendant's use. *Held* sufficient to charge a theft by the owner of his own property. State v. Stephens, 32 Texas, 155.

**165.** In Alabama, an indictment under the statute (Rev. Code, § 3695), which alleges that the defendant broke into and entered a building, and feloniously took and carried away personal property of the value of more than one hundred dollars, without an averment that the breaking and entering were with intent to steal or to commit a felony, charges grand larceny, and not felony. Bell v. State, 48 Ala. 684; s. c. 2 Green's Crim. Reps. 623. But see Fisher v. State, 46 Ala. 717.

**166. General rule as to description of property.** Goods charged to have been stolen, must be described with certainty to a common intent, that is, with such certainty as will enable the jury to say that the goods proved to have been stolen are the same as those charged in the indictment, and that the court can see that they are the subject-matter of the offense alleged. People v. Jackson, 8 Barb. 637.

**167.** The indictment must show on its face that the offense alleged, was committed. If the language employed be capable of two interpretations, only one of which imports a charge of larceny, the indictment is bad. Where the defendant was charged with stealing gold-bearing quartz rock, and it did not appear from the indictment that the rock had been severed from the ledge, and thus become personal property, before the alleged taking by the defendant, it was held ground for arrest of judgment. People v. Wiliams, 35 Cal. 671. But judgment will not be arrested where the objection is not to the whole of the indictment, but only to the allegations concerning a part of the property which is alleged in it to have been stolen. Com. v. Eastman, 2 Gray, 76. See Com. v. Hathaway, 14 Ib. 392.

**168.** An indictment for larceny must describe the articles stolen by the names they

usually bear, and specify the number and value of each species or particular kind. State v. Longbottoms, 11 Humph. 39; State v. Clark, 8 Ired. 226.

**169.** An indictment for stealing one bridle, of the value of, &c., was held good. State v. Dowell, 3 Gill & Johns. 310. And the same was held as to an indictment which charged the stealing of a book, of the value of three dollars, without giving the title of the book. State v. Logan, 1 Mo. 532.

**170.** An indictment which described the stolen property as "one head of neat cattle, of the value of $12," was held sufficient. State v. Murphy, 39 Texas, 46. But an indictment which charged the stealing of "one certain trunk or chest, containing various articles of clothing, jewelry," &c., was held bad for uncertainty. Potter v. State, Ib. 388.

**171.** An indictment for larceny, which in one count described the thing stolen as "a certain writ of *fieri facias* belonging to the Superior Court" in another count, as "a certain process of and belonging to the Superior Court," and in a third count, as "a certain record of and belonging to the Superior Court," was held bad for uncertainty. State v. McLeod, 5 Jones, 318.

**172.** Where an indictment under a statute which makes a distinction between the terms "horse" and "gelding," charges the defendant with stealing a horse, proof that the defendant stole a gelding will not be sufficient. Turley v. State, 3 Humph. 323; State v. Plunket, 2 Stewart, 12.

**173.** An indictment for larceny, described the property stolen as "a black or brown mare or filly, branded with a small mule shoe on the left shoulder." *Held* that describing the animal in the alternative was not a fatal objection, especially as the property was identified by other terms of description. People v. Smith, 15 Cal. 408.

**174.** In South Carolina, the word pig not being in the statute against hog stealing, it was held that an indictment for stealing a pig contrary to that act, could not be supported. State v. McLain, 2 Brev. 443.

**175.** An indictment charging that the defendant stole a parcel of oats is sufficient. State v. Brown, 1 Dev. 137.

**176.** Where an indictment charged the stealing from C. of three swarms of bees and forty pounds of honey, it was held that it must be intended after verdict, that the bees were reclaimed and the honey the property of C. Harvey v. Com. 23 Gratt. 941; s. c. 2 Green's Crim. Reps. 654. A person who has planted oysters has an absolute property in them, and an indictment for stealing them need not aver that they were reclaimed. State v. Taylor, 2 Dutch. 117.

**177.** When the thing stolen is in its raw or unmanufactured condition, it may be described in the indictment by its name, and as so much in quantity, weight, or measure. But if it be worked up into a specific article, and remain so when stolen, it must be described by the name by which it is generally known. The cast iron top of an iron box which was stolen separate from the box, may be described as "one pound of iron," although it may weigh more or less than a pound. State v. Horan, Phil. N. C. 571.

**178. Description of promissory notes.** Under a statute making promissory notes the subject of larceny, they may be described in the same manner as other things which have an intrinsic value; and it is not necessary to add the words "for the payment of money." An indictment is also good which alleges the larceny of a piece of paper, stating its value without further description. Com. v. Brettun, 100 Mass. 206. See Com. v. Campbell, 103 Ib. 436.

**179.** But where an indictment alleged that the defendant feloniously stole, took and carried away sundry promissory notes for the payment of money, of the value of $80, of the goods and chattels of the said M., it was held bad for uncertainty. Stewart v. Com. 4 Serg. & Rawle, 194.

**180.** A promissory note alleged to have been stolen, was proved on the trial to have been payable with semi-annual interest, and all taxes that should be assessed on the amount of money represented by it. An information for the theft in describing the note, omitted those particulars. *Held* that the variance was not material. State v. Fenn, 41 Conn. 590.

**181. Averment of the stealing of mon-**

ey. In Michigan, where an information alleged that the defendant "did feloniously steal, take and carry away, of the property, goods and chattels of J. C. from the possession of J. C., one hundred and thirty-five dollars," without other description of the property stolen, or any allegation of its value, it was held fatally defective. Merwin v. People, 26 Mich. 298; s. c. 1 Green's Crim. Reps. 349.

182. But in the same State, an indictment under the statute (Com. L. § 7930), which charged that the defendant did "feloniously steal, take and carry away, of the personal goods and chattels of A. B. fifty dollars in money, of the value of fifty dollars, contrary to the statute," was held to sufficiently describe the property stolen. Brown v. People, 29 Mich. 232.

183. **Description of bank bills.** An indictment under a statute which prescribes the punishment for stealing "any bank note," is good which charges the stealing of "a bank bill." Eastman v. Com. 4 Gray, 416; Low v. People, 2 Parker, 37.

184. In Michigan, an indictment under the statute (Sess. 1840, p. 42, § 1), which charged the stealing of "bank notes" or "bank bills," following the language of the statute, was held good. People v. Kent, 1 Doug. 42.

185. An indictment for stealing bank bills need not particularly describe them; but their number and value should be stated. Hamblett v. State, 18 New Hamp. 384; and it ought to be alleged that the bills contained a promise to pay money, or some agreement to that effect. State v. Emery, Brayt. 131.

186. An indictment for the larceny of a bank note, which described the note as a twenty dollar bank note on the State Bank of North Carolina, of the value of twenty dollars, was held sufficient. State v. Rout, 3 Hawks, 618. And the same was held of an indictment which alleged that the defendant stole of the proper goods and chattels of A. B. "a ten dollar bill of the currency of the country, commonly called paper money, of the value of ten dollars." State v. Evans, 15 Rich. 31.

187. An indictment was held good which described the stolen property as "a bank note of the State Bank of Ohio for the payment of ten dollars." Crawford v. State, 2 Carter, 132. And see Engleman v. State, Ib. 91. The same was held of an indictment which charged the stealing of "three promissory notes called bank notes on the Bank of the United States." McLaughlin v. Com. 4 Rawle, 464. But an indictment which alleged the stealing of "one bank note of the Bank of Baltimore," was held bad. Com. v. McDowell, 1 Browne, 359.

188. An indictment charging the larceny of sundry bank bills, of a specified denomination and value, of the Central Railroad and Banking Company of Georgia, signed by the president of that company and countersigned by the cashier, the same being the property of that bank, which were intrusted to the defendant as such cashier, is a sufficient description of the articles stolen. Bullock v. State, 10 Ga. 46.

189. An indictment for larceny which describes the peoperty stolen as "a quantity of bank bills current within this commonwealth, amounting together to one hundred and fifty dollars, and of the value of one hundred and fifty dollars," is sufficient. Com. v. O'Connell, 12 Allen, 451. And see Com. v. Sawtelle, 11 Cush. 142.

190. Where an indictment alleged that the prisoner feloniously and violently stole, took, and carried away from the person of J. D., and against his will, current bank bills of the value of fifteen dollars, and silver coin of the value of three dollars, it was held sufficient, although it did not show the number and denomination of the bank bills, or the amount secured thereby and remaining unsatisfied thereon, or the number, size and description of the pieces of silver coin. People v. Loop, 3 Parker, 559.

191. An information for larceny was held sufficient which charged the property stolen as "thirteen bills against the Hartford Bank, each for the payment and of the value of ten dollars, issued by such bank, being an incorporated bank in this State." Salisbury v. State, 6 Conn. 101.

192. An indictment for larceny sufficiently

describes the property stolen in alleging that it consisted of "one ten dollar treasury note of the United States, usually called a greenback, and one ten dollar national bank bill usually called a greenback." Sallie v. State, 39 Ala. 691.

193. An indictment charged the defendant with stealing "two five dollar United States treasury notes, issued by the treasury department of the United States government, for the payment of five dollars each, and of the value of five dollars each." *Held* sufficient. State v. Thomason, 71 N. C. 146.

194. An indictment for larceny which alleged the stealing of "divers bank notes, amounting in the whole to the sum of five hundred dollars, and of the value of five hundred dollars," *held* bad for uncertainty. State v. Hinckley, 4 Minn. 345. But an indictment was held sufficient which charged that the defendant "did steal, take and carry away divers and sundry genuine and current treasury notes of different denominations, issued by the treasury department of the United States, and divers and sundry genuine and current bank notes of different denominations issued by different and sundry national banks, organized under the laws of the United States, all of which treasury notes and bank notes amounted to the sum of, and were of the value of $250, and were the property of one J. S.; a more particular description of which treasury notes and bank notes, or of any or either of them, is to the grand jurors unknown. State v. Taunt, 16 Ib. 109.

**195. Description of bank bills as promissory notes.** An indictment properly describes a bank bill alleged to have been stolen, as a promissory note. Com. v. Thomas, 10 Gray, 483; Com. v. Paulus, 11 Ib. 305.

196. An indictment for larceny was held sufficient which alleged that the property stolen was "one promissory note issued by the treasury department of the government of the United States for the payment of one dollar. State v. Fulford, Phil. N. C. 563.

197. An indictment for the larceny of United States treasury notes described them as "promissory notes of the United States given for the payment of money," stating their denomination and value; and bank notes were described as "national bank notes, commonly called national currency notes, then and there being obligatory promissory notes of the national currency issue, given for the payment of money." *Held* sufficient. Hummel v. State, 17 Ohio, N.S. 628.

198. An indictment was held sufficient which charged the defendant with stealing ten promissory notes, called bank notes, issued by the Chickopee Bank, for the payment of the divers sums of money, amounting, in the whole, to the sum of $50, and of the value of $50; ten promissory notes, called bank notes, issued by the Agawam Bank, &c., of the goods, chattels and property of one B. M. People v. Jackson, 8 Barb. 637. And see People v. Holbrook, 18 Johns. 90.

199. In South Carolina, the stealing of a bank bill was held an offense within the statute (of 1736–7), making it felony to steal any warrant, bill, or promissory note for the payment, or for securing the payment, of any money, being the property of any other person or persons; and that it was not a good objection to the indictment that it described the bill as a promissory note, although the words promissory note and bank bill are not convertible terms. State v. Wilson, 3 Brev. 196.

**200. Bank issuing bills alleged to have been stolen need not be named.** An indictment for the larceny of a bank note need not state that the bill is genuine, or the name of the bank issuing it. State v. Stevens, 62 Maine, 284; s. c. 2 Green's Crim. Reps. 481. And charging in the same count that the defendant stole a pocket-book and shoe-knife, at the same time and place, does not render the indictment bad for duplicity. Ibid.

201. In Virginia, an indictment for the larceny of two bank notes, which contained no other description of the notes than that they were bank notes current within the United States, and that one of them was for the sum of ten dollars, and the other for five dollars, was held good after verdict. Com. v. Mosely, 2 Va. Cas. 154.

202. In Tennessee it was held sufficient, in an indictment for larceny, to describe bank notes alleged to have been stolen, as "ten five dollar bank bills of the value of five dollars each," without naming the bank that issued them; and that the fact that they were current when stolen was *prima facie* evidence that they were worth their nominal value. Pyland v. State, 4 Sneed, 357.

203. In South Carolina, an indictment under the statute for the larceny of bank bills, need not allege that they were the bills of an incorporated bank, or so describe them that they may be distinguished from other bills of the same bank. It is sufficient to describe them as the bills of a certain bank, naming it. State v. Smart, 4 Rich. 356.

**204. Insufficient description of bank bills.** An indictment for larceny, which describes the property stolen as "goods and lawful money of the United States, commonly called greenbacks, of the value of twenty-four dollars and twenty-five cents," is insufficient. State v. Cason, 20 La. An. 48.

205. An indictment for larceny, charging that the defendant took and carried away "one lot of treasury notes, called greenbacks, the issue of the treasury of the U. S. of America, and one lot of Kentucky bank notes," is bad for uncertainty. Rhodus v. Com. 2 Duvall, Ky. 159.

206. An indictment charged the defendant with stealing "twelve five dollar and one ten dollar notes, to wit: United States promissory or bank notes of the value of seventy dollars." *Held* that the objection that the description was uncertain and in the alternative came too late after verdict. Bell v. State, 41 Ga.589.

207. An indictment which charged the stealing of "one hundred and eighty-two dollars in United States currency," was held bad for uncertainty. Martinez v. State, 41 Texas, 164; Ridgeway v. State, Ib. 231. And the same was held of an indictment which charged the larceny of "$150, in United States currency." Merrill v. State, 45 Miss. 651; *contra*, State v. Gasting, 23 La. An. 609.

208. An indictment for the larceny of "bills of credit on the United States Bank," which showed that the amounts charged were less than the Bank of the United States was authorized to issue by its charter, was held bad. Culp v. State, 1 Porter, 33.

**209. Description of coin.** Stolen coin should be described as so many pieces of current gold or silver coin, specifying the species of coin, unless the species of coin be unknown to the grand jury, in which case they may so state. People v. Bogart, 36 Cal. 245. An indictment described the property stolen as "three thousand dollars lawful money of the United States." *Held* not sufficient, the species of coin not being stated. People v. Ball, 14 Cal. 101. An indictment which charged the defendant with stealing "ten dollars good and lawful money of the State of Tennessee," was held insufficient. State v. Longbottoms, 11 Humph. 39.

210. It is not a ground for arrest of judgment, after conviction of larceny of gold and silver coin and bank bills of a specified value, that the indictment avers that the grand jury have no knowledge or means of knowledge of the particular description of the coin or bank bills alleged to have been stolen. Com. v. Sawtelle, 11 Cush. 142. See Com. v. O'Connell, 12 Allen, 451.

211. Where it was alleged that the prisoner stole "three dollars in divers pieces of silver current in this State, and of the lawful value of three dollars," it was held insufficient, and that the defect was not cured by a verdict. Lord v. State, 20 New Hamp. 404.

212. An averment in an indictment for larceny, that the defendant stole United States gold coin, is the same as to allege that he stole gold coin of the United States; and it will be presumed that the court and jury know that a United States gold coin of the denomination and value of ten dollars is an eagle. Daily v. State, 10 Ind. 536.

213. An indictment charged the defendant with stealing "the sum of sixty-five dollars of the following description: two twenty dollar gold pieces, and one five dollar gold piece, and two ten dollar United States currency bills, and one money purse." *Held* that as the indictment failed to state that

they were of the current coin of the United States or of any other country, it was bad both as to description and value. Boyle v. State, 37 Texas, 359.

214. In Louisiana, in an indictment for the larceny of coin under the statute (R. S. 1856, p. 176, § 88) it is not necessary to specify the kind or denomination of the coin. State v. Walker, 22 La. An. 425.

215. In Massachusetts, a complaint for larceny was held sufficient which described the property stolen as "copper coin of the value of two dollars and seventy-five cents," without alleging that it was money current in the State. Com. v. Gallagher, 16 Gray, 240.

216. **Description of building.** Where an indictment for larceny in a building does not properly describe the building, the conviction will, notwithstanding, be good for simple larceny. Com. v. Hathaway, 14 Gray, 392.

217. In Maine, where an indictment for compound larceny under the statute (ch. 156, § 2), which punishes the breaking and entering into and stealing within any building in which goods, merchandise, or any valuable thing is kept for use, sale, or deposit, omitted to charge that it was a building of that description, it was held that the indictment might be maintained for simple larceny. State v. Savage, 32 Maine, 583.

218. **Ownership of property must be averred.** At common law, the ownership of property stolen must be correctly averred if known; and the proof must correspond with the averment. If not known, it must be averred to be the property of some person or persons to the grand jurors unknown. Winder v. State, 25 Ind. 234; Com. v. Manley, 12 Pick. 173; Com. v. Morse, 14 Mass. 217; Reed v. Com. 7 Bush, Ky. 641.

219. An indictment for altering the brand of a horse with intent to steal it, which charges the property as that of an *estate*, is bad. It should allege that the animal belongs to a particular individual, or that the owner is unknown. People v. Hall, 19 Cal. 425.

220. A complaint which charges the larceny of "one sheep of the value of five dollars, the property of another person who is unknown to your complainant," is sufficient. State v. Polland, 53 Maine, 124.

221. Charging the larceny of bank bills "the goods and chattels of A.," is sufficient without alleging that they were the property of A.; the term "chattel" denoting property and ownership. People v. Holbrook, 18 Johns. 90; Com. v. Moseley, 2 Va. Cas. 154; People v. Kent, 1 Doug. 42.

222. An indictment for the larceny of coin, bills, bonds, and treasury notes, which describes them as "of the goods and chattels" of A., sufficiently alleges ownership. State v. Bartlett, 55 Maine, 200.

223. An indictment is sufficient which in one count charges that the defendant "did steal a mule, the personal property of J. L.," and in another count that he "did steal a horse, mare, gelding, colt, filly, or mule, the personal property of J. L." Gabriel v. State, 40 Ala. 357.

224. **Owner of goods stolen must be named.** It is necessary to set forth in an indictment for larceny, the entire christian as well as the surname of the owner of the goods alleged to have been stolen, if known. Unger v. State, 42 Miss. 642; State v. Godet, 7 Ired. 210.

225. In an indictment for larceny, the name of the owner of the goods stolen is matter of substance, and the indictment in this respect cannot be amended. State v. Lyon, 47 New Hamp. 416.

226. Where the property stolen was alleged to belong to Richard G., and it was afterward described as the property of Robert G., it was held a mere clerical error, and not ground for objection. Greeson v. State, 5 How. Miss. 33.

227. In Texas, it has been held that the initials of the christian name of the owner of property stolen, in an indictment for larceny, are sufficient. State v. Black, 31 Texas, 560. And where the indictment charged that an animal stolen was the property of T. C. Lucky, and the proof showed it to be the property of C. C. Lucky, it was held that the variance was immaterial. Brown v. State, 32 Ib. 124.

228. **Ownership of mail matter.** An in-

dictment for stealing a letter must allege it to be the property of some person other than the prisoner. U. S. v. Foye, 1 Curtis C. C. 364.

229. An indictment for stealing bank notes from the mail, may describe them as the property of the person forwarding them. U. S. v. Burroughs, 3 McLean, 405.

230. **Articles furnished by parent to child.** Necessary articles furnished by a parent to a child, may be described in the indictment as belonging either to the parent or child. State v. Williams, 2 Strobh. 229.

231. An indictment for larceny charged that the property stolen belonged to A. B. It was objected that it should have been laid as the property of her father, she being under age and living with him. *Held* that the ownership was well laid in the daughter, the articles being in her possession, and used exclusively by her. State v. Koch, 4 Harring. 570.

232. An indictment for stealing a saddle furnished by a father to his minor son, may describe the saddle as the property either of the father or son. State v. Williams, 2 Strobh. 229.

233. **Property of married woman.** Money held by a married woman, for the support of herself and children, is in contemplation of law the property of her husband, and must be so averred in pleading, when an averment of property is necessary. Com. v. Davis, 9 Cush. 283.

234. An indictment for stealing the separate property of the wife, from the possession of the husband, may describe it as belonging to the husband. Davis v. State, 17 Ala. 415.

235. In Massachusetts, the statute (of 1855, ch. 304) enabling married women to have money and property in their own right and to their own use, and to trade on their own account, does not change the rule of the common law, that money in the possession of a married woman is deemed, in the absence of proof, the property of the husband, and must be so alleged in an indictment for larceny. Com. v. Williams, 7 Gray, 337.

236. In Louisiana, in an information for larceny committed against the property of the community, the goods stolen should be alleged to belong to the husband, and proof that they belong to the community will not sustain a charge that they belong to the wife. State v. Gaffery, 12 La. An. 265. The rule is the same in Texas. Merriweather v. State, 33 Texas, 789.

237. **Joint ownership.** At common law, if the stolen goods are the property of partners or joint owners, the names of all the partners or joint owners must be stated; but if they belong to a corporation, an indictment will be good which contains an allegation to that effect. People v. Bogart, 36 Cal. 245.

238. Where the goods of partners are stolen, one of whom has only a contingent interest in the goods, they must be laid in the indictment as the property of the partner who has the legal interest in them. People v. Romaine, 1 Wheeler's Crim. Cas. 369.

239. An indictment for larceny which in one count alleges the goods stolen to be the property of certain persons, and in other counts states the owners to be different persons, does not charge different offenses, but only the same offense in different forms. People v. Connor, 17 Cal. 354.

240. Where property stolen belongs to a body of persons, it ought not to be laid in the indictment as the property of the body, unless such body is incorporated, but should be described as belonging to the individuals composing the company. Where the indictment did not describe the property as belonging to any natural person or persons, nor to any corporate body, it was held on motion in arrest of judgment, that the error was fatal. Wallace v. People, 63 Ill. 451; s. c. 2 Green's Crim. Reps. 562.

241. **Special ownership.** When there is a general and a special owner of the thing stolen, the indictment may lay the ownership, in either the one or the other, although the goods were never in the real owner's possession, but only in that of the bailee. State v. Gorham, 55 New Hamp. 152; State v. Mullen, 30 Iowa, 203; Com. v. O'Hara, 10 Gray, 469; Hill v. State, 1 Head, 454.

242. Goods bought for the use of the poor,

by order of the county superintendent, and kept by him for that object, may be stated in the indictment to be his property or the property of the county. People v. Bennett, 37 N. Y. 117.

243. An indictment for stealing money from a guardian, may allege that it is the property of the guardian. Thomasson v. State, 22 Ga. 499.

244. Where a person receives leather to make into shoes, to be delivered to his employer when done, an indictment for stealing them, while yet in the hands of the manufacturer, may allege the property of the shoes to be in him. State v. Ayer, 3 Foster, 301.

245. Goods stolen from a woman who takes in the linen of other people to wash, may be charged in the indictment to be the property of such woman. State v. Ayer, *supra;* U. S. v. Burroughs, 3 McLean, 405.

246. Where goods which have been levied on by a constable are stolen, they may be described in the indictment as the property of the constable. Palmer v. People, 10 Wend. 166.

247. An indictment for stealing a pistol hired from the State, may describe it as the property of the hirer. Jones v. State, 13 Ala. 153.

248. The property in a box belonging to a society deposited in a tavern, the landlord being entitled to the key of the box, may be laid to be in the landlord. State v. Ayer, 3 Foster, 301.

249. Where the goods of A. are stolen by B., and afterward they are stolen from B. by C., an indictment against the latter may charge them to be the property of either A. or B. Ward v. People, 3 Hill, 395.

250. If a coach be standing in the yard of a coachmaker to be repaired, and a plate of glass and hammercloth be stolen from it, the property may be laid in the coachmaker. U. S. v. Burroughs, 3 McLean, 405.

251. Where goods are stolen from the boot of a stage, they may be laid in the driver, though he be not the proprietor of the coach. Ib.

252. An indictment for stealing horses may allege the property of the horses to be in one who had the lawful possession of them, though not the real owner. State v. Addington, 1 Bail. 310. And see People v. Smith, 1 Parker, 329.

253. Where a horse got away from the owner, and was taken in the field of a third person and placed in his stable, from whence he was stolen, it was held that the indictment for the larceny might describe the horse as belonging either to the owner or such third person. Owen v. State, 6 Humph. 330.

254. **Averment of possession.** An indictment for larceny at common law need not allege that the property was stolen from the possession of any person. Thompson v. Com. 2 Va. Cas. 135.

255. The first count of an indictment charged the defendant with stealing a slave of the goods and chattels of A. B. from the possession of A. B. The second count was like the first, excepting that it did not allege that the slave was taken from the possession of any one, and neither count charged that the offense was committed against the form of the statute. It appeared that the slave was at the time a runaway. *Held* that the defendant must be discharged, the slave not being in the actual possession of A. B., and the indictment not charging an offense at common law. Com. v. Hays, 1 Va. Cas. 122.

256. Where the bailee of a sheriff took from him personal chattels which had been attached, and gave an accountable receipt with a promise to deliver the same on demand, it was held that the bailee had no such special property in the chattels as would sustain an indictment charging larceny from such bailee. Com. v. Morse, 14 Mass. 217.

257. An indictment for larceny from a house must state the name of the owner or occupant of the house. Lankin v. State, 42 Texas, 415.

258. **Averment of value.** Where the nature of the punishment for larceny depends upon the value of the things stolen, the allegation of value is material, and if the indictment omits such an averment it cannot be amended. State v. Goodrich, 46

New Hamp. 186; Sheppard v. State, 42 Ala. 531; Com. v. Smith, 1 Mass. 245; Morgan v. State, 13 Fla. 671. The failure to allege in the indictment the value of the property charged to have been stolen is ground for arrest of judgment. Davis v. State, 40 Ga. 229.

**259.** Although when the goods of several persons are stolen at the same time the indictment may include the whole, yet the value of each article and the name of each owner must be separately and specially alleged. State v. Merrill, 44 New Hamp. 624; Hope v. Com. 9 Metc. 134; *contra*, Clifton v. State, 5 Blackf. 224; State v. Murphy, 8 Ib. 498.

**260.** Where an indictment for stealing towels and handkerchiefs did not allege that each of the towels or each of the handkerchiefs was of some value, but only that six of the towels and twelve handkerchiefs were of some value, it was held that there must be a new trial, it being consistent with the allegation that the only towels and handkerchiefs which were deemed of any value were those not produced or proved to have been stolen. Com. v. Lavery, 101 Mass. 207.

**261.** In an indictment for larceny, the following allegation: The defendant "feloniously took and carried away a certain writing commonly called a cotton receipt, issued by," &c., "dated Dec. 4th, 1869, numbered 988, and issued to," &c., "for the receipt of one bale of cotton, marked," &c., "and weighing 524 pounds, of the value of more than $100, the property of," &c., is bad for uncertainty, it not appearing whether the allegation of value applies to the bale of cotton or the receipt. Cæsar Williams v. State, 44 Ala. 396.

**262.** An indictment for stealing a letter from the post office, containing an article of value, must describe the article and state its value. U. S. v. Burroughs, 3 McLean, 405.

**263.** An indictment for the larceny of promissory notes must allege the value of the notes. Describing them as being of certain amounts is not sufficient. Wilson v. State, 1 Porter, 118.

**264.** An indictment for the larceny of bank bills which alleges their aggregate amount and value, need not state their number or denomination. Com. v. Stebbins, 8 Gray, 492. Where, therefore, an indictment charged the stealing of sundry bank bills of some banks respectively, to the jurors unknown, of the amount and value of thirty-eight dollars, it was held sufficient without setting forth the number of bank bills stolen, or the denomination of each particular bill. Com. v. Grimes, 10 Ib. 470.

**265.** In Alabama, an indictment for stealing any horse, mare, gelding, colt, filly, or mule, is sufficient, without alleging the value of the animal taken; the Code making such theft grand larceny irrespective of the value. Maynard v. State, 46 Ala. 85.

**266.** Where the punishment for larceny from the person does not depend upon the amount stolen, the indictment need not allege the value of the property, or describe it with particularity. Com. v. McDonald, 5 Cush. 365.

**267.** Under the act of New York of 1862 (ch. 374, § 2), providing that "whenever any larceny shall be committed by stealing, taking, and carrying away from the person of another, the offender may be punished as for grand larceny, although the value of the property taken shall be less than twenty-five dollars," an indictment is good as a charge for grand larceny, although it does not aver that the property was stolen in the night time, nor that it was of a value exceeding twenty-five dollars. People v. Fallon, 6 Parker, 256; affi'd 1 N. Y. Ct. of App. Decis. 83.

**268. Averment of place of offense.** In Mississippi, when goods are stolen in one county and carried into another county, an indictment in the latter county will be quashed for want of jurisdiction, unless it charge that the larceny was committed in that county, the possession of the stolen goods by the thief being a larceny in every county into which he carries them. Johnson v. State, 47 Miss. 671; s. c. 1 Green's Crim. Reps. 341. In Nevada, it has been held that the indictment in such case must charge that the offense was committed in the latter county, or state that the bringing of the

property into that county was felonious. State v. Brown, 8 Nev. 208; s. c. 1 Green's Crim. Reps. 343.

269. An indictment for bringing stolen property from another State must allege that the possession of the property in the State to which it was taken was felonious. State v. Levy, 3 Stew. 123.

270. A., while traveling on the cars from Detroit to Chicago, became acquainted with B., C. and D. While the train was in the State of Indiana, B. made a bet with A.; whereupon A. deposited the amount of his bet in money with C., and B. deposited an express package, which afterward proved to be nothing but waste paper, though marked on the back $380. A. demanded his money from C., which he refused to return. B., C. and D., being tried and convicted of larceny in Chicago, the judgment was affirmed. Stinson v. People, 43 Ill. 397.

271. **Charging attempt to commit offense.** An indictment for an attempt to commit larceny must state facts showing the manner in which the attempt was made. State v. Brannan, 3 Nev. 238.

272. An indictment for an attempt to commit larceny is sufficient which charges that the accused took the impression of a key, and prepared a false key from that impression, to unlock the door of A.'s store, with the intention, through the agency of B., to break and enter the store and to steal. Griffin v. State, 26 Ga. 493.

273. An indictment for attempting to commit larceny from the person, which alleges that the defendant "did attempt to steal, take, and carry away from the person of F., the money, goods, and chattels of the said F., then and there being in the possession and upon the person of the said F.," &c., and did, "with intent then and there to commit the crime of larceny from the person of the said F., thrust, insert, and place his hand into the pocket of said F.," sufficiently charges that the pocket into which the defendant thrust his hand was on the person of F. Com. v. Sherman, 105 Mass. 169.

274. **Charging second offense.** An indictment which charges the prisoner with a second offense of petit larceny must state facts to show that he had, prior to the last offense, been convicted of the previous offense; and if the conviction is alleged to have taken place before a court of limited jurisdiction, the indictment must show that the court had jurisdiction as well of the subject-matter as of the person of the prisoner. People v. Powers, 2 Seld. 50.

275. In New York, an indictment for petit larceny charged as a second offense is good which avers generally that the Court of Special Sessions, before which the defendant was convicted, had full and competent power and authority in the premises to try and convict the defendant, without setting forth the facts showing jurisdiction, the omission to state such facts being only a formal defect, which is cured by the statute of *jeofails*. People v. Golden, 3 Parker, 330.

276. An indictment for petit larceny as a second offense is sufficient, although it only charges that the defendant was convicted of the first offense, without alleging a judgment or sentence, or naming the person or property which the first offense concerned. But not if the indictment omits to charge that the defendant had been pardoned or otherwise discharged from the first conviction before the commission of the second offense. Stevens v. People, 1 Hill, 261. The statute of New York declaring a second offense of petit larceny to be punishable in the State prison does not apply to a case in which the first conviction took place in another State. People v. Cæsar, 1 Parker, 645.

277. In Virginia, an indictment for a second offense of larceny, which charged a former conviction and punishment for a like offense, but did not state that the court in which the first offense was tried had jurisdiction of the same, or that the former conviction remained in force, or that such conviction appeared of record, or that the prisoner was the person who was formerly convicted, was held sufficient after verdict. Stroup's Case, 1 Rob. 754.

278. Where an indictment for petit larceny described it as a second offense, and alleged a previous conviction of forgery, it was held that the defendant might be con-

victed of the larceny as a first offense. Palmer v. People, 5 Hill, 427.

**279.** Form of an indictment charging petit larceny as a second offense. People v. Cæsar, 1 Parker, 645.

**280. Charging offense in different ways.** Where an indictment containing several counts charges the same larceny in different ways, the prosecutor will not be compelled to elect on which count he will proceed; but it is otherwise where the evidence tends to show that distinct larcenies are embraced in the indictment. Engleman v. State, 2 Carter, 91.

**281.** An indictment for larceny charging the defendant with "stealing, taking, and leading or driving away" animals stolen, is not bad as charging the offense in the disjunctive. People v. Smith, 15 Cal. 408.

**282.** A grand juror's complaint charged that A., at &c., on the 21st day of November, 1857, with force and arms, one buffalo robe of the value of eight dollars, of the goods and chattels of B., of, &c., feloniously did steal, &c., and that said A., at, &c., on the 21st day of November, 1857, did then and there, feloniously steal, &c., one other buffalo robe of the value of eight dollars of the goods and chattels of B., against the peace and contrary to the statute. *Held* not a ground for arrest of judgment on account of duplicity. State v. Holmes, 28 Conn. 230. The prosecution may elect to proceed for part of several articles charged in the indictment to have been stolen. State v. Donnegan, 34 Mo. 67.

**283. Averment of the stealing of articles belonging to different persons.** The spoils of a single larcenous act may all be included in one count, and the indictment is not thereby bad for duplicity. State v. Stevens, 62 Maine, 284; s. c. 2 Green's Crim. Reps. 481; and this may be done, notwithstanding the articles stolen are the property of different persons. State v. Hennessy, 23 Ohio, N. S. 339; s. c. 2 Green's Crim. Reps. 541; Lorton v. State, 7 Mo. 55; State v. Morphin, 37 Ib. 373; State v. Nelson, 29 Maine, 329; Bell v. State, 42 Ind. 335; or there may be as many different indictments against the thief as there are owners of the property. State v. Thurston, 2 McMull. 382; Com. v. Sullivan, 104 Mass. 552; State v. Lambert, 9 Nev. 321.

**284.** Counts for horse stealing, and for stealing other property, may be joined in the same indictment. Barton v. State, 18 Ohio, 221. An indictment which charges the stealing of a horse of the value of one hundred dollars, a sleigh of the value of fifty dollars, and a harness of the value of thirty dollars, is not bad for duplicity. State v. Snyder, 50 New Hamp. 150.

**285.** The following indictment containing a single count, was held not bad for duplicity: That on the 9th of September, 1866, the defendant feloniously did steal one horse of the value of three hundred dollars, one buggy wagon of the value of one hundred and fifty dollars, and one harness of the value of fifty dollars, the proper goods and chattels of a person named. State v. Cameron, 40 Vt. 555.

**286. Charging distinct offenses.** Distinct larcenies may be presented in different counts of one indictment; and whether the prosecution shall elect between them is in the discretion of the court and not a subject of exception. Com. v. Sullivan, 104 Mass. 552.

**287.** An indictment may charge the defendant with larceny, and with receiving the same goods knowing them to have been stolen. State v. Stimpson, 45 Maine, 608; Hampton v. State, 8 Humph. 69; Keefer v. State, 4 Ind. 246; State v. Crosby, 4 La. An. 434; State v. McLane, Ib. 435.

**288.** In Massachusetts, distinct larcenies, and also distinct offenses of receiving stolen goods may be joined in the same indictment in different counts; and the ordering of separate trials is in the discretion of the court. Com. v. Hills, 10 Cush. 530.

**289.** An indictment which alleges that the defendant broke and entered a shop with intent to commit a larceny, and did then and there commit a larceny, is not bad for duplicity. Com. v. Tuck, 20 Pick. 356; and the same if true of an indictment which charges the breaking and entering a dwelling-house in the night, and stealing therein. Com. v. Hope, 22 Pick. 1; State v. Squires, 11 New Hamp. 38.

290. An indictment charged the defendants with "burglary committed as follows," and then stated facts constituting the crime of larceny. *Held* good as an indictment for the latter offense. State v. Coon, 18 Minn. 518.

291. An indictment charging that the defendant did embezzle, steal, take, and carry away, certain goods, is not bad for duplicity. The word embezzle may be rejected as surplusage. Com. v. Simpson, 9 Metc. 138.

292. **Material and immaterial averments.** An indictment which alleges that the defendant "feloniously did steal, take, and carry" the property, omitting the word "away" is insufficient, either as against the thief or the receiver. Com. v. Adams, 7 Gray, 43.

293. An indictment for the larceny of bank notes must charge that the offense was committed feloniously, and state to whom the notes belonged, or allege that he is unknown. Barker v. Com. 2 Va. Cas. 122.

294. The word "steal" is not necessary in an indictment for larceny. Damewood v. State, 1 How. Miss. 262; Engleman v. State, 2 Carter, 91; and the employment of the term "stal" for steal, in the indictment, is not cause to arrest the judgment. Wills v. State, 4 Blackf. 457.

295. It is not ground of demurrer to an indictment for larceny, that the property stolen is alleged to be of the value of a specified number of dollars, omitting the words "lawful money of the United States." People v. Winkler, 9 Cal. 234.

296. An indictment for stealing a cow is sufficient which charges that the defendant "did steal, take and carry away" the cow, omitting the words "lead or drive away." People v. Strong, 46 Cal. 302.

297. **Conclusion.** As the stealing of a promissory note is not an offense at common law, an indictment for the larceny of it must conclude "contrary to the form of the statute." People v. Cook, 2 Parker, 12.

### 7. Evidence.

#### (*a*) *Proof of taking.*

298. **Materiality.** On the trial of an indictment for larceny, a taking as well as carrying away must be shown. Pennsylvania v. Campbell, Addis. 232.

299. On a trial for stealing two hogs, the property of W., it was proved that the two hogs of W. were missing, and that fifty pounds of pork were found in the possession of the defendant, which it was claimed from certain marks was the meat of the lost hogs. Evidence was offered by the defendant to the effect that he bought a quantity of pork shortly previous to the loss of W.'s hogs. The judge charged the jury that if they were reasonably satisfied that the meat found in the possession of the defendant was the property of W., it was their duty to find the prisoner guilty. *Held* that as it was necessary to show that a larceny had been committed before attaching importance to the identification of the property, the instruction was erroneous. State v. McGowan, 1 Rich. N. S. 14.

300. **Taking from mail.** To justify a conviction on a trial for stealing letters and packages from the mail, the jury must be satisfied not only that the mail has been violated, but that the letters and packages in question had been in and were taken from the mail. The most satisfactory evidence that a letter or package was put into the mail for transmission, is that of the person who deposited it in the post office; and the best evidence of its loss, is that of the person to whom it was addressed. U. S. v. Crow, 1 Bond, 51.

301. **Proof of substance of charge sufficient.** An indictment which charges the stealing and carrying away of a horse, will be maintained by proof that the defendant rode, drove or led the horse away. Baldwin v. People, 1 Scam. 304.

302. In Alabama, it was held on the trial of an indictment for larceny, competent for the prosecution to prove that the goods were stolen by the defendant in another State and brought by him into that State. Murray v. State, 18 Ala. 727.

303. But proof of embezzlement will not support an indictment for larceny, notwithstanding the statute declares that a person who embezzles money or goods, shall be

held to have committed larceny. Com. v. Simpson, 9 Metc. 138; Com. v. King, 9 Cush. 284; Fulton v. State, 8 Eng. 168. Proof, however, of burglary, on the trial of an indictment for larceny, does not entitle the defendant to an acquittal. Wyatt v. State, 1 Blackf. 257.

**304.** An indictment for larceny will not be supported by proof that the defendant received or purchased the goods, knowing them to be stolen, although by statute the punishment for the offense proved is the same with that charged. Ross v. State, 1 Blackf. 390.

**305. Uncorroborated testimony of prosecutor.** It is doubtful whether on the trial of an indictment for larceny, the defendant ought ever to be convicted on the uncorroborated testimony of a prosecutor who claims the property in question, to which the defendant also claims title, where the transaction was not attended with any of the usual concomitants of larceny or concealment. State v. Kane, 1 McCord, 482.

**306. Prosecution compelled to elect.** When the evidence tends to prove distinct larcenies, the prosecution may be compelled to elect upon which of them they will rely. Engleman v. State, 2 Carter, 91.

**307. Question for jury.** The question whether the severance from the freehold, and asportation of property alleged to have been stolen, were so separated by time as not to constitute one transaction, is to be determined by the jury. State v. Berryman, 8 Nev. 262; s. c. 1 Green's Crim. Reps. 335.

*(b) Evidence as to property taken.*

**308. Proof of stealing more than charged.** An indictment charged the defendant with stealing two horses, and it was proved that he also stole saddles and bridles. *Held* that the variance was immaterial. Jackson v. State, 14 Ind. 327.

**309. Proof as to one of several articles charged to have been stolen.** Under an indictment for larceny, or for receiving stolen goods, charging the stealing or receiving of several articles, the defendant may be found guilty, although the offense is proved only in respect to a single article. People v. Wiley, 3 Hill, 194.

**310.** In Virginia, where the indictment was for stealing one gelding, of a dark bay color, and also two horses, worth $75 each, and it appeared from the record of the examining court that the defendant had been examined for stealing a dark bay horse, and also two horses, halter-chain and collar, worth $150, it was held that the variance was not material. Halkem v. Com. 2 Va. Cas. 4.

**311.** But in Alabama, where an indictment charged the stealing of a bank note and other articles, and there was a variance between the indictment and the proof as to the bank note, and the defendant would not consent to an amendment of the indictment so as to correctly describe the bank note, the court refused to permit a *nolle prosequi* to be entered. State v. Kreps, 8 Ala. 591.

**312. Slight variance not regarded.** An indictment charging the larceny of treasury notes, was held sustained by proof that the property stolen was greenbacks. Hickey v. State, 23 Ind. 21.

**313.** Proof that a trunk, containing money, was taken and carried away from a house, will support a charge of taking and carrying away money. Berry v. State, 10 Ga. 511.

**314.** Evidence that the defendant stole a mare, or gelding, will support an indictment for stealing a horse. Baldwin v. People, 1 Scam. 304; State v. Donnegan, 34 Mo. 67. Proof of stealing a lamb will support an indictment for stealing sheep. State v. Trott, 2 Harr. 561; and an indictment for stealing a hog will be supported by proof that the defendant stole a shoat. State v. Godet, 7 Ired. 210.

**315.** An indictment for stealing a "bull-tongue," was held to be supported by proof that the defendant stole a particular kind of plowshare, usually known in the neighborhood in which he resided by that name. State v. Clark, 8 Ired. 226.

**316.** Where an indictment for larceny described the property stolen as a silver tea-pot and a silver coffee-pot, and it was proved that the articles stolen were plated ware, consisting of only about one-twenty-

fifth part silver, it was held that the variance was not material. Goodall v. State, 22 Ohio, N. S. 203; s. c. 1 Green's Crim. Reps. 671.

317. Coin alleged to be stolen is not capable of the same description and identification as other property, and therefore the same exactness in proof is not required. The jury must determine whether the coin proved to have been stolen is the same kind of coin as that charged in the indictment; and when several kinds are stated in the indictment, the proof should show that one or more of such kinds were among the kinds of coin stolen. People v. Linn, 23 Cal. 150.

318. Under an indictment charging that the defendant stole gold and silver coin of the value of two thousand dollars, and bank notes of the value of five thousand dollars, the denomination and nature of the coin need not be proved, nor the date of the bank notes, the bank that issued them, or the person to whom they were payable. Berry v. State, 10 Ga. 511.

319. **When description is essential it must be proved as laid.** Where an animal stolen is described by color and sex, the description must be supported by the proof. Rowell v. Small, 30 Maine, 29. Under an indictment for stealing a steer, there cannot be a conviction upon proof of stealing a bull. State v. Royster, 65 N. C. 539. But under an indictment describing the animal as a bay, it was held sufficient to prove that it was a bay or red sorrel. Turner v. State, 3 Heisk. 452; s. c. 1 Green's Crim. Reps. 353.

320. An indictment for larceny, which alleges the stealing of an animal, is not supported by proof that the animal was dead when stolen. Com. v. Beaman, 8 Gray, 497.

321. An indictment for stealing bank bills will not be supported by proof that the defendant stole the orders of a railroad company on its treasurer. Grummond v. State, 10 Ohio, 510.

322. Where the indictment charges the stealing of a plow, and it is proved that the defendant stole a plowshare, the variance will be fatal. State v. Cockfield, 15 Rich. 316.

323. The defendant was charged with stealing a shovel-plow, and it was proved that he stole the rim of a shovel-plow. *Held* that it should have been left to the jury to determine whether the thing stolen was, according to common understanding, a shovel-plow, as laid in the indictment. State v. Sansom, 3 Brev. 5.

324. The defendant was convicted of stealing a white woolen sheet, upon proof that he stole a blanket made of cotton and woolen—the warp being cotton and the filling woolen. *Held*, that the conviction could not be sustained. Alkenback v. People, 1 Denio, 80.

325. An indictment for stealing "one pair of boots" is not supported by proof that the defendant stole two boots unmatched, being the right boot of two pairs. State v. Harris, 3 Harring. 559.

326. To support an indictment for stealing two barrels of turpentine, it must be proved that the turpentine was in barrels when it was stolen. State v. Moore, 11 Ired. 70.

(c) *Proof of place of offense.*

327. **Exact proof not required.** Simple larceny being an offense not local in its nature, the place of its commission is not material, if in the county alleged. Where the indictment charged a larceny in a building in the city of B., in the county of S., and the proof was of larceny in a building in the city of C., in the same county, it was held that the defendant might be convicted of simple larceny, but not of larceny in a building. Com. v. Lavery, 101 Mass. 207.

328. An indictment for larceny charged that the offense was committed in a vessel in the *First* Ward of the city of New York. It was proved that the vessel was lying in the river at a wharf in the *Third* Ward. *Held*, that the variance was not material. People v. Honeyman, 3 Denio, 121.

329. Where the indictment was for larceny in "a certain building called and being a shop," and the building was proved to be a store, it was held that the variance was not material. Com. v. Riggs, 14 Gray, 376. And see Com. v. Annis, 15 Gray, 197.

330. Where an indictment for larceny al-

leged that the defendant had been convicted of similar thefts on three former occasions, "at the Municipal Court, begun and holden at Portland," and it was proved that these convictions were before "the Municipal Court for the City of Portland," it was held there was no variance. State v. Regan, 63 Maine, 127.

**331.** But an indictment for larceny from a house is not sustained by proof of stealing from a tent. Callahan v. State, 41 Texas, 43; nor by proof that the stolen goods were taken while hanging outside a store door. Martinez v. State, Ib. 126.

**332.** In an indictment for stealing letters, the description of the termini between which letters are sent by the post is material, and must be proved as laid. U. S. v. Foye, 1 Curtis C. C. 364.

(*d*) *Proof of ownership of property.*

**333. How made.** It is not necessary that the person whose goods are charged to have been stolen should swear that they belonged to him. That fact may be proved by others. Lawrence v. State, 4 Yerg. 145.

**334.** A written receipt for the purchase-money of stolen goods, in the possession of the alleged owner, is competent evidence to show title or ownership. If it appear from the receipt that the money was paid by another person, as agent of the alleged owner, parol evidence is admissible to prove that the contract was made by the agent for his principal. Oakley v. State, 40 Ala. 372.

**335.** Where stolen bank notes have been found in a place designated by the prisoner, and handed to the person from whom they are alleged to have been stolen, the prosecution cannot prove that the latter "received them as his own;" nor does the death of the alleged owner before the trial render such evidence proper. Sayres v. State, 30 Ala. 15.

**336.** The testimony of a consignee that goods were sent through a carrier to him is sufficient evidence that the goods, while in the hands of the carrier, are in the constructive possession of the consignee, and may be submitted to the jury in support of an indictment charging larceny of the property of the consignee. Com. v. Sullivan, 104 Mass. 552.

**337. Proof of special ownership sufficient.** The goods alleged to have been stolen may be proved to be the absolute or special property of him who is charged to be the owner. State v. Furlong, 19 Maine, 225.

**338.** Where it was proved that the stolen property was taken from the possession of the alleged owner, but the evidence was conflicting as to the character of his possession, and the defendant requested the court to instruct the jury, "that if they were in any doubt whether the property belonged to him or to the government, they must give the defendant the benefit of the doubt, and acquit him," which charge the court refused to give without the qualification, "that if he had possession of the property as agent or bailee, they should convict the defendant," it was held that there was no error. Miller v. State, 40 Ala. 54.

**339.** An indictment for stealing a watch alleged that it was the property of A. It was proved that B. was the general owner of the watch, but that he had exchanged it with A. for a few weeks, and that it was stolen while in A.'s possession. *Held*, that as A. had a special property in the watch, there was no variance. Yates v. State, 10 Yerg. 549.

**340.** Proof that the alleged owner of the goods stolen bought them at a sheriff's sale subject to a mortgage after condition broken, and that he had the rightful possession, will support an allegation of ownership. Robinson v. State, 1 Kelly, 563.

**341.** Occupancy of a house is sufficient evidence of ownership to sustain the allegation in an indictment for larceny, that the prisoner entered such person's dwelling-house. Markham v. State, 25 Ga. 52.

**342.** An indictment for the larceny of a box of tobacco charged that it was taken from the agent of the steamship company. It was proved that it was taken from the steamer, and had never been in the possession of the agent. *Held* that the variance was fatal. Radford v. State, 35 Texas, 15.

**343. Property held in trust.** Proof that the person alleged to be the owner held the

property for the purpose of conveyance, or in trust for the benefit of another, will support an allegation of ownership in an indictment for larceny. State v. Somerville, 21 Maine, 14.

344. Where an indictment described the property stolen as the goods and chattels of A., and it was proved that they were owned by B., and that A. had the custody of them for B., with authority to sell them and account to B. for the proceeds, it was held no variance. People v. Smith, 1 Parker, 329.

345. The allegation of ownership, in a complaint for an alleged larceny of goods, is sustained, when it is shown that the complainant at the time the offense was committed, held possession of the goods under a loan from, or contract with the owner. State v. Pettis, 63 Maine, 124, Appleton, C. J., and Barrows, J., *dissenting*.

346. **Property of married woman.** On a trial for larceny, the ownership of the property stolen must be proved as laid. Jones v. Com. 17 Gratt. 563. And if the alleged owner was a married woman at the time of the commission of the offense, it is error, and the prisoner must be acquitted. Hughes v. Com. 1b. 565.

347. Under an indictment for larceny in stealing the shawl of C., it was proved that the shawl was the property of the wife of C., and was given to her by her mother after marriage. *Held* that the variance was fatal. Stevens v. State, 44 Ind. 469; s. c. 2 Green's Crim. Reps. 717.

348. An indictment charged the stealing of a title bond, the property of A. It was proved that the bond was executed to A. and B., who were husband and wife; that B. had died leaving one child, and that the bond was taken from the possession of A. *Held* that the variance was immaterial. Dignowitty v. State, 17 Texas, 521.

349. An information for stealing a cow alleged that it was the property of A. It was proved that the cow, which was running at large when stolen, was owned by A.'s mother-in-law, who was old and nearly blind, and that A. had the entire management and control of her property. *Held* that the variance was ground for a new trial. State v. Washington, 15 Rich. 39.

350. **Property of corporation.** On the trial of an indictment for stealing the property of a corporation it is sufficient to prove that the company known by the name given in the indictment is a corporation *de facto*, doing business as such. People v. Barric, 49 Cal. 342; Smith v. State, 28 Ind. 321.

351. **Joint ownership.** An indictment for larceny, alleging that the goods stolen were the property of A., is not sustained by proof that they are the property of A. and B., who are partners, and were stolen while in A.'s possession. Com. v. Trimmer, 1 Mass. 476; Hogg v. State, 3 Blackf. 226; State v. McCoy, 14 New Hamp. 364; State v. Owens, 10 Rich. 169; State v. London, 3 Rich. N. S. 230; State v. Burgess, 74 N. C. 272; and the same is true where the indictment charges that the property stolen belonged to two, and the proof is, that it belonged only to one. Brown v. State, 35 Texas, 691.

352. In Massachusetts, under the statute (Genl. Stats. ch. 172, § 12), if the indictment charge the stealing of the property of A., and the proof is, that A. and B. own the property as tenants in common, the variance is not material. Com. v. Arrance, 5 Allen, 517.

353. When stolen goods are alleged to have belonged to three executors, a conviction cannot be had on proof that the ownership was in two of them only. Parmer v. State, 41 Ala. 416.

354. **Name of owner.** An indictment for larceny charged the ownership of the property to be in A. B., and it was proved that it was in A. B., Junior. *Held* that the variance was immaterial. State v. Grant, 22 Maine, 171.

355. Where an indictment alleged that the property stolen belonged to Elizabeth Moore, and it was proved to be the property of Betsey Moore, it was held that the jury must decide whether the person so described was known by both names. State v. Godet, 7 Ired. 210.

356. The defendant was charged in the indictment with stealing the goods of J. H.

Dargin. It was proved that his name was John H. Dargin, but that he was frequently called J. H. Dargin, and signed his name J. H. Dargin. *Held* sufficient. Thompson v. State, 48 Ala. 165.

**357.** But where an indictment charged the stealing of Stephen Daniel's hog, and it was proved that the defendant stole Philip Daniel's hog, it was held that the variance was fatal. Hensley v. Com. 1 Bush, Ky. 11.

(*e*) *Proof of value of property.*

**358. Genuineness of bank note must be shown.** On a trial for stealing a bank note, it must be proved that the note was genuine. State v. Dobson, 3 Harring. 563; State v. Smart, 4 Rich. 356.

**359. Genuineness of bank bills, how proved.** Under an indictment for stealing bank bills, proof that similar bills were received and passed away in the ordinary course of business, as a part of the currency of the country, would be presumptive evidence of the existence of the bank, and of the genuineness of the bills. Johnson v. People, 4 Denio, 364; Fallon v. People, 2 N. Y. Ct. of Appeals Decis. 83; s. c. 2 Keyes, 145.

**360.** On the trial of an indictment for the larceny of foreign bank bills, their genuineness and value may be proved by the person from whom they were stolen, to the effect that he received and passed them in the course of trade at their nominal value, and by the testimony of others, that such bills circulated as money in the community. Corbett v. State, 31 Ala. 329.

**361.** On a trial for the larceny of bank bills, the testimony of a person that he received the bills in another State, and that they were the bills of banks there, is admissible to show that they were of value, and current in the State where the trial is had. Com. v. Stebbins, 8 Gray, 492.

**362.** Where on the trial of an indictment for grand larceny, a witness testified that the bills stolen "were of the currency ordinarily known as greenbacks," and that they were of the denomination of one hundred dollar bills of that currency, it was held that there was sufficient evidence of the genuineness and value of the bills to sustain the judgment. Remsen v. People, 57 Barb. 324.

**363.** Evidence that the defendant stole a bank note, and passed it as genuine, is sufficient proof that it was of value. Cummings v. Com. 2 Va. Cas. 125. And on a trial for stealing bank bills from M., it was held proper to refuse to charge that the fact that they had been paid to him for services and received by him in payment, was no evidence that they were genuine and of a certain value. The presumption in such case is that the bills are genuine and of the value they purport, and the onus of showing the contrary is on the prisoner. People v. Fallon, 6 Parker, 256; affi'd 2 N. Y. Ct. of App. Decis. 83.

**364. Proof of genuineness of bank bills presumed.** Although evidence that bank bills of certain denominations were taken, without proof that they were genuine circulating media, will not sustain a conviction for larceny, yet where the bill of exceptions does not contain all the evidence, it will be presumed that proof of the genuineness was given on the trial. The defendant was indicted for robbery and stealing from the person, a wallet of the value of one dollar, twenty-four promissory notes (commonly called bank bills), of national currency issued by divers banking associations, to the jurors unknown, of the value in the aggregate of fifty-one dollars. All the proof there was of the kind or amount of money was that it consisted of three ten dollar bills, four five dollar bills, and a one dollar bill. There was no proof as to the person or corporation by whom they were issued, or whether they were genuine. *Held* that unless this defect was cured by the omission of the prisoner's counsel to raise the objection that there was not sufficient proof of the value of the property to render the crime grand larceny, it was fatal to the verdict. Higgins v. People, 7 Lans. 110.

**365. Proof of contents of bank bills.** On the trial of an indictment for the larceny of bank bills, parol evidence of the contents of the bills stolen is admissible, without

accounting for their non-production. People v. Holbrook, 18 Johns. 90.

**366. Value of goods stolen, how proved.** On a trial for larceny, the stolen goods may be exhibited to the owner before he is required to testify in relation to them; and when examined as a witness, he may refresh his recollection as to the value of the articles from a schedule made by his clerk in his presence and under his direction and inspection. State v. Lull, 37 Maine, 246.

**367.** Where the punishment of the offense charged (larceny from the person), did not depend on the value of the articles taken, it was held that proof of value was unnecessary, and that the jury might ascertain whether or not the articles were of any value by inspecting them. Com. v. Burke, 12 Allen, 182.

**368.** Where articles of different kinds are alleged to have been stolen, and only the collective value of the whole is averred, there can be no conviction upon proof of stealing either description of property alone. This rule is also applicable to indictments for robbery. Com. v. Cahill, 12 Allen, 540.

**369. Value inferred.** On a trial for stealing a horse, the fact that the horse was of some value, is sufficiently established by proof of facts from which the jury may infer it; as where the prisoner said he borrowed the horse, and again that he stole it, it might be inferred that the animal was of some value, as no one would borrow or steal a worthless horse; so evidence that a witness went one hundred miles to hunt the horse after he was stolen, would tend to prove that he was of some value, as one would hardly go so far for a worthless horse; so proof that the horse possessed the power of locomotion, and traveled a hundred miles and back again, would go to establish the fact that he was of some value. Houston v. State, 8 Eng. 66.

*(f) Presumptive evidence.*

**370. Handwriting.** On the trial of an indictment for larceny committed by falsely personating the owner of the property, evidence that the signature to the receipt for the articles was in the handwriting of the defendant is admissible to identify him as the person who had falsely personated the owner and obtained the articles; and it is no objection to its admissibility for this purpose that it also proved him guilty of another offense. Com. v. Lawless, 103 Mass. 425.

**371. Foot-prints.** An officer may lawfully take off the boots or shoes of a person arrested on a charge of larceny, and compare them with foot-prints, and testify on the trial as to the result of the comparison thus made. State v. Graham, 74 N. C. 646.

**372. Possession by defendant of other property.** On a trial for larceny, it may be proved that goods not described in the indictment were taken at the same time and found in the defendant's possession; and the jury may take to their room, with the goods alleged to have been stolen, the goods that were taken at the same time. Com. v. Riggs, 14 Gray, 376.

**373.** Where on a trial for grand larceny, two of the notes which the defendant stole which were of an amount sufficient to constitute the offense, were described in the indictment with particularity, it was held that evidence as to other bills and coin not sufficiently described was admissible among the circumstances attending the offense, though a conviction could only be had as to the property of which there was a sufficient description. Haskins v. People, 16 N. Y. 344. See Quinlan v. People, 6 Parker, 9.

**374.** On the trial of an indictment for larceny, evidence having been introduced tending to show that the trunk in which the stolen goods were found belonged to the defendant, it was held that envelopes directed to him, and a pardon found in the trunk, were admissible as tending to prove the defendant's connection with the goods. State v. Lull, 37 Maine, 246.

**375. Embarrassed circumstances of the defendant.** The fact that the defendant was in embarrassed circumstances at the time of the theft, is proper to be submitted to the jury as a circumstance, taken in connection with the other evidence, affording a presumption of his guilt. Bullock v. State, 10 Ga. 46.

376. On a trial for stealing a horse and buggy, a witness for the defendant testified that the team which the defendant had was bought by J. C. *Held* competent for the prosecution to show that J. C. was on the jail limits for debt, had failed in business and had no visible means of support. State v. Cameron, 40 Vt. 555.

377. **Acts of defendant.** On the trial of an indictment for larceny in a hotel, the prosecution may prove the presence of the prisoner in the hotel on the night of the larceny, and his acts and conduct there, and the circumstances attending his arrest, as a part of the *res gestæ*, though these acts only show an attempt to commit a felony on another person in another part of the hotel. Burr v. Com. 4 Gratt. 534.

378. On a trial for stealing a bullock, it is competent for the jury to consider the fact that the ears and brand were cut off and hid, in connection with other facts proved, in order to determine whether the defendant intended to steal the animal, the carcass of which was found in his possession. People v. Murphy, 47 Cal. 103.

379. Where on the trial of an indictment for larceny, the evidence tended to prove that the defendant, at the time the offense was committed, was acting in concert with a confederate, that he was in the entry of his own house at an unusual hour of the morning, with a light in his hand; and that he met the thief as he came down stairs, and received from him a pocket-book containing money which had been stolen from a lodger in the house, it was held that he might be convicted as a principal. Com. v. Lucas, 2 Allen, 170.

380. On a trial for larceny, the evidence tended to show a conspiracy between the prisoner and his accomplice, to steal the prosecutor's watch, and afterwards to meet and divide the profits. *Held* competent for the prosecution to prove that the accomplice having stolen the watch, afterwards paid double toll at a bridge on the direct road to the place at which he and the prisoner were to meet. Scott v. State, 30 Ala. 503.

381. On a trial for the larceny of a hog, the only witness in the case testified that he heard the report of a gun in the woods, and immediately afterward heard a hog squeal; that he saw the defendant chase the hog about one hundred yards, and that he was in the act of striking it with his gun when the witness asked him what he was doing; and that he replied, he had shot at a squirrel and hit the hog, and wanted to see where the hog was shot. *Held* that this did not prove larceny. Wolf v. State, 41 Ala. 412.

382. **Defendant pointing out stolen property.** When a person charged with larceny, shortly after its commission, points out the place where the stolen property is concealed, he must be deemed the thief, unless he can reconcile his knowledge with his innocence. Hudson v. State, 9 Yerg. 408.

383. On a trial for horse stealing, the prosecution was allowed to prove that immediately after the arrest of the prisoner, one C. conducted the witness to the horses. *Held* that such proof was proper without showing a conspiracy between the prisoner and C. to steal the horses. *Held* also that it was proper to show what was said by C. in relation to the taking of the horses, in the presence and hearing of the defendant, although the latter remained silent. State v. Bowers, 17 Iowa, 46.

384. **Taking by defendant of other goods.** The admission of evidence on a trial for grand larceny, that the accused took a wagon on the same night from another person, is not error, the taking of a wagon under such circumstances being corroborative of the main charge. Phillips v. People, 57 Barb. 353; aff'd 42 N. Y. 200.

385. On the trial of an indictment for stealing R.'s sheep, the testimony of W., that his sheep and those of R. which herded together, were driven off together by the same parties, and sold together by the parties driving them off, is admissible as tending to prove the larceny of R.'s sheep. People v. Robles, 34 Cal. 591.

386. On the trial of an indictment for larceny in retaining jewelry which the prisoner had obtained from K. & Co., for the purpose of showing it to a customer, with

the understanding that he should return the articles unsold, and the money for such as were sold, the prosecution were allowed to prove that the prisoner on the same day and the day following that on which he procured the jewelry from K. & Co., in the same way procured other jewelry from other persons, which he appropriated to his own use. *Held* that the evidence was proper to show felonious intent. Weyman v. People, 6 N. Y. Supm. N. S. 696.

**387. Commission of distinct larceny.** It is error on a trial for larceny to permit the prosecution to prove that just before the larceny charged, the defendant committed another larceny. Barton v. State, 18 Ohio, 221.

**388.** On the trial of an indictment for the larceny of a watch, it is competent to prove that the prisoner at another time stole a cloak. Walker's Case, 1 Leigh, 574.

**389.** Association with horse thieves, or a subsequent conspiracy to steal horses, cannot be proved on a trial for horse stealing. Cherry v. State, 7 Ohio, 222.

**390. Flight of defendant.** On the trial of an indictment for larceny, the court charged the jury, that if they believed that the defendant fled because he was accused of the crime, it was a suspicious circumstance, which it was for him to explain, but that they must find that it was a flight; that the burden of proof was on the prosecution; and that even if the defendant could not explain his flight, they need not necessarily find him guilty. Com. v. Annis, 15 Gray, 197.

**391. Return of defendant.** Where on the trial of an indictment for stealing letters and packages from the mail, it appeared that the defendant, when it was made known to him that he was suspected, although in a distant State, immediately returned to his former residence and demanded a full investigation of the charge, it was held that this circumstance together with proof of his good character was entitled to the consideration of the jury, unless the evidence of guilt was clear beyond a reasonable doubt. U. S. v. Crow, 1 Bond, 51.

**392. Possession of stolen property.** According to the weight of authority, the fact that stolen property is found soon after the offense, in the possession of the accused, is *prima facie* evidence of his guilt. People v. Preston, 1 Wheeler's Crim. Cas. 41; State v. Merrick, 19 Maine, 398; State v. Wolff, 15 Mo. 168; State v. Bruin, 34 Ib. 537; State v. Gray, 37 Ib. 463; State v. Williams, 54 Ib. 170; State v. Smith, 2 Ired. 402; State v. Williams, 9 Ib. 140; State v. Brewster, 7 Vt. 122; Hughes v. State, 8 Humph. 75; Pennsylvania v. Myers, Addis. 320; State v. Weston, 9 Conn. 527; Fuller v. State, 48 Ala. 273; Unger v. State, 42 Miss. 642; State v. Millain, 3 Nev. 409; State v. Cassady, 12 Kansas, 550; Atzroth v. State, 10 Fla. 207; Wise v. State, 24 Ga. 31; State v. Turner, 65 N. C. 592.

**393.** Where the thief is found in possession of goods in a certain State, the presumption is that the larceny was committed in that State. Simpson v. State, 4 Humph. 456.

**394. Possession of stolen property must have been recent.** To justify the presumption that the possessor of stolen goods is the thief, they must have been found in his possession so recently after the theft that it is reasonable to suppose he stole them. State v. Graves, 72 N. C. 482. What is a recent possession is a question for the jury. Price v. Com. 21 Gratt. 846.

**395.** Where on a trial for larceny, it appeared that the property was stolen the first of November, and found in the possession of the defendant in December, it was held incumbent on him, in order to exonerate himself from the imputation of guilt, to account for his possession. Mondragon v. State, 33 Texas, 480.

**396.** The presumption of guilt from the possession of stolen property is not rebutted by the lapse of two months between the theft and the finding. State v. Bennett, 3 Brev. 514; s. c. 2 Const. R. 692. In Tennessee, it was held that the possession of a stolen horse two months after the theft did not, even if unexplained, raise a conclusive presumption of the possessor's guilt. Curtis v. State, 6 Cold. 9.

**397.** On the trial of an indictment for

stealing a package of bank bills in December, it was held that proof that two of the bills (which were identified), each of the denomination of one hundred dollars, were in the defendant's possession, one of them in March, and the other in April following, might be submitted to the jury, as evidence that he stole the whole package; and that even if none of the stolen bills had been identified, yet testimony to prove that the defendant, after the larceny, was in possession of two one hundred dollar bills, similar to those that were stolen, and also a large amount of other bank bills, and that he was destitute of money before the larceny, was admissible in connection with other accompanying circumstances indictative of guilt. Com. v. Montgomery, 11 Metc. 534.

**398. Possession of stolen property, how regarded in the different States.** In New York, the exclusive possession of the whole, or of some part of the stolen property by the prisoner, recently after the theft, is sufficient, when standing alone, to cast upon him the burden of explaining now he came by it, or of giving some explanation, and if he fail to do so, to warrant the jury in convicting him of the larceny; or of burglary, where that is the offense proved. Knickerbocker v. People, 43 N. Y. 177.

**399.** Where a larceny was committed during the night, and the property was found in the possession of the defendant at half past three o'clock in the morning, it was held not erroneous for the court to refuse to charge the jury, that the mere possession of the stolen property was not *prima facie* evidence of the commission of the larceny by the defendant. Dillon v. People, 4 N. Y. Supm. N. S. 203; 8 Ib. 670.

**400.** In North Carolina, the presumption of guilt arising from the possession of stolen property only applies when the evidence tends to show that the property came into the possession of the accused by his own act or concurrence. Where, therefore, the defendant and his two sons were indicted for stealing tobacco in the night, and it was proved that the stolen tobacco was found the next day in the defendant's outhouse, which was occupied by one of his negroes, and in which the defendant kept his own tobacco, and that he claimed to own the tobacco so found, though proved to be the stolen tobacco, it was held erroneous for the court to instruct the jury that "the possession of the stolen tobacco raised a strong presumption of the defendant's guilt." State v. Smith, 2 Ired. 402.

**401.** In Indiana, it has been held that if, on the trial of an indictment for larceny, the jury find, from the evidence, that the property described in the indictment, or some portion of it, was stolen, and that it was soon thereafter found in the possession of the defendant, who failed to account for its possession, or who gave a false account of his possession, it is their duty to find him guilty, unless such possession is explained by the attending circumstances, or from his character or habits of life they have a reasonable doubt of his guilt. Smathers v. State, 46 Ind. 447. See Tuberville v. State, 42 Ib. 490; Jones v. State, 49 Ib. 549.

**402.** On a trial for stealing a horse, the court charged the jury as follows: "If the property stolen, or a portion of it, was found in the possession of the defendant a short time after the larceny, it would be your duty to find the defendant guilty, unless he satisfies you, from the evidence, that he came by the horse honestly." *Held* that the court should have told the jury that they *might* instead of that they *should* find the defendant guilty; that the defendant was not bound to satisfy the jury that he came honestly by the property alleged to have been stolen, but only to raise a reasonable doubt whether he had not so come by it. Hall v. State, 8 Ind. 439. See Engleman v. State, 2 Ib. 91.

**403.** In Illinois, possession of property soon after it is stolen is not of itself *prima facie* evidence that it was stolen by the defendant. Everything connected with the possession must be considered, such as its proximity to the larceny; whether it was concealed; whether the party admitted or denied the possession; whether other persons had access to the place where it was found; the demeanor of the accused, and his good character. Conkwright v. People, 35 Ill.

204. If the possession is recent after the theft, and there are no attendant circumstances, or other evidence to rebut the presumption, or to create a reasonable doubt of guilt, the mere fact of such possession will warrant a conviction. Comfort v. People, 54 Ill. 404.

404. In Michigan, on a trial for larceny, the jury were told that they might consider as evidence of guilt the recent possession of the stolen property by the defendant, coupled with the fact that he was in a situation to steal it; that the circumstances did not explain how he came in possession by any honest course, and that he was in a position to account for his possession, if it was an honest one. *Held* proper. People v. Wilson, 30 Mich. 486.

405. In Wisconsin, on the trial of an indictment for larceny, the court charged the jury, that if within a short time after the theft the stolen property was found in the possession of the prisoner, the burden was on him to show how he came by it, otherwise, he might be presumed to have obtained it feloniously; that such presumption might be rebutted by the circumstances proved; that it was a presumption of fact, and if the evidence led to a reasonable doubt whether it was well founded, that doubt would avail in favor of the accused. *Held* correct. Crilley v. State, 20 Wis. 231.

406. In Alabama, it was held that a charge to the jury on the trial of an indictment for stealing a horse, that the recent possession by the accused, of the property taken, unexplained, was evidence of guilt, was not erroneous. Maynard v. State, 46 Ala. 85. But such possession is not conclusive evidence of guilt. Fisher v. State, Ib. 717.

407. In Tennessee, where, on a trial for larceny, nothing more is proved than that the goods were stolen, and that they were shortly thereafter found in the possession of the defendant, the burden of proof is cast upon him, and, if unexplained by positive evidence, by the circumstances, or by the character and habits of life of the defendant, the presumption of his guilt becomes conclusive. Hughes v. State, 8 Humph. 75; State v. Brewster, 7 Vt. 118; State v. Weston, 9 Conn. 527.

408. In California, a person cannot be convicted of larceny upon mere proof of possession of the stolen property. People v. Chambers, 18 Cal. 382. It is therefore error in the court to instruct the jury that such possession casts the burden of proof upon the defendant. People v. Ah Ki, 20 Ib. 177. And the rule is not changed by the absence of proof of good character. People v. Gassaway, 23 Cal. 51. But proof of possession, together with proof of other circumstances indicative of guilt, would make a *prima facie* case against the defendant, and thereupon the burden of proof would be shifted to the defendant. People v. Antonio, 27 Cal. 404; People v. Kelly, 28 Ib. 423; People v. Gill, 45 Ib. 285.

409. Although the possession of money of the same kind as that which was recently stolen is usually of slight, if any weight, as evidence to prove the guilt of the person in whose possession it is found, yet it is of greater significance when that kind of money is rarely seen in circulation at that place. People v. Getty, 49 Cal. 581.

410. Where money is stolen, proof that a part of it on the following day was found on the person of the accused, is sufficient corroborating evidence to sustain a conviction on the testimony of an accomplice. People v. Melvane, 39 Cal. 614.

411. The facts that on the morning after the larceny of a horse, the animal was found in the defendant's possession under circumstances which were suspicious, and that he immediately removed the horse to another place, and gave an assumed name, sufficiently corroborate the testimony of an accomplice to sustain a conviction. People v. Cleaveland, 49 Cal. 577.

412. In Nevada, it has been held that when property recently stolen is found in the possession of a person accused of the theft, the accused is bound to explain the possession in order to remove its effect as a circumstance indicative of guilt. In such case, the prosecution may show that the accused has made different statements concerning the

manner in which the possession was acquired. State v. I. En, 10 Nev. 277.

**413.** In New Hampshire, the law does not presume guilt from the exclusive possession of property recently stolen. State v. Hodge, 50 New Hamp. 510. In Iowa, it has been held that the mere possession of stolen property shortly after a burglary, is not *prima facie* evidence of guilt. State v. Reid, 20 Iowa, 413.

**414. Fact of possession of stolen property to go to jury.** The recent possession of stolen property is a circumstance to be submitted to the jury, in connection with other evidence of guilt. The court cannot properly say, in any case, that evidence of good character, or the fact that the possession was undisguised and open, is a satisfactory explanation. State v. Hogard, 12 Minn. 293; Yates v. State, 37 Texas, 202; State v. Williams, 2 Jones, 194; State v. Shaw, 4 Ib. 440.

**415.** An instruction to the jury, in substance, that from proof that property had been stolen, and recently thereafter found in the possession of the accused, which possession was unexplained by him, it was a presumption of law that such property had been feloniously stolen by him, is erroneous. But where the jury were afterward directed to consider the question as one of fact, not only upon this but other proof in the case, it was held that the error was obviated. Stover v. People, 56 N. Y. 315.

**416.** Charging the jury that "the possession of stolen property is not alone sufficient to convict," and "it is merely a guilty circumstance which, taken in connection with other testimony, is to determine the question of guilt," is not erroneous on account of the expression "guilty circumstance." People v. Rodundo, 44 Cal. 538; s. c. 2 Green's Crim. Reps. 411.

**417. Possession of stolen property may be explained.** Although the possession of articles recently stolen raises a presumption that the person in whose possession the same are found is the thief, yet this presumption may be repelled by evidence tending to show how the accused came by them. Way v. State, 35 Ind. 409.

**418.** Where goods are found in the possession of a person charged with larceny, he may rebut the presumption of guilt without explaining how he came by them. Clackner v. State, 33 Ind. 412.

**419.** Although the possession of goods recently stolen is presumptive evidence that such possessor is the thief, and in the absence of satisfactory explanation will warrant his conviction, yet if he give a reasonable account of how he came by them, it is incumbent on the prosecution to show that the account is false. Jones v. State, 30 Miss. 653; Belote v. State, 36 Ib. 96.

**420.** When the explanation given by a party in whose possession stolen property is found, is unreasonable or improbable, the *onus* of proving its truth lies on him. But if it is natural and probable, it devolves upon the prosecution to show its falsity. Garcia v. State, 26 Texas, 209.

**421.** On a trial for larceny, it was held not erroneous for the court to refuse to charge that where a man, in whose possession stolen property is found, gives a reasonable account of how he came by it, the prosecutor is required to show the account to be false, it being necessary to appear, in order to render such an instruction proper, that the account was given to those finding him in possession. Dillon v. People, 4 N. Y. Supm. N. S. 203; 8 Ib. 670.

**422.** A person found in possession of cattle, and accused of removing them from their accustomed range, may prove that he bought them of one who represented that he was the agent of the owner of cattle of the same road brand which had strayed from the herd while passing through the county. Smith v. State, 41 Texas, 168.

**423. Possession of stolen property obtained from carrier.** Possession of stolen goods, which had its inception by a delivery of them to the defendant by a carrier, who had transported them some distance, is not such a possession as "creates a strong presumption" that the defendant committed the larceny, although it might, in connection with other evidence, tend to show his complicity in the crime. Heed v. State, 25 Wis. 421.

**424. Presumption of discharge from former conviction.** An indictment, in addition to the charge of grand larceny, for which the prisoner was tried, contained an averment that the prisoner had been tried and convicted previously of grand larceny, and sentenced to the State prison, from which he had been duly discharged and remitted of such judgment. The record showed a conviction on the 6th of February, 1871, and sentence to imprisonment for one year. The present indictment was found in June, 1872. It was held that the fact that the term for which the prisoner was sentenced had expired, was sufficient evidence to go to the jury that he was discharged of that conviction. Johnson v. People, 65 Barb. 342.

**425. Effect of circumstantial evidence.** When on a trial for grand larceny, the evidence is mainly circumstantial, a charge asked for, that "innocence should be presumed until the case proved, in all its material circumstances, is beyond any reasonable doubt, and that the evidence ought to be strong and cogent to find the defendant guilty," should be given. Moorer v. State, 44 Ala. 15.

**426.** The following instruction was held unobjectionable: That the evidence being wholly circumstantial, if the jury could not reconcile all the facts proved upon any other theory than the guilt of the prisoner, they must find him guilty; but if they could reconcile them with his innocence, they must acquit him. Com. v. Annis, 15 Gray, 197.

*(g) Admissions, declarations and confessions.*

**427. Not to be excluded because owner of property not a witness.** On the trial of an indictment for stealing from the person of another, the admissions of the accused are not to be excluded on the ground that the person from whom the property is alleged to have been stolen, is not examined as a witness. Com. v. Kenney, 12 Metc. 235.

**428. When not sufficient.** On the trial of an indictment for larceny, the *corpus delicti* must be proved otherwise than by the confessions of the accused. Jenkins v. State, 41 Miss. 582.

**429. Silence of defendant.** On a trial for larceny, it is competent to prove that the prisoner when arrested was charged with the theft, and made no reply. State v. Pratt, 20 Iowa, 267.

**430. Offer to pay for property.** The fact that a person charged with larceny offered to pay the owner of the property fifty dollars, is not admissible in evidence against him as a confession, the offer being made under the hope of settlement. Train v. State, 40 Ga. 529.

**431. Confession.** On the trial of an indictment for stealing money, the statement of the prisoner, not voluntarily made, that he would point out the place where the money was buried, in connection with the fact that he did so, and that the money was found there, is admissible in evidence; but not the further statement, "I buried it in the ground there." People v. Hoy Yen, 34 Cal. 176.

**432.** On the trial of a freedman for the larceny of a mule alleged to be the property of J. L. Terrell, the prisoner's confession that he had taken "*Mass. Lee's* mule," is not competent evidence without proof of the identity of J. L. Terrell as "*Mass. Lee.*" And the admission of such confession is error, although the bill of exceptions states that the defendant was on trial for the larceny of a mule, "the property of Lee Terrell," and no objection was made to the evidence on the ground of variance. Gabriel v. State, 40 Ala. 357.

**433.** The owner of stolen goods, on the defendant's expressing sorrow for the offense, promised not to prosecute him, but the officer whom they shortly after met, told them the matter could not be settled, and immediately arrested the defendant. *Held* that the defendant's confessions made subsequently, were admissible in evidence against him, notwithstanding the previous promise of the owner. Ward v. People, 3 Hill, 395.

**434. Declarations of owner of stolen property.** On a trial for grand larceny against two jointly indicted, it having been proved that money, corresponding somewhat

with that which had been taken from the complainant, was found on one of the prisoners, the following evidence was held admissible on the question of identity: That after the prisoners were arrested, the complainant stated that one of them was the man who had taken his money, and that the other was the one who, at the time of the larceny, introduced a game of dice, to which they made no reply; and that the complainant then said that another person had represented himself as city attorney, which both prisoners immediately denied. Armsby v. People, 2 N. Y. Supm. N. S. 157.

**435.** On a trial for stealing a pair of boots, the question was whether or not the defendant took them without the consent of the owner. The defendant proved by two or three witnesses, that he bought the boots of A., and the only evidence to the contrary was the testimony of C. and others, that a dispute arose between the defendant and A. in regard to the boots, about the time they were taken from the store, in which the defendant claimed to have bought them of A., and which A. denied. *Held*, that the testimony as to what A. said was hearsay and inadmissible. Davis v. State, 37 Texas, 227.

**436.** For the purpose of proving a bargain and sale, the declarations of the parties thereto at the time are a part of the *res gestæ*, and competent evidence for the defendant to rebut the presumption of guilt arising from the possession of stolen goods. Leggett v. State, 15 Ohio, 283.

**437.** The declarations of the alleged owner of stolen bank notes, made on the morning after the night of the prisoner's arrest, that "he and the prisoner were drunk together on that night, that he let the prisoner have the bank notes in order to invest them in the grocery business, and that they were not stolen," are not competent evidence for the prisoner, although the alleged owner has since died. Sayres v. State, 30 Ala. 15.

**438. Declarations of defendant in his own behalf.** Where it is proved, on a trial for larceny, that the defendant was accused of the offense when he was arrested, it is competent for him to show what he said in reply to the charge. State v. Patterson, 63 N. C. 520.

**439.** Where, on a trial for larceny, it appears that the defendant took lawful possession of the property, his declaration as to his intention, made at the time, is admissible as part of the *res gestæ*. Maddox v. State, 41 Texas, 205.

**440.** On the trial of an indictment for stealing a cow, the defendant offered to prove that on the night the cow was killed, before the family and others at his house went to bed, he declared openly in their presence that "he intended to kill the cow that night, and take her to the neighboring town to market; that he had received a message from the owner of the cow which authorized him to kill and pay for her. *Held* admissible, as part of the *res gestæ* and to show the intention of the defendant in killing the cow. Cornelius v. State, 7 Eng. 782.

**441.** In the same case, the defendant proved by M., a resident of the neighboring town, that the day before the cow was killed, he had engaged to deliver M. beef the following morning; and he then offered to prove by M. that he told him he had no beef of his own, but that there was one at his house, belonging to another man, which he would kill and pay for, and that he had permission from the owner to do so. *Held* admissible, as part of the *res gestæ*, to show the intention of the defendant in killing the cow. Ib.

**442.** On a trial for larceny, the declarations of the accused as to the manner in which he came into possession of the property are not competent evidence in his favor. Taylor v. State, 42 Ala. 529; Maynard v. State, 46 Ib. 85. It was accordingly held that a person charged with larceny could not be permitted to prove that after the goods came into his possession, he stated that he found them. State v. Pettis, 63 Maine, 124, Appleton, C. J., and Burrows, J., *dissenting*.

**443.** On a trial for stealing a horse, the defendant offered to show that just previous to taking the animal, he had made arrangements with a man to bring the horse back, after he had driven to a certain place. *Held*

admissible to explain the defendant's conduct and intention. State v. Shermer, 55 Mo. 83; s. c. 2 Green's Crim. Reps. 613.

444. Whether, on a trial for larceny, the declaration of the defendant before he was suspected of the theft, and before any search was made, accounting for his possession of the property, is admissible in his favor—*query*. Tipper v. Com. 1 Metc. Ky. 6.

445. **Admission of district attorney.** On the trial of an indictment for stealing sheep, one R., a witness for the prosecution, testified that the defendant and another person drove them to the party in possession. Afterward the district attorney admitted that R. was indicted for receiving the same sheep, knowing them to have been stolen, the following instruction of the court to the jury was held erroneous: "There is no proof in this case that the witness R. has been indicted or now is indicted for any crime, and you will not consider the statement of counsel that indictments are now pending against him in this court, as there is no such evidence." People v. Robles, 34 Cal. 591.

446. **Wife of defendant as witness.** Upon the trial of two for larceny, the wife of one of the defendants cannot be a witness. State v. McGrew, 13 Rich. 316. But where one of two persons jointly indicted for larceny and embezzlement, is tried separately, the wife of the other defendant may testify. Cornelius v. Com. 3 Metc. Ky. 481. And under a joint indictment against several, the wife of one of the defendants, who has not been arrested, and is not on trial, is a competent witness for the prosecution. State v. Drawdy, 14 Rich. 87.

*(h) Guilty knowledge and intent.*

447. **Must be proved.** Under an indictment for the larceny of cattle, which had been seized by the sheriff by virtue of an execution against the defendant, and committed to the care of a third person, the prosecution must show that the defendant had knowledge of the execution and seizure of the cattle by the sheriff. State v. Dewitt, 32 Mo. 571.

448. On the trial of an indictment for stealing a steer, the substance of the instruction was that if the defendant caused the steer to be killed, with the intent to deprive the owner of it, he might be convicted, notwithstanding he had not actually carried the animal away. *Held* erroneous, as the instruction authorized the jury to convict, even though the steer had been killed as an act of malicious mischief, and without any felonious intent, and without removing it. People v. Murphy, 47 Cal. 103.

449. On the trial of an indictment for stealing a horse, it was proved that the defendant hired a horse, promising to return it by evening, but never came back. *Held* that to sustain a conviction, the jury must find that the prisoner intended to steal the horse at the time of hiring it. People v. Jersey, 18 Cal. 337; People v. Smith, 23 Ib. 280.

450. On the trial of an indictment for entering a dwelling-house in the day time, and stealing therefrom, the following instruction was held erroneous: That "if it was proved that the defendant was with the one who stole, as charged in the indictment, and saw him steal without interference on the defendant's part to prevent it, upon the defendant would then devolve the labor of proving himself innocent." People v. Ah Ping, 27 Cal. 489.

451. **Possession of other stolen property.** Evidence that other stolen property besides that described in the indictment was found in the defendant's possession, is admissible to show guilty knowledge; but not that other stolen property was found in the possession of a person with whom the defendant lived as a hired man. State v. Wolff, 15 Mo. 168.

452. **Mental condition of defendant.** On the trial of an indictment for larceny, it appeared that the defendant was addicted to the habitual and excessive use of opium, and that at the time of the supposed offense, he had been deprived of it. *Held* competent for him to show what effect such deprivation would have upon his mental condition, as tending to prove whether or not he was in a condition to commit larceny. Rogers v. State, 33 Ind. 543.

**453. Minority of defendant.** On a trial for larceny, the defense cannot be permitted to prove that the defendant is a minor, for the purpose of showing that in committing the offense, he was acting under the control of his mother. People v. Richmond, 29 Cal. 414.

**454. Mistake.** On the trial of an indictment for stealing a steer, it is competent for the defendant to prove, in order to show the absence of guilty intent, that immediately after the fact was ascertained that the steer was the property of K., he went to him and said, if it was K.'s, he had made a mistake, and that he paid K. the amount for which the steer had been sold; it being for the jury to determine from all the facts in the case, whether the mistake was real or feigned. Hall v. State, 34 Ga. 208.

**455. Right of defendant to explain intent.** On the trial of an indictment for larceny, it is competent for the defendant to introduce any legal proof conducing to show the intent with which he took the property, or whose property it was, or the general or special title to it. People v. Stone, 16 Cal. 369.

**456.** But under an indictment for stealing a portion of the cargo of a vessel, the defendant cannot be permitted to prove a custom for the officers of vessels to appropriate a small part of the cargo, or to show that instances had occurred where the mates of vessels, under a claim of right, had appropriated parts of the cargoes in their possession. Com. v. Doane, 1 Cush. 5.

**457. To be determined by jury.** On the trial of an indictment for larceny, the jury are the judges as to the title of the property, the taking and carrying away, and the intent. The defendant being indicted for stealing a steer, the court charged the jury in effect, that though the defendant killed the steer believing it to be his own, yet when he appropriated it to his own use and benefit, it was evidence of a felonious intent. *Held* error. People v. Carabin, 14 Cal. 438.

**458.** Where there is any testimony tending to show that the defendant took the property alleged to have been stolen, and removed it with the felonious intent charged, the sufficiency of the evidence is wholly a question for the jury. State v. Carr, 13 Vt. 571.

**459.** The owner of a hog, having lost it, it was taken up as an estray by A., who upon inquiring for the owner, was told by the defendant that it belonged to him. The latter then took the animal home, changed the mark on it, and put it in the pen with his other hogs. *Held* proper for the court to charge the jury that it was for them to determine whether the defendant took the hog with a felonious intent, and that if he did, he was guilty of larceny. State v. Fisher, 70 N. C. 78.

(*i*) *Former conviction.*

**460. To be proved.** Upon a charge of larceny after a former conviction of the accused for the same offense, the former conviction and discharge must be alleged in the indictment, be proved on the trial, and passed upon by the jury. Such proof is not incompetent on the ground that it tends to establish bad character by proof of specific acts. Johnson v. People, 55 N. Y. 512.

**461. Waiver of objection.** Where under an indictment for larceny after a former conviction, the objection that the discharge of the accused from imprisonment under the former conviction was not proved, was not raised on the trial, it was held that it was not available on appeal. Ib.

8. Charge of court.

**462. As to finding the value of the stolen property.** Where on a trial for larceny, under an indictment charging the stealing of several sums from the person of another, in the city of New York, amounting to more than $25, the judge was asked to instruct the jury that their verdict ought to indicate the amount stolen, so that if less than $25, the court would not be compelled to sentence the prisoner to the State prison, it was held that the prisoner was entitled to the instruction asked. Williams v. People, 24 N. Y. 405.

**463.** Where on the trial of an indictment for stealing from the person moneys exceed-

ing twenty-five dollars, it was proved that less than that sum was stolen, and the judge refused to charge that the defendant could be found guilty of petit larceny only, but instructed the jury that if they found the defendant had stolen eighteen dollars, they might render a verdict of guilty under the indictment, it was held error. Rhodihan v. People, 5 Parker, 395.

**464.** Where the grade of the offense does not depend upon the value of the property stolen, it is not error for the court to refuse to instruct the jury "they must assess the value of the property according to its value in gold." Yarborough v. State, 41 Ala. 405.

9. Verdict.

**465. Under an indictment charging the larceny of several articles.** Where a person is charged in one count with stealing several articles, he may be found guilty of the larceny of one, and acquitted as to the rest; and if the jury find him guilty of stealing one of the articles, and take no notice of the other, it is an acquittal as to the other articles. Swinney v. State, 8 Smed. & Marsh. 576; People v. Wiley, 3 Hill, 194. But see O'Connell v. Com. 7 Metc. 460.

**466.** Although as a general rule, where a person is charged with having stolen several articles, and he is proved to have stolen only some of them, and not all, a general verdict is good, because the punishment will be the same; yet where the penalty is increased in proportion to the number of articles stolen, the verdict will be bad. State v. Bunten, 2 Nott & McCord, 441.

**467.** Under an indictment charging the larceny of various articles, some of which are well and others insufficiently described, if a general verdict of guilty be found, the insufficiency of the description as to some of the articles has no other effect than to strike them out of the indictment, and the verdict is to be applied to the property which is correctly described. Com. v. Williams, 2 Cush. 582; Warren v. State, 1 Greene, 106.

**468. When there must be a finding of value.** Where the statute fixes the punishment for larceny according to the value of the property stolen, the verdict should find the value, in order that the court may know with certainty of what offense the defendant has been convicted. Ray v. State, 1 Greene, 316. The verdict may be for the aggregate value of the goods stolen. Warren v. State, *supra*.

**469.** The rule by which to value a bank note for the purpose of determining the degree of larceny, is the sum which on its face it promises to pay. State v. Cassell, 2 Har. & Gill, 407.

**470.** A general verdict of guilty on a trial for larceny must be regarded as a finding of the truth of all of the material averments constituting the offense charged, including the allegation of value. Mason v. People, 2 Col. 373.

**471.** In Massachusetts, when the alleged value of property stolen does not exceed one hundred dollars, the jury need not find any precise sum as the value, and a general verdict of guilty will necessarily include the finding of value. Com. v. McKenney, 9 Gray, 114.

**472.** In Illinois, where a verdict for larceny does not find the value of the property stolen, it is ground for arresting the judgment, and for a new trial. Collins v. People, 39 Ill. 233.

**473. Finding value of part of articles stolen.** Notwithstanding only the collective value of property alleged to have been stolen is stated in the indictment, yet if the jury find the defendant guilty of stealing a part only of the property, and in their verdict state the value of the articles so stolen by him, judgment may be rendered on the verdict. Gilmore v. McNeil, 46 Maine, 532.

**474.** Under an indictment alleging the larceny of bank bills of the value of $367, the jury found the defendant guilty of stealing bank bills of the value of $317, only. *Held* not a ground for arrest of judgment; it being like the case of an allegation of a larceny of ten bank bills, and a verdict of guilty as to nine of the bills. Com. v. Duffy, 11 Cush. 145; approving Com. v. Sawtelle, Ib. 142. See Com. v. Gallagher, 16 Gray, 240; Com. v. Hussey, 111 Mass. 432.

**475. Finding collective value.** On a trial for larceny, the verdict was that the

prisoner was guilty of stealing all of the articles to which a collective value was assigned in the indictment. *Held* no ground for arrest of judgment; it being only in cases where the verdict negatives the stealing of a part of the articles, that an allegation of the collective value will be held insufficient. State v. Hood, 51 Maine, 363.

476. An indictment for larceny charged the defendant with stealing certain goods and chattels, and then gave a list of the goods with their value, amounting in the aggregate to one hundred dollars. The jury found the prisoner guilty of grand larceny. *Held* that they should have specified the value, or found the defendant guilty of the offense charged in the indictment, and that not having done so, the verdict was void for uncertainty. State v. Coon, 18 Minn. 518.

477. In Mississippi, the first count of an indictment charged the stealing of a horse of the value of seventy dollars; a saddle of the value of ten dollars; a bridle of the value of one dollar; a blanket of the value of one dollar; ten dollars in specie, and a bank note for ten dollars. The second count charged the stealing of a promissory note for twenty-two hundred dollars. The jury found a verdict of guilty, without assessing any value to the property, or any portion of it. *Held* sufficient to warrant a sentence for grand larceny. Wilborn v. State, 8 Smed. & Marsh. 345.

478. In New Hampshire, on a trial for larceny under the statute (R. S. ch. 215, § 13), if the jury find a verdict of guilty, they must also find the value of the property stolen. Where the indictment charged the stealing of a breast pin of the value of ten dollars, and a watch of the value of one hundred dollars, and it was proved that the property was not worth as much as alleged, and there was a verdict of guilty simply, it was held that the judgment must be reversed. Locke v. State, 32 New Hamp. 106.

479. In Ohio, where on the trial of an indictment containing counts for horse stealing and grand larceny, the jury found a general verdict of guilty, assessing the value of the whole property, without finding the amount charged in each count, the judgment was reversed. Barton v. State, 18 Ohio, 221.

**480. Where another offense is charged.** Where the indictment charges in one count the larceny of goods, and in another the receiving them knowing that they were stolen, there may be a general verdict of guilty. State v. Speight, 69 N. C. 72; State v. Baker, 70 Ib. 530; State v. Bailey, 73 Ib. 70.

481. Where on the trial of an indictment for larceny, it appears that it was committed in connection with a burglary, the prisoner may be convicted of the larceny as a separate and distinct offense. There is no merger in such a case which is available to the accused by way of defense, until there has been a trial and conviction. People v. Smith, 57 Barb. 46.

**482. In case of charge against two.** Under a joint indictment against two for stealing the same goods, one cannot be convicted of petit larceny, and the other of grand larceny. State v. Davis, 3 McCord, 187.

10. Sentence.

**483. To be consistent with verdict.** Where under an indictment for stealing several articles, there is a general verdict of guilty, the court cannot impose the punishment for stealing only one of the articles, although the larceny of only one was proved; but the judgment must conform to the verdict. State v. Kersh, 1 Strobh. 352.

**484. For part of offense found.** Where an indictment for burglary alleges a breaking and entering in the night with intent to steal, and an actual stealing, the prosecution, after a general verdict of guilty and before sentence, may enter a *nolle prosequi* as to so much of the indictment as charges a breaking and entering, and the defendant may be sentenced for the larceny. Jennings v. Com. 105 Mass. 586.

**485. Defendant disfranchised.** In Indiana, the law prescribes as a part of the punishment, on a conviction of petit larceny, that the defendant be disfranchised, and rendered incapable of holding any office of trust or profit, for a determinate period to

be found by the jury. Doty v. State, 6 Blackf. 529.

*See* RECEIVING STOLEN PROPERTY.

# Lasciviousness.

1. WHAT CONSTITUTES.
2. INDICTMENT.
3. EVIDENCE.

## 1. WHAT CONSTITUTES.

**1. Wanton behavior.** When wanton and lascivious acts are practiced by an individual toward another of a different sex, against the will and consent of such person, no one else being present, such acts constitute the offense of "lascivious carriage," within the meaning of the statute of Connecticut. Fowler v. State, 5 Day, 81.

**2.** Where a man without provocation, asks another person's wife to go to bed with him, his intention in using the language, as well as the purpose for which he used it, makes it in law both obscene and vulgar. Dillard v. State, 41 Ga. 278, Brown, C. J., *dissenting*.

**3. Indecent exposure.** The indecent exposure of one's person on a public highway, is a misdemeanor at common law. State v. Rose, 32 Mo. 560. The offense of indecent exposure does not depend on the number of persons to whom one thus exposed himself. State v. Millard, 18 Vt. 574.

**4.** In Tennessee, where a person permitted his slaves to pass about in public view indecently naked, it was held that he was liable to indictment for lewdness. Britain v. State, 11 Humph. 203.

**5.** In Vermont, under the statute (R. S. ch. 99, § 8), where a man exposes his person indecently to a woman, and solicits her to have sexual intercourse with him, and persists in so doing, against her remonstrance, he is guilty of "open and gross lewdness and lascivious behavior," and liable to indictment. State v. Millard, *supra*.

**6. Obscene language.** The use in public, of grossly obscene language, is indictable as an offense against public morals and decency, at common law. State v. Appling, 25 Mo. 315.

**7. Keeping house of ill-fame.** To constitute the offense of keeping a bawdy-house, a house or room must be kept for the accommodation and entertainment of lewd people. Therefore, a female is not amenable to that offense, who lives alone, and habitually admits persons to an illicit cohabitation with her. State v. Evans, 5 Ired. 603.

**8.** On the trial of an indictment for keeping a house of ill-fame, the defendant may be convicted, although the house is owned by his wife as her separate property, and the business is carried on by her and she takes the profits, in which he does not participate. Com. v. Wood, 97 Mass. 225.

**9.** The statute of Connecticut (R. S. tit. 6, § 89), which provides that "every justice of the peace may, on the complaint of any informing officer, require sureties of the peace and good behavior from any person who shall be guilty of frequenting, keeping or maintaining houses reputed to be houses of bawdry and ill-fame," with right of appeal, is not unconstitutional, and a person may be convicted who keeps but one such house. State v. Main, 31 Conn. 572.

**10. Renting house for prostitution.** The owner of a house who rents it to be used and kept as a house of prostitution is to be deemed to keep such house, and is liable to indictment and conviction as the keeper of a bawdy-house. The principle of this rule applies to any person who is directly concerned in the keeping of such a house. Lowenstein v. People, 54 Barb. 299.

**11.** A person who has the control of a house, and knowingly rents it and permits it to be used as a house of prostitution, is liable to punishment therefor, although he is a mere agent. Ib.

**12. Lascivous cohabitation.** In Michigan, to constitute the offense of lewd and lascivious cohabitation under the statute, the cohabitation must be lewd and lascivious on the part of both. If either was acting in good faith, neither is guilty. The charge must therefore be joint, and both must be joined as defendants, unless one of the parties is unknown or has since died. But

they may be tried separately, and one convicted and sentenced before the other is tried. The following indictment was therefore held bad in not charging a joint offense: That "T. D. did lewdly and lasciviously associate and cohabit with one M. S., he the said T. D. being then and there a man, and she the said M. S. being then and there a woman, and they, the said T. D. and M. S., not being then and there married to each other." Delany v. People, 10 Mich. 241.

**13.** In Tennessee, where two persons of the opposite sex cohabit together, ostensibly as husband and wife, without in fact being married, they are liable to indictment, although the fact of their being unmarried may not be generally known. State v. Boling, 2 Humph. 414.

**14.** In Illinois, to constitute the offense of fornication within the meaning of the statute, the parties must cohabit openly and notoriously. Searls v. People, 13 Ill. 597. And in South Carolina, it was held that an indictment for "living in open lewdness, whoredom and adultery," was not supported by simply proving adultery. State v. Brunson, 2 Bail. 149. And see Com. v. Calef, 10 Mass. 153.

**15.** In Massachusetts, a husband obtained a divorce from his wife for desertion. The wife subsequently went to another State, where she was married to another man, with whom she returned to Massachusetts and there lived. *Held* that she was not indictable under the statute (R. S. ch. 130, § 4) for lewd and lascivious behavior. Com. v. Hunt, 4 Cush. 49.

**16.** Simple incontinence is not punishable at common law. Com. v. Jones, 2 Gratt. 555.

2. Indictment.

**17. When it will lie.** All acts and conduct calculated to corrupt the public morals, or to outrage the sense of public decency, are indictable. Williams v. State, 4 Mo. 480.

**18. Joinder of parties.** Several persons in the same place, but occupying different houses, and having no community of interest, may be joined in an indictment for keeping bawdy-houses. State v. McDowell, Dudley, S. C. 346.

**19.** But an indictment which charges two persons in a single count with obscenity is bad for duplicity, the offense being personal. State v. Roulstone, 3 Sneed, 107.

**20. Name of defendant.** The defendant pleaded to an indictment for keeping a house of ill-fame, that her name was Mary Y. Homer and not Mary Homer. *Held* that if the letter Y. was to be regarded merely as the initial letter of the middle name it was doubtful whether the plea was sufficient; that the name of which that was the initial letter should have been set forth in the plea. State v. Homer, 40 Maine, 438.

**21. Charging lascivious behavior.** An indictment for open and gross lewdness or lascivious behavior must set out the acts which are charged to constitute the offense, and state that they were committed openly and notoriously. It is not sufficient to allege generally that the defendant was guilty "of open gross lewdness and lascivious behavior, by then and there publicly cohabiting with one A. B.," but the specific act of lewdness must be stated. Dameron v. State, 8 Mo. 494; State v. Moore, 1 Swan, 136.

**22.** In New Hampshire, where a complaint alleged that the defendant was guilty of indecent and rude conduct in a public street contrary to the statute, without any further description of the acts complained of, it was held insufficient. State v. Pierce, 43 New Hamp. 273. And see State v. Goulding, 44 Ib. 284.

**23.** In Massachusetts, a complaint under the statute (Gen. Stats. ch. 165, § 28), which alleges that the defendant "was, and still is, a lewd, wanton and lascivious person in speech and behavior," is not bad either for uncertainty or duplicity, and it need not conclude "to the common nuisance of the people of the commonwealth." Com. v. Parker, 4 Allen, 313.

**24. Averment of indecent exposure.** An indictment which charges an indecent and scandalous exposure of the naked person to public view, in a public place, is sufficient, without alleging that the act was committed

in the presence of one or more of the citizens of the State. State v. Roper, 1 Dev. & Batt. 208.

25. An indictment which alleges that the defendant, "devising and intending the morals of the people to debauch and corrupt," "unlawfully, scandalously, and wantonly" exposed his naked body to the view of persons present, sufficiently charges a criminal intent in the indecent exposure of himself, and need not conclude, "to the common nuisance of all the citizens," &c. Com. v. Haynes, 2 Gray, 72.

**26. Description of common night walker.** In an indictment for being a common night walker, the offense (as in the cases of common barrators, common scolds, and the like), may be described in general terms. State v. Dowers, 45 New Hamp. 543.

**27. Charge of publication or sale of indecent print.** In an indictment charging that the defendant did "publish an indecent and obscene newspaper called," &c., the composition should be set out, or such description given of it that the court can judge of its character. State v. Hanson, 23 Texas, 232.

28. An indictment for selling an obscene publication should, in general, set forth the publication *in hæc verba*. But when the publication is of so gross a character that spreading it upon the record will be an offense against decency, it may be excused. State v. Brown, 27 Vt. 619.

**29. Charge of keeping house of ill-fame.** An indictment for keeping a house of ill-fame need not specify the street in which the house is situated. And where the offense is created by statute, the words "to the common nuisance," &c., are not essential to the validity of the indictment. State v. Stevens, 40 Maine, 559.

30. It is no objection to an indictment for keeping and maintaining a building for prostitution, lewdness, illegal gaming, and the unlawful sale of intoxicating liquors, which is described as a tenement on the fourth floor, fronting on a certain street, that there are three other rooms not occupied by the defendant, on the same floor, fronting on the same street. Com. v. Hill, 14 Gray, 24. And see Com. v. Donovan, 16 Gray, 18.

**31. Charge of unlawful cohabitation.** An indictment for illegal cohabitation should allege that one of the parties was a man and the other a woman, and that they cohabited as husband and wife. State v. Dunn, 26 Ark. 34.

32. Where an indictment alleged that "A. did take into his house one B., and they did then and there have one or more children without parting, or an entire separation, they, the said A. and B., never having been lawfully married," it was held that it sufficiently showed that the parties were of different sexes. State v. Fore, 1 Ired. 378.

33. Under a statute providing that "if any man or woman shall live together as husband and wife, without being married, each of them shall be deemed guilty of a misdemeanor," an indictment which alleges that a woman "did bed to and live" with a man is insufficient. Crouse v. State, 16 Ark. 566.

34. An indictment is sufficient which alleges that the defendants, a man and woman, lived together in fornication. Lawson v. State, 20 Ala. 65. And where the indictment charged that the defendant, an unmarried man, lived in open and notorious fornication with a woman, it was held that it need not allege that she was unmarried. State v. Gooch, 7 Blackf. 468.

35. In Massachusetts, an indictment under the statute (Gen. Stats. ch. 165, § 4), for continuing to cohabit with a second wife, the defendant having a former wife living, is sufficient which alleges that the second marriage took place on a certain day, and that the defendant "afterward did cohabit and continue to cohabit with said A. at C., in said county for a long space of time, to wit., for the space of six months." Com. v. Bradley, 2 Cush. 553; Com. v. Godsoe, 105 Mass. 464.

### 3. Evidence.

**33. Complainant as witness.** On the trial of an information for lascivious carriage and behavior, the complainant is a competent witness. Fowler v. State, 5 Day, 81.

**37. Intent of defendant.** Under an in-

dictment for exposing the naked body in public, the intent with which the act was done is material. Miller v. People, 5 Barb. 203.

**38. Proof of open lewdness.** An indictment for open gross lewdness and lascivious behavior, will not be supported by evidence of lewdness or such behavior in secret. Com. v. Catlin, 1 Mass. 8.

**39.** On a trial for open and notorious lewdness, it is error to permit a witness to testify that "it was the general rumor of the neighborhood that the defendants were living together in adultery." Buttram v. State, 4 Cold. Tenn. 171; approving Fox v. State, 8 Humph. 63.

**40.** A charge for open and notorious lewdness may be proved by circumstantial evidence. Peak v. State, 10 Humph. 90.

**41. Acts of illicit intercourse.** Under a charge of illicit intercourse, within a limited period, evidence may be given of acts anterior to that period, in connection with, and in explanation of acts of a similar character occurring within the same period, although such former acts, if treated as an offense, would be barred by the statute of limitations. Lawson v. State, 20 Ala. 65.

**42.** Where acts of indecent familiarity have been explained by previous acts of illicit intercourse, proof of subsequent illicit intercourse becomes corroborative, and is admissible. Ib.

**43. Proof of renting house for purposes of prostitution.** Where on a trial of an indictment for leasing premises for the purpose of being used in keeping a bawdy-house, there was no evidence that the defendant in renting the house knew that the lessee was an improper character, or that the house was to be used for an improper purpose, it was held that a conviction could not be sustained. State v. Leach, 50 Mo. 535.

**44.** In Iowa, on the trial of an indictment under the statute (Code, § 2712), for leasing a house knowing that the lessee intended to use the same as a place of resort for prostitution, and for knowingly permitting it to be so used, the prosecution must show such acts or circumstances as shall satisfy the jury that the lessor, knowing that the house was being used for the illegal purpose, after the execution of the lease, not only remained inactive, but consented to such use; and he is not bound to prove that he took some step to manifest his dissent. Abrahams v. State, 4 Iowa, 541; s. c. 6 Ib. 117.

**45. Proof of evil reputation of house.** On a charge of keeping a house of ill-fame resorted to for the purpose of prostitution and lewdness, the former may be proved by the reputation of the house, the latter, by the testimony of persons knowing the fact that prostitutes and lewd persons resorted there and committed acts of prostitution; and in determining the purpose for which such persons resorted to the house, the jury may take into consideration the reputation of the house. O'Brien v. People, 28 Mich. 213.

**46.** On the trial of an indictment for keeping a bawdy-house, it may be proved that convicted prostitutes resorted to the house of the accused; that females were arrested there in the night charged with being prostitutes; and that the accused procured bail for them. Harwood v. People, 26 N. Y. 190.

**47.** Where on the trial of a complaint for keeping a house of ill-fame, it appeared that a former prosecution for the same offense was discontinued upon payment of the costs by the defendant, it was held that evidence was admissible of the reputation of the house, at the time of, and prior to the former prosecution. State v. Main, 31 Conn. 572.

**48. Proof of keeping house of ill-fame.** The offense of keeping a bawdy-house does not respect the ownership of the house, but its criminal management. It is therefore proper to show on the trial of an indictment for such offense, that the defendant procured a woman from a neighboring town to go and live in the house; and it is immaterial whether he acted as principal, or as the agent or servant of another. As the nuisance consists in drawing together dissolute persons engaged in unlawful practices, evidence is admissible to show the character of the persons who frequent the house. The gist of the offense is the keeping or managing

such a house to the public detriment, and under a general allegation particular instances may be proved. State v. McGregor, 41 New Hamp. 407.

49. In Massachusetts, an indictment for keeping a house of ill-fame resorted to for prostitution and lewdness, within the statute (Gen. Stats. ch. 87, §§ 6, 7), will not be sustained by proof of a single act of illicit intercourse. There need not be proof of numerous acts of prostitution or lewdness permitted by the keeper of the house, but it must be shown that it was kept as a place of resort for such purposes. Com. v. Lambert, 12 Allen, 177.

**50. Proof of unlawful cohabitation.** An indictment for unlawful cohabitation, under the statute of Massachusetts of 1784, ch. 40, § 6, is not supported by proof of a single act of criminal intercourse between a married man and an unmarried woman. Com. v. Calef, 10 Mass. 153.

51. Proof of two acts of private incontinence, are not sufficient to sustain an indictment for lewd and lascivious cohabitation. State v. Marvin, 12 Iowa, 499.

52. Proof of adultery will not support an indictment for "living in open lewdness, whoredom and adultery." State v. Brunson, 2 Bail. 149.

53. On the trial of an indictment for fornication and adultery, it is sufficient to show circumstances from which the jury may reasonably infer the guilt of the defendants. Where in such case, a witness testified that he went early one morning to the house of the man, and on knocking was, after some delay, admitted by the woman who came to the door with her dress on but unfastened; that the man was in the only bed in the room; that the shoes of the woman were near the head of the bed, and that the bed seemed to be very much tumbled; it was held that the court properly refused to charge the jury that there was no evidence from which the jury might infer the criminality of the defendants. State v. Poteet, 8 Ired. 23; and see Peak v. State, 10 Humph. 99.

**54. Proof of marriage.** In Massachusetts, on the trial of an indictment for lascivious cohabitation, one of the parties being married, it was held that such marriage must be proved by the record of the clergyman or by witnesses who were present at the ceremony. Com. v. Barbarick, 15 Mass. 163.

**55. Admissions and declarations.** On the trial of a man and woman jointly indicted for living together in fornication, the confessions of the woman are admissible in evidence against her. But such confessions can only operate against the party making them. Lawson v. State, 20 Ala. 65.

56. On the trial of a man and woman for living together in fornication, the admission of the woman that her codefendant was the father of a bastard child of which she was delivered more than twelve months after the finding of the indictment, is admissible in evidence against her when connected with other acts committed within the period embraced in the indictment. Ib.

57. In such case, a conversation between the mother of the woman and the doctor, in the room in which the woman was lying, a few minutes after she had been delivered of a child, as to the person to whom the doctor should look for his pay, in which conversation she took no part, is not admissible in evidence against her as tending to show her admission of the truth of their statements. Ib.

58. The refusal of the man to pay for the lying-in expenses of the woman, and his declaration that the child was not his, are not admissible in evidence in his behalf, when not connected with any conversation or admission introduced by the prosecution. Ib.

*See* Adultery; Bigamy; Incest; Nuisance; Obscene publications.

## Letter.

**1. Unlawful to open.** When a letter is once placed in the post office, it is in the custody of the law, and no one except the writer, or person to whom it is addressed, or his agent, has the right while it is there, to open it for the mere purpose of ascertaining its contents. The fact that it was agreed between a criminal and the sheriff that the

latter might inspect all the letters written by the former before they left the jail, and that the criminal violated the agreement, would not authorize the sheriff to open the letter after it was in the post office to ascertain its contents. U. S. v. Eddy, 1 Bis. 227.

**2. Indictment.** An indictment for opening the letter of another, contrary to the act of Congress of March 3d, 1825 (4 Stat. at Large, 109), will be sustained, although the letter was not sealed, and was not in the custody of any person having lawful charge of it, and although it was addressed to a person under a fictitious name; and the indictment need not charge that the opening was unlawful, or that the person to whom the letter was addressed was a real person. U. S. v. Pond, 2 Curtis C. C. 265.

**3. When defendant entitled to acquittal.** On the trial of an indictment for opening a letter which had been in the custody of a mail carrier, before it had been delivered to the person to whom it was directed, with a design to obstruct correspondence, &c., as it appeared that the letter was delivered by the mail carrier at the place to which it was directed; and the defendant had resorted to no fraud or artifice to get possession of it; and as there was no testimony showing either the opening or destruction of the letter, except the defendant's admissions, the court directed an acquittal. U. S. v. Mulvaney, 4 Parker, 164.

*See* THREATENING TO ACCUSE OF CRIME.

# Libel.

1. MEANING AND NATURE.
2. INDICTMENT.
3. EVIDENCE.
4. VERDICT.
5. WRIT OF ERROR.

## 1. MEANING AND NATURE.

**1. What is.** To charge a person with being "a hireling murderer," if false and malicious, is slander; and if it is written and published, it is a libel. Smith v. State, 32 Texas, 594.

**2.** A malicious publication, the obvious design and tendency of which is to bring the subject of it into contempt and ridicule, is a libel, although it imputes no crime. State v. Henderson, 1 Rich. 179.

**3.** Where the tendency of the publication was to degrade a man in the opinion of the community, impeach his integrity as a juror, and make him an object of public distrust and contempt, it was held that it was a libel. Com. v. Wright, 1 Cush. 46.

**4.** To publish of a person that he is habitually profane, is a libel. Com. v. Batchelder, Thach. Crim. Cas. 191.

**5. Need not be ill-will.** Although malice is of the essence of libel, yet it is not necessary to render an act malicious that the party be actuated by a feeling of hatred or ill-will toward the individual, or that he entertain and pursue any general bad purpose or design. Com. v. Snelling, 15 Pick. 337; Com. v. Bonner, 9 Metc. 410.

**6.** The editor of a paper is liable for libelous matter inserted therein, unless done without his knowledge or consent. Com. v. Kneeland, Thach. Crim. Cas. 346.

**7.** The fact that the publication is true does not affect the character of the libel as a public offense. Com. v. Blanding, 3 Pick. 304.

**8. What is not.** A conspiracy to publish what is true of a person, is not a criminal offense, if done from good motives and for justifiable ends. De Bouillon v. People, 2 Hill, 248; *contra*, Com. v. Blanding, *supra*. Simply charging another with forging, does not impute a criminal offense. Jackson v. Weisiger, 2 B. Mon. 214.

**9.** Where the object of the publication is the removal of an incompetent person from office, or the prevention of his election, or to impart useful information to the community, or to those who have a right to it, the occasion is lawful, and the writer justified. State v. Burnham, 9 New Hamp. 34.

**10.** The following is not libelous: "The above druggist in the city of Detroit, refusing to contribute his mite with his fellow merchants, for watering Jefferson avenue, I have concluded to water said avenue in front of Pierre Felle's store for the week end-

ing June 27, 1846." People v. Jerome, 1 Mann. 142.

**11.** The reception of a libelous letter which has not been read or heard by some third person, does not constitute the publication of a libel; though the sending of such a letter is indictable, if the intention in sending it was to provoke a breach of the peace. Hodges v. State, 5 Humph. 112.

2. INDICTMENT.

**12. Must show that the publication is a libel.** An indictment for libel must set forth matter which is *prima facie* libelous, and whether or not it is libelous is to be determined by the court; or it must charge that the matter set out, although not a libel on its face, was designed to be so, and then the question is to be left to the jury. State v. White, 6 Ired. 418. The charge in an indictment for libel need not be more specific than the libelous publication. Melton v. State, 3 Humph. 389.

**13. What it ought to contain.** It must be expressly averred, when it does not appear from the libel itself, who was its author, the persons of and concerning whom it was written, and its object. Where the writing is not libelous on its face, but has a latent meaning which renders it so, the latent meaning must be set forth by way of averment or colloquium, so as to show on the face of the indictment that the writing is a libel. State v. Henderson, 1 Rich. 179; State v. White, 6 Ired. 418.

**14.** An indictment which alleges that the defendant published a libel "tending to blacken the honesty, virtue, integrity and reputation of the said A. B., and thereby expose him to public hatred, ridicule and contempt, in which said false, scandalous and malicious libel there are defamatory and libelous matters of and concerning the character of the said A. B.," sufficiently charges that the libel was in relation to A. B. Taylor v. State, 4 Ga. 14.

**15. Innuendo.** The office of an innuendo is to point out and refer to matter previously expressed, to explain the meaning of the publication when it is obscure, and to indicate the persons charged to have been libeled where they are referred to in ambiguous terms. Giles v. State, 6 Ga. 276.

**16.** Where the persons charged to have been libeled are referred to ambiguously, it is not enough to charge generally that the paper was composed and published "of and concerning" those persons, with innuendos accompanying the ambiguous terms that they mean those persons. There must be a positive averment that the defendant under and by the use of the terms employed wrote of and concerning those persons. State v. Henderson, 1 Rich. 179.

**17. Averment of publication.** An indictment which charges that the defendant published a libel as an advertisement in a newspaper, and sets forth the libel signed by a third person, is sufficient without alleging that the libel was written by such third person. Taylor v. State, 4 Ga. 14. Charging that the defendant sent the libel is a sufficient averment of publication. State v. Barnes, 32 Maine, 530.

**18. Libelous matter must be set out.** The indictment will be bad unless it set out the alleged libel in words and figures. Professing to set it out according to its substance is not sufficient. State v. Brownlow, 7 Humph. 63; even though an exact copy of the libel be given. State v. Goodman, 6 Rich. 387; Com. v. Wright, 1 Cush. 46; Com. v. Sweney, 10 Serg. & Rawle, 173.

**19.** Where it was charged that the libel "contained among other things in substance the following false, malicious and libelous matters, according to the tenor and effect following, that is to say," it was held that as the indictment professed to set forth the substance and not the words of the libel, it was insufficient. State v. Brownlow, 7 Humph. 63.

**20.** An indictment alleged that the defendant "did write a certain false malicious libel of and concerning the said A. B., which said false, malicious and defamatory libel is of the following purport and effect, that is to say," and then set out a copy of the libel within inverted commas. Upon motion in arrest of judgment, it was held that the indictment was bad, for the reason that it did not profess to set out the words.

of the libel. State v. Goodman, 6 Rich. 387.

**21.** Where the indictment alleged that the defendant published an account of an illegal lottery, and set forth the lottery scheme, which showed that the prizes consisted of sums of money, it was held sufficient, although it was not otherwise averred that the lottery was set on foot for the purpose of disposing of money, land, &c. Charles v. People, 1 Comst. 180.

**22.** The whole of a book containing defamatory matter need not be set out. Describing the libel as a letter, circular or pamphlet is not objectionable, it being only the statement of a mode of publication. State v. Barnes, 32 Maine, 530.

**23.** Where in setting out a libel the omission or addition of a letter does not alter the word so as to make it different, the variance is not material. Com. v. Buckingham, Thach. Crim. Cas. 29.

**24.** On the trial of an indictment for libel, to the printed matter offered in evidence there were appended words and figures constituting a date or memorandum of the time and place where it purported to have been published, with a fictitious mark or signature, while nothing of the kind was averred in the indictment. *Held* that the variance was not material. Com. v. Harmon, 2 Gray, 289.

3. Evidence.

**25. Descriptive averment.** An averment which is descriptive of the offense must be proved. The charge of sending to more than one person is not of that character, but is only a statement of the mode in which the offense is in part effected. State v. Barnes, 32 Maine, 530.

**26. Proof of publication.** Where an indictment alleged that a libel was published by the defendant on the 21st of November, and the publishing was proved to have been on the 19th of the same month, it was held that there was no variance, though it would have been otherwise if the allegation had been that the libel was published in a paper *bearing date* November 21st. Com. v. Varney, 10 Cush. 402.

**27.** In Massachusetts, where an indictment for a libel alleged that it was contained in a newspaper printed and published by two, and it was proved that the newspaper was printed and published by only one of the persons named, it was held that under the statute (of 1864, ch. 250, § 1) the variance was not material. Com. v. Morgan, 107 Mass. 199.

**28.** Where on the trial of an indictment for libel, the defendant testifies in his own behalf, he may be compelled to state on cross-examination, whether or not he was the publisher of the newspaper which contained the libel, although on his direct examination he was asked only as to his knowledge of the publication of the libel. Ib.

**29. Publication by defendant, when presumed.** A person who is proved to have once written the libel which is subsequently published, will be deemed the maker of it, unless he rebut the presumption by showing that another person is the author. The following instruction was held proper: That if the jury believed that the libel was in the handwriting of the defendant, was afterward found by the roadside and read, the presumption was that it was published by him or by his authority, and that if it was not so published, the burden of proof was on the defendant to show how it came out of his possession. Giles v. State, 6 Ga. 276.

**30. Explanation of meaning.** On the trial of an indictment for libel, the meaning of the language used by the defendant, when it is ambiguous, or consists of expressions not in common use but has a known meaning among certain persons, may be explained. Thus it was held that the words "State cop," in a libel, might be shown to mean a deputy State constable. Com. v. Morgan, 107 Mass. 199.

**31. Admissions.** The admissions of the editor of the newspaper as to the author of the publication made in his absence, are not admissible until it is proved that the defendant was the author. Com. v. Guild, Thach. Crim. Cas. 329.

**32.** On the trial of an indictment for a libel, admissions made by the complainant

are in general inadmissible in behalf of the defendant, even to prove facts tending to a justification. Otherwise as to conversations or declarations which are a part of the *res gestæ*. De Bouillon v. People, 2 Hill, 248.

33. **Presumption of malice.** When libelous matter is published, malice or the intent to injure is presumed, and the burden of proof is on the accused, to show that the publication was made under such circumstances as to bring it within the class of privileged communications. Smith v. State, 32 Texas, 594.

34. When a libel is sold in a bookseller's shop, by a servant of the bookseller in the ordinary course of his employment, or is published in a newspaper, it is sufficient to charge the bookseller or the proprietor of the newspaper with the publication. In the latter case, proof that the defendant had never seen the libel, and was not aware of its publication until it was pointed out to him by a third party, and that an apology and retraction were subsequently published in the same newspaper, will not rebut the presumption of guilt arising from the publication; his want of knowledge implying criminal neglect to exercise proper supervision over his subordinates. Com. v. Morgan, 107 Mass. 199.

35. **Other publication.** On a trial for libel, proof may be given of other libelous publications of the defendant of the same nature, against the same person, for the purpose of showing malice; but not as evidence that the defendant published the libel charged. State v. Riggs, 39 Conn. 498; s. c. 1 Green's Crim. Reps. 558.

36. **Proof in justification or mitigation.** In Massachusetts, it has been held that to establish a justification under the statute, the facts must be proved as strictly and precisely as if pleaded in a civil action. Com. v. Snelling, 15 Pick. 337.

37. A libel which charges hardness toward the poor, and dissoluteness of morals derived from instances of bad conduct previously stated, cannot be justified by other instances not stated in the publication. De Bouillon v. People, 2 Hill, 248.

38. Where on the trial of an indictment for a libel, the defendant does not give the truth in evidence in defense, he will not be permitted to show that the person libeled treated a portion of the libel as a joke originated by himself; the public scandal and injury to public morals remaining, however lightly he may have treated it. Com. v. Morgan, 107 Mass. 199.

39. Evidence that the complainant had used violent, abusive and slanderous words concerning the defendant, which had been communicated to him about a month previous to the publication of the libel, is not admissible in mitigation of damages. Graves v. State, 9 Ala. 447.

40. **Truth of publication.** Although the truth of the libel be no justification, yet the defendant may show the object of the publication to have been justifiable, after which he may give its truth in evidence, to negative the malice and intent to defame. Com. v. Clap, 4 Mass. 163; Com. v. Blanding, 3 Pick. 304.

41. In Massachusetts, prior to the year 1826, the truth of a libel was not admissible in evidence. In that year a statute was passed permitting such evidence to be given, but providing that it should not be a justification unless on the trial, it was made satisfactorily to appear that the matter charged as libelous was published with good motives and for justifiable ends. Com. v. Batchelder, Thach. Crim. Cas. 191.

42. In New York, the libel cannot be justified by proving the truth, unless it be further proved that the publication was made from good motives and for justifiable ends. De Bouillon v. People, 2 Hill, 248.

43. In Virginia, on the trial of an indictment for libel, the truth may be given in evidence in mitigation of the fine. Com. v. Morris, 1 Va. Cas. 176.

44. In South Carolina, it was held that the defendant could not prove the truth of the libel, unless the prosecution desired it. State v. Lehre, 2 Brev. 446.

45. A person incurs the same liability for giving currency to a slander or libel as if he had originated it. Evidence of common report, or of publications in newspapers, is not

admissible to prove the truth of the charges. State v. Butman, 15 La. An. 166.

**46.** But where a writing claimed to be a libel, alleged that the prosecutor was called a murderer, and forsworn, it was held that the defendant might introduce evidence to show that there was, and long had been, a general report in the neighborhood, that the prosecutor was a murderer and forsworn. State v. White, 7 Ired. 180.

**47.** A written statement that the prosecutor was charged and proved guilty, by the affidavits of seven or eight of the most respectable gentlemen of the county, of both fraud and lying, is not justified by affidavits employed before an ecclesiastical tribunal upon a charge made by the defendant against the prosecutor. When such evidence is introduced, the prosecution may inquire what was the decision of that tribunal. Graves v. State, 9 Ala. 447.

**48. Proof of character.** On a trial for conspiracy to publish a libel imputing moral delinquencies to a clergyman, after evidence had been given as to the truth of the imputations, it was held that the character of the defendant for good morals, piety, and an aversion to hypocrisy, might be shown on the question of motive. De Bouillon v. People, 2 Hill, 248. In such case, evidence of the defendant's general good character would be too indefinite, and therefore, inadmissible. Ib.

**49. Waiver by defendant.** Although in prosecutions for libel, the defendant is entitled to have the question of libel or no libel submitted to the jury, yet it is competent for him to waive this right, in which case he cannot complain of a ruling of the court, as matter of law, that it is a libel. State v. Goold, 62 Maine, 509; s. c. 2 Green's Crim. Reps. 482.

### 4. Verdict.

**50. What to contain.** In South Carolina, the jury may by their verdict determine whether the matter charged be or be not libelous, as well as the questions of fact as to the publication of the writing, and its truth. State v. Lehre, 2 Brev. 446.

**51.** At common law, the publication of a libel, was punishable by fine and imprisonment. State v. Burnham, 9 New Hamp. 34.

**52. Must be consistent with charge.** An indictment for libel charged the defendant with publishing of the prosecutor that he "was the most swindling and worthless speculator who ever brought ruin on the city of St. Louis." The jury found a special verdict of "guilty of charging the prosecutor of being a visionary, worthless speculator;" held that the verdict was bad in finding matter not alleged in the indictment, and in not finding malice. Webber v. State, 10 Mo. 4.

### 5. Writ of error.

**53. For exclusion of evidence.** On error brought by persons jointly convicted of a conspiracy to publish a libel, they are entitled to avail themselves of an erroneous exclusion of evidence tending to exonerate an alleged co-conspirator, since proof of his innocence might tend to their benefit. De Bouillon v. People, 2 Hill, 248.

**54. Record.** An obscene book or picture can never with propriety be spread upon the records of the court. Com. v. Holmes, 17 Mass. 336.

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## License.

**1. Necessity of.** It is not a defense to an indictment for keeping an eating house without a license, that the defendant conducted the business as agent. Winter v. State, 30 Ala. 22.

**2.** In New York, any person may keep an inn, tavern, or hotel, without a license, unless he sell intoxicating liquors. People v. Murphy, 5 Parker, 130.

**3. To partnership.** In Alabama, although a license may be granted to a partnership, upon each partner complying with the statute as to certificate, oath, &c., yet a license to one partner individually confers no authority upon his copartners or the firm. Long v. State, 27 Ala. 32.

**4. Unlawful granting of.** To constitute a criminal offense in granting a license under the statute of New York, the license must

have been granted with full knowledge of the facts, and willfully. The offense consists in the motive and intent with which the act was done. The mere granting of a license which a court or jury might say ought not to have been granted, is not an offense; but the jury must be able to say from the evidence that the commissioners, or such as are pronounced guilty, knew at the time that it was not a proper case for a license under the statute, and nevertheless granted it in willful disregard of the statute —that is, that they knowingly and purposely disregarded the statute. People v. Jones, 54 Barb. 311.

5. **Indictment.** An indictment for a sale of merchandise, in violation of the license law, must state to whom the goods were sold, or allege that the person or persons are unknown. Spielman v. State, 27 Md. 520.

6. In Alabama, an indictment under the statute (Code, §§ 397, 399), for exhibiting feats of sleight of hand without a license, need not allege that the exhibition was for profit; nor need that fact be proved on the trial. Spaight v. State, 29 Ala. 32; Pike v. State, 35 Ib. 419.

7. **Evidence.** Where, on a trial for exhibiting feats of sleight of hand without a license, it appeared that the alleged exhibition was a musical entertainment, regularly licensed, it was held competent for the prisoner to show, as a part of the *res gestæ*, that he publicly announced, while the audience were assembling for the entertainment, that he would show feats of legerdemain, free of charge. Spaight v. State, *supra*.

8. Where, on the trial of a complaint for refusing to allow a negro to play at billiards in a public billiard room, it was not proved that the room was licensed, it was held that a conviction could not be sustained. Com. v. Sylvester, 13 Allen, 247.

*See* SPIRITUOUS LIQUORS, SALE OF.

## Lottery.

1. WHAT CONSTITUTES.
2. INDICTMENT.

### 1. WHAT CONSTITUTES.

1. **What deemed.** A revolving wheel, with an index, which, upon being turned, determines whether the holder of cards marked with numbers corresponding with numbers on the wheel, wins or loses, is a lottery. Chavannah v. State, 49 Ala. 396.

2. The distribution of prizes by chance constitutes a lottery. Randle v. State, 42 Texas, 580. Where, according to a scheme upon which the defendants professed to act, there was a correspondence between the numbers placed on books purchased, and the different articles proposed as gifts or prizes the purchaser was entitled to have, it was held that it was a lottery within the statute of New Hampshire. State v. Clarke, 33 New Hamp. 329.

3. A public exhibition was conducted thus: Each person got a ticket at the door, with a number on it. At the close of the exhibition one of the proprietors called, at will, any number, and the person holding the corresponding ticket presented himself, when, if the exhibitor liked his appearance, he gave him one of the articles advertised as gifts. It was also a condition that, at the option of the proprietors, there should be no distribution of gifts. *Held* a lottery. State v. Shorts, 3 Vroom (32 N. J.) 398.

4. The constitution of the American Art Union provided that the society should purchase such works of art as the state of the treasury allowed, and that they were to become, by lot, the property of the members, each member being entitled to one chance or share in the distribution, for each five dollars subscribed and paid by him, the mode of distribution being particularly pointed out in the by-laws. The association publicly announced that, for the payment of five dollars, any person would become a subscriber, and entitled to an engraving, to a copy of the bulletin of their proceedings, and to a chance of one of a number of paintings to be "distributed by lot among the members, each member having one share for every five dollars paid by him." *Held* not unlawful within 1 N. Y. R. S. 666, §§ 30, 31. People v. Am. Art. Union, 7 N. Y. 240.

5. The defendant was indicted for selling a lottery ticket, of which the following was a copy: "Chicago Industrial College and

Home Festival. This ticket is a receipt for five dollars in payment for, and delivery of, a copy of a steel-plate engraving and admission to our concerts and lectures for which it is sold. By order of the officers. Thomas & Co., General Agents." With the ticket a steel-plate engraving was delivered, and a bill, entitled "Grand National Festival to erect, in the city of Chicago, an Industrial College and Home for unfortunate females." The bill stated that there would be given a series of musical receptions, and a course of lectures, at the close of which, and after the sale of 200,000 copies of steel-plate engravings, there would be distributed, as presents to the purchasers of engravings, "in a just and legal manner," $200,000 in presents, amounting, in number, to 3,012. Twenty-eight hundred of this number were newspapers, at a price from $2 to $12 each. The remaining 212 were estimated at from $35,000, to $50,000. *Held* a lottery. Thomas v. People, 59 Ill. 160; s. c. 2 Green's Crim. Reps. 551.

**6. Lottery tickets.** A guaranty, by which the guarantor binds himself that he will pay the prize which may be drawn to a certain number in a lottery, when sold by the proprietor of the ticket or a duly authorized agent of the proprietor, is a lottery ticket, though not in the form of one. Com. v. Chubb, 5 Rand. 715.

7. A ticket purported to entitle the holder to whatever prize should be drawn by its corresponding number, in a scheme called a "prize concert." The prizes were gifts in greenbacks and other property. One-half of all the tickets represented blanks, and every other ticket was to draw a prize. *Held* that this constituted a lottery. Com. v. Thacher, 97 Mass. 583.

**8. Advertisement.** In Massachusetts, the printer of a newspaper, containing an advertisement of lottery tickets, is liable to indictment, though not concerned in the sale of the tickets. Com. v. Clapp, 5 Pick. 41.

9. In the same State, a sign-board at a person's place of business, stating that lottery tickets were for sale there, was held an advertisement within the statute of 1825, ch. 184, and to be a new advertisement every day it was kept up after the passing of the statute, although erected before. Ibid.

**10. Prohibitory statutes.** In New York, under the statute (1 R. S. 665, § 28), it is a misdemeanor to publish in that State an account of a lottery to be drawn in another State or territory, although such lottery is lawful in the place where it is to be drawn. People v. Charles, 3 Denio, 212; 1 Comst. 180.

**11.** Construction of the Constitution of New York (art. 1, § 10), and of the statute (R. S. § 22), relative to "raffling and lotteries." People v. Am. Art Union, 7 N. Y. 240.

**12.** The statute of Connecticut (R. S. tit. 6, § 96), making it a criminal offense to publish within the State, any written or printed proposals to sell or procure lottery tickets, is not unconstitutional; and it is applicable to domestic and foreign lotteries alike, whether they are or are not authorized by the laws of the State in which they are located, and without reference to the place where the tickets are to be procured or sold. State v. Sykes, 28 Conn. 225.

**13.** An information charged that the accused published a proposal to sell and procure lottery tickets. The instrument, which was set out in words and figures, was denominated "a caution notice," and imported a caution against the devices of fraudulent ticket vendors, and the purchase of spurious lottery tickets. It stated that the country was flooded with swindling lotteries, what lotteries and tickets should be avoided, what lotteries were authorized, how the genuine tickets could be distinguished from the spurious, and that purchasers in the Maryland State lotteries might be sure of fair and honest drawings. But there was no proposal to sell or procure lottery tickets, and the author did not profess to have such things for sale, or to be engaged in the business of selling or procuring them. *Held* not a violation of the statute of Connecticut (R. S. tit. 6, § 96), which prohibited the publishing within the State, of any written or printed proposals to sell or procure lottery tickets. Ib.

14. An indictment may be maintained under the statute of Missouri, of Dec. 19th, 1842, for the sale of a lottery ticket, although the statute is in the plural, prohibiting the sale of lottery tickets. Freleigh v. State, 8 Mo. 606.

15. In Alabama, a resale of a ticket in a lottery not authorized by law, by a third person not connected with the lottery, is not a violation of the statute (Code, § 3254), when his previous purchase extinguished all interest of ownership of every agent, conductor, manager or proprietor in the ticket. Salamon v. State, 28 Ala. 83.

2. Indictment.

16. **Descriptive averments.** The object of the lottery will be sufficiently stated in the indictment, by setting out verbatim an advertisement that the lottery was made for the purpose of disposing of money or property, without other averment. People v. Charles, 3 Denio, 212; affi'd 1 N. Y. 180.

17. In New York, an indictment for setting on foot a lottery contrary to the statute, must state the object of the lottery. A general allegation of its object is not sufficient. But the amount of the lottery need not be stated. People v. Taylor, 3 Denio, 91. The lottery must be described as one set on foot for the purpose of disposing of property, according to the terms of the statute (1 R. S. § 27). People v. Payne, 3 Denio, 88. The indictment need not set out the tickets sold, or name the persons to whom they were sold, it being alleged that their names are unknown. People v. Taylor, *supra;* or allege that the lottery was not authorized by law. People v. Sturtevant, 23 Wend. 418; nor aver that the lottery was established in the State, or got up for the purpose of disposing of real estate, goods, money or things in action. People v. Warner, 4 Barb. 314.

18. An indictment which alleged that the defendant unlawfully did set on foot a certain lottery for the purpose of exposing certain money to abide the drawing of such lottery, he being unauthorized, &c., without containing other matter of description, was held insufficient. People v. Taylor, 3 Denio, 91.

19. An indictment was held insufficient which alleged that the defendant kept a certain common gaming house, in which he sold and furnished tickets in lotteries unauthorized by law, to divers persons. People v. Jackson, 3 Denio, 101.

20. In Massachusetts, an indictment under the act of 1825, ch. 184, for causing lottery tickets to be advertised for sale, need not allege that they were advertised as for sale within the commonwealth, or charge that the lottery was in the State, and against the law thereof, or set forth the lottery. Com. v. Clapp, 5 Pick. 41.

21. An indictment charged that the defendant did unlawfully and knowingly permit in the dwelling-house and building then and there actually used and occupied by him, the setting up of a lottery, in which certain articles of personal property and of value were disposed of by the way of a lottery. *Held* that it was unnecessary to allege that it was "a lottery not authorized by law for money," or to describe particularly the articles which were the subject of the lottery, their value, and owners, or to name the parties who drew them as prizes. Com. v. Horton, 2 Gray, 69.

22. In New Hampshire, an indictment charging that "F., of Concord, unlawfully sold to one C. part of a ticket, that is to say, one quarter part of a ticket, at and for the price of fifty cents, in a certain lottery not authorized by the Legislature of the State, contrary to the form of the statute in such case made and provided," without any description of the ticket or lottery, was held good, since all lotteries were prohibited. State v. Follet, 6 New Hamp. 53.

23. A ticket in a lottery entitling the holder to one fourth of the prize drawn, although commonly called a quarter of a ticket, may be described as a lottery ticket in an indictment under the statute of Missouri of December 19, 1842, "to abolish lotteries and to prohibit the sale of lottery tickets in this State." Freleigh v. State, 8 Mo. 606.

24. In Pennsylvania, an indictment for selling lottery tickets must allege the name

of the lottery and the number of the tickets Com. v. Gillespie, 7 Serg. & Rawle, 469.

## Magistrate.

**Proceedings before, continuous.** An examining magistrate does not act judicially in the technical sense, but as conservator of the peace. His proceedings are regarded as continuous, unless formally adjourned; and where a legal holiday intervenes, the close of business on one day carries them over to the next business day. Hamilton v. People, 29 Mich. 173.

## Malicious Arrest.

*See* FALSE IMPRISONMENT.

## Malicious Mischief.

1. WHAT CONSTITUTES.
2. INDICTMENT.
3. EVIDENCE.
4. VERDICT.

### 1. WHAT CONSTITUTES.

**1. Meaning.** Malicious mischief is the willful destruction of personal property from ill-will or resentment toward its owner or possessor, and out of a spirit of wanton cruelty or wicked revenge. State v. Robinson, 3 Dev. & Batt. 130. Where it was proved that the defendant supposed he had a right to do the act, it was held that a conviction could not be supported. Goforth v. State, 8 Humph. 37.

**2.** In Massachusetts, to constitute the offense under the statute of 1862, ch. 160, it is not sufficient that the injury was willful and intentional, but it must have been done out of cruelty, hostility, or revenge. Com. v. Williams, 110 Mass. 401; s. c. 2 Green's Crim. Reps. 265. It is erroneous to charge the jury that the word maliciously means "the willfully doing of an act prohibited by law, and for which the defendant had no lawful excuse," and that "moral turpitude of mind need not be shown." Com. v. Walden, 3 Cush. 558.

**3. What essential.** The essence of the crime of malicious mischief is the injury to property. Without this, an act, however wanton and dangerous, does not constitute it. Wait v. Green, 5 Parker, 185.

**4.** Acts which will sustain an indictment for arson or larceny will support a charge for malicious mischief. State v. Leavitt, 32 Maine, 183.

**5. At common law.** It has been held not an indictable offense at common law to injure the private property of another, though done forcibly, unless the act be with a breach of the peace. State v. Wheeler, 3 Vt. 344; Illies v. Knight, 3 Texas, 312. But in New York, it was held that the wanton destruction of personal property in the day time, clandestinely and maliciously, was a misdemeanor at common law. People v. Moody, 5 Parker, 568.

**6.** It is an offense at common law for a person to shoot or wound stock found trespassing upon his premises. In Illinois, a person so doing may be convicted and fined under the statute for malicious mischief. Snap v. People, 19 Ill. 80.

**7.** To put an irritating substance called cow-itch on a towel and in a tub of water used by another person is indictable at common law. People v. Blake, 1 Wheeler's Crim. Cas. 490.

**8. Injury of animals.** It is indictable to maliciously, willfully and wickedly kill another's horse or cow. Resp. v. Teischer, 1 Dall. 335; People v. Smith, 5 Cow. 258; and stabbing another's horse is indictable without proof of express malice. State v. Council, 1 Overt. 305.

**9.** Malice toward the owner is essential to constitute the offense of malicious injury to animals; otherwise, it is a mere trespass and not malicious mischief. Where the injury is unlawful, malice may be presumed from circumstances. Hill v. State, 43 Ala. 335; Hobson v. State, 44 Ib. 381.

**10.** To render the defendant liable under the statute of Tennessee (of 1803, ch. 9) for maliciously killing cattle, there must be malice against the owner of the cattle, and

not merely against the animals, and it must be so alleged and proved. State v. Wilcox, 3 Yerg. 278.

11. In Indiana, an indictment under the statute (R. S. ch. 53, § 71) for malicious mischief, will be supported by proof of killing a dog. State v. Sumner, 2 Carter, 377. In Virginia, a dog is not property within the meaning of the code (ch. 192, § 53), for the killing of which an indictment will lie. Davis v. Com. 17 Gratt. 617. In New Hampshire, dogs are under the protection of the statute (R. S. ch. 215, § 18), and an indictment will lie for their willful and malicious destruction. State v. McDuffie, 34 New Hamp. 510.

12. In South Carolina, shaving the mane and cropping the tail of a horse, in the owner's stable, was held not to constitute the offense of disfiguring within the meaning of the statute. State v. Smith, Cheves, 157.

13. **Destruction of property.** Tearing down advertisements for the sale of land for taxes, and refusing to put them up again, is an indictable offense. Pennsylvania v. Gillespie, Addis. 267.

14. Where a person whose property had been seized for taxes and a sale of it duly advertised, after replevying it, tore down the advertisement of sale, it was held that he was liable to indictment. Faulds v. People, 66 Ill. 210.

15. The willful and malicious cutting off of a rope having a banner attached to it, by means of which the rope and banner were greatly injured, is an indictable offense within the statute of New Hampshire (R. S. ch. 215, § 18). State v. Webster, 17 New Hamp. 543.

16. It is not indictable, unlawfully and maliciously to destroy the saddle bags of another. Shell v. State, 6 Humph. 283.

17. A person in possession of land under a *bona fide* claim of title, cannot be guilty of malicious mischief in tearing down a fence erected on the land against his consent. On the trial of an indictment for malicious mischief, it appeared that there was a controversy between the prosecutors and the defendant as to the possession of land, the defendant being in actual possession, and that on the prosecutors attempting to run a division fence across it, the defendant took up the posts and tore off the boards while the fence was in process of construction; that the defendant forbade them from making the fence, protesting that they had no right so to do, and that he was paying rent for the whole premises. *Held* that the defendant was entitled to acquittal. Sattler v. People, 59 Ill. 68; s. c. 2 Green's Crim. Reps. 550.

18. An indictment for malicious mischief in destroying a quantity of standing Indian corn cannot be supported; the offense being confined to personal property. State v. Helms, 5 Ired. 364.

19. In Virginia, a person was charged with knowingly, willfully, and without lawful authority, cutting down and carrying away a line tree standing on the division line between his land and the land of another. *Held* not an offense within any statute then in force in that State. Powell's Case, 8 Leigh, 719.

2. Indictment.

20. **Averment of malice.** An indictment for malicious mischief must either expressly allege malice against the owner, or otherwise describe the offense. Charging that the act was done feloniously, willfully and maliciously, without stating that it was done mischievously, or with malice against the owner, is not sufficient. State v. Jackson, 12 Ired. 329.

21. In Kentucky, an indictment under the statute (R. S. ch. 28, art. 25, § 8), which provides for the punishment of any person who shall *willfully* kill, disfigure or maim any horse, cow, &c., not his own, without the consent of the owner, charging that the defendant *unlawfully* killed the horse of R. C., omitting the word "willfully," was held fatally defective. Com. v. Turner, 8 Bush, 1; s. c. 1 Green's Crim. Reps. 293.

22. An indictment for cutting timber on another person's land, must allege that it was done knowingly. State v. Arnold, 39 Texas, 74.

23. **Nature of act.** An indictment for malicious mischief need not allege that the

offense was committed with force and arms. Taylor v. State, 6 Humph. 285.

**24. Description of property.** Where an indictment for defacing and destroying a promissory note, alleges that the tenor of the note cannot be set forth because it was destroyed by the defendant, it must state the substance and effect of the instrument. Birdg v. State, 31 Ind. 88.

**25.** In Vermont, it was held that an indictment for wounding a steer need not allege in the words of the statute that the steer was "cattle or other beast." State v. Abbott, 20 Vt. 537.

**26.** An indictment under a statute (R. S. of Mass. ch. 126, § 42) punishing a person who shall maliciously or wantonly break the glass in any building, must allege that the glass was a part of a building. An averment that it was in a building is not sufficient. Com. v. Bean, 11 Cush. 414; s. p. Com. v. Lindsay, Ib. 415, *note*.

**27.** An indictment under a statute punishing the willfully and maliciously cutting down a tree which had been marked to show the "point on a boundary of" land, alleged that the defendant willfully and maliciously cut down a tree which had been marked in order to designate "a corner of a tract of land." *Held* insufficient. State v. Mallory, 5 Vroom (34 N. J.) 410.

**28.** In Indiana, an indictment for malicious mischief in destroying and injuring the windows of a county seminary which was under the management of county commissioners, was held in effect to charge the malicious destruction of public property; and it was further held that the prosecution need not prove that the title to the seminary was in the county. Read v. State, 1 Smith, 369.

**29. Averment of ownership.** An indictment for maliciously killing a domestic animal must either allege the owner's name or state that the name of the owner is unknown. State v. Pierce, 7 Ala. 723.

**30.** An indictment under the statute of New Hampshire (R. S. ch. 215, § 3) for maliciously placing obstructions on a railroad track need not aver the legal existence or organization of the company, or the ownership of the road. Where it was charged that the defendants "willfully and maliciously placed upon the track of the Boston and Maine railroad" in S. an obstruction, it was held that the averment was one of description and not of property, and that it might be proved by *parol* that the road was known by the name alleged. State v. Wentworth, 37 New Hamp. 196. Such indictment need not allege that the railroad was a corporation or carrier, or a way or road used for travel. Ib.

**31. Allegation of value.** Where the statute does not make the punishment for injuring an animal depend upon the value of the animal, it is not necessary to allege the value in the indictment. Caldwell v. State, 49 Ala. 34.

**32. Description of injury.** An indictment alleging that the defendant willfully shot a domestic animal with intent to injure the owner must state the amount of the injury. State v. Heath, 41 Texas, 426.

**33.** In Massachusetts, an indictment which alleges that the defendants did willfully and maliciously kill the horse of another person named, sufficiently avers the statute offense (R. S. ch. 126, § 39) without setting forth the manner of the killing. Com. v. Sowle, 9 Gray, 304.

**34.** In Missouri, an indictment under the statute prohibiting the torture of animals, which merely charged the tying of brush or boards to the tail of a horse, without any other averment, was held insufficient, such act not necessarily producing torture. State v. Pugh, 15 Mo. 509.

**35.** In Massachusetts, an indictment under the statute (Gen. Stats. ch. 161) for destroying hens by poison need not state what kind of poison was used, and the allegation that the act was done unlawfully, willfully and maliciously is sufficient without an averment of guilty knowledge. The intent to poison the hens and the placing of the poison where they found and ate it, is causing them to eat it; and whereseveral hens were destroyed the indictment may state their collective value. Com. v. Falvey, 108 Mass. 304.

**36.** An indictment under the statute of

New Hampshire (R. S. ch. 215, § 3) for maliciously placing obstructions on a railroad track, "whereby the life of any person may be endangered," is sufficient after verdict if it contain the averment, "whereby the lives of sundry persons, to wit, twenty persons riding in said cars upon said railroad were greatly endangered," without naming the persons. State v. Wentworth, 37 New Hamp. 196.

3. Evidence.

**37. Proof of ownership.** On the trial of an indictment for maliciously killing a domestic animal, it must be proved that there was an owner and who he was. But it is not essential to a conviction that the defendant before committing the act declared his intention to injure the owner, or did or said anything showing express malice. Malice will be presumed. State v. Garner, 8 Porter, 447.

**38.** Where an indictment for breaking down a dam alleges the ownership of the dam, it must be proved as laid. State v. Weeks, 30 Maine, 182.

**39.** On a trial for maliciously cutting and girdling fruit trees, described in the indictment as the property of B., it is sufficient proof of ownership to prove that the land on which the trees stood was in the possession and occupation of B. at the time the offense was committed. People v. Horr, 7 Barb. 9.

**40.** A complaint for maliciously breaking glass in a building, the property of Nathan S. Hoard, is not supported by proof that the building was hired of Nathan Hoard, and that the defendant threatened to break the windows of Mr. Hoard. Com. v. McAvoy, 16 Gray, 235.

**41. Property injured.** An indictment which charges the malicious killing of a horse, will not be sustained by proof of the killing of a gelding. Gholston v. State, 33 Texas, 342. As to the same rule, in case of larceny, see Gibbs v. State, 34 Ib. 134.

**42. Nature of injury.** An indictment for an attempt to poison a horse, charged that the defendants "filled and saturated" potatoes with croton oil, intending to give them to the horse to eat. The evidence showed that the potatoes were not saturated, but that they were filled with bran which was. *Held* that the variance was not material. Com. v. McLaughlin, 105 Mass. 460.

**43.** In Texas, it was held that an indictment for altering the brand of a cow, was supported by proof that the defendant put an additional brand on the animal to the one already on her, although the second brand did not interfere with or change the first. Linnay v. State, 6 Texas, 1.

**44.** On the trial of an indictment for malicious mischief containing but one count, for an injury to "a mare and an ox," committed at different times, it is error to refuse to charge that "if the State had failed to prove that the mare and ox were injured at the same time, or so near each other as to constitute the same offense, the defendant is not guilty as charged." The indictment in such case should have charged the offenses in two counts, or in the alternative in the same count. Burgess v. State, 44 Ala. 190.

**45.** In Massachusetts, an indictment under the statute (R. S. ch. 126, § 39), for malicious mischief, charging that the defendant willfully, maliciously and secretly destroyed lobster cans and cables to which the cans were attached, was held sustained by proof that the cables were cut in the center, and that the cans had floated a short distance away, and were somewhat injured. Com. v. Soule, 2 Metc. 21.

**46.** On the trial of an indictment for maliciously obstructing a railroad track by placing pieces of timber on it, it is not necessary that the proof should correspond with the allegation as to the number of the pieces of timber. It is sufficient if the evidence shows that one piece of timber was placed on the track in such a manner as to obstruct the passage of the cars. Allison v. State, 42 Ind. 354; s. c. 2 Green's Crim. Reps. 683.

**47. Proof of another offense.** On the trial of an indictment for placing obstructions on a railroad track, evidence that the prisoner placed obstructions on the track other than those for which he was indicted, is admissible when the acts are so connected

as to form one entire transaction. State v. Wentworth, 37 New Hamp. 196.

**48. Proof of malice.** On the trial of an indictment for maliciously injuring a fence, the following instruction was held erroneous: "Malice may be inferred or implied from the act, or manner of committing the act, or by its repetition, or by the relation existing between the defendant and the family in which he lived, and the owner of the fence," it not being competent for the jury to consider as one of the circumstances tending to prove a malicious intent on the part of the defendant, the relation existing between the family in which he lived, and the owner of the fence. State v. McDermott, 36 Iowa, 107; s. c. 2 Green's Crim. Reps. 634.

**49.** In Tennessee, where on the trial of an indictment for malicious mischief, it was proved that the act was committed without any unlawful, willful and malicious intent to injure, but under the belief that the defendant had a right to commit it, it was held that the defendant must be acquitted. Goforth v. State, 8 Humph. 37.

**50.** In Maine, an indictment under the statute (R. S. ch. 162, § 2), which provides that if any person shall maliciously or wantonly break down, injure, remove, or destroy any dam, &c., he shall be punished, &c., charged that the defendants maliciously *and* wantonly broke down, &c. *Held*, that proof that the act was done either maliciously *or* wantonly was sufficient. State v. Burgess, 40 Maine, 592.

**51.** On the trial of an indictment for malicious mischief, evidence of malice toward the son of the owner of the property is not admissible. Northcot v. State, 42 Ala. 330.

**52.** In Tennessee, on a trial under the statute (Code § 4657), for malicious mischief in killing a horse in the possession of a bailee, it is sufficient to prove malice toward the bailee, notwithstanding the indictment describes the horse as the property of the general owner. Stone v. State, 3 Heisk. 457; s. c. 1 Green's Crim. Reps. 520.

**53.** If the act of altering or defacing the marks of cattle is proved to have been willfully done, it follows that the intent was to defraud the owner, unless there be proof to the contrary. State v. Davis, 2 Ired. 153.

**54.** Whether a person was guilty of malicious shooting or not, with intent to kill, depends upon the question whether if he had killed the person at whom he shot, instead of only wounding him, the offense would have been murder. Read v. Com. 22 Gratt. 924; s. c. 1 Green's Crim. Reps. 267.

**55. Presumption.** On the trial of an indictment for maliciously shooting and killing a mare, a witness was permitted to testify as to the kind of shot found in an animal which was at the same time wounded, with a view of showing that the shot agreed in size with those found at the defendant's house on the day the shooting took place, as a circumstance to connect the defendant with the offense charged. State v. Wholeham, 22 Iowa, 297.

**56. Opinion of witness.** On a trial for willfully and maliciously shooting a mule, it was held that a witness who was acquainted with the mule, both before and after the occurrence, but who had no skill in veterinary or medical science, might state his opinion as to the extent of the damage caused by the wound. Johnson v. State, 37 Ala. 457.

**57. Declarations of defendant.** On the trial of an indictment for maliciously killing a hog, the declarations of the defendant immediately after the occurrence tending to show that it was accidental, are admissible in evidence in his behalf. State v. Graham, 46 Mo. 490.

**58.** On a trial for malicious mischief, the only evidence was, that the witness asked the defendant "what made him shoot his mare," to which the defendant replied that "he did not shoot her with shot." *Held* not sufficient to sustain a conviction. Dover v. State, 32 Texas, 84.

**59. Justification.** On the trial of an indictment for malicious mischief in shooting a mule, it is competent for the defendant to show that the mule was of a thievish and unmanageable disposition, and that he shot it to protect his crop, and not from ill will

to the owner, or cruelty to the animal. Wright v. State, 30 Ga. 325.

60. It is not a defense to an indictment for altering and defacing marks on cattle, that at the time the act was committed, the cattle had strayed from their owner. State v. Davis, 2 Ired. 153.

61. On the trial of an indictment for malicious mischief in tearing down and removing a fence standing on the land of another, it is no justification, that the defendant built the house, or that his wife claimed an interest in the land. Ritter v. State, 33 Texas, 608.

4. VERDICT.

62. **Must find malice.** Since to constitute malicious mischief at common law, there must have been malice toward the owner of the property injured, if this be not found by the verdict, the defendant must be acquitted. State v. Newby, 64 N. C. 23.

*See* MALICIOUS TRESPASS.

## Malicious Prosecution.

**When indictable.** It is an indictable offense to buy three promissory notes against the same person, get them into as many judgments, and issue separate executions on them. But such acts do not make the perpetrator of them, a common barretor. Com. v. McCulloch, 15 Mass. 227.

## Malicious Trespass.

1. WHAT IS OR IS NOT DEEMED.
2. COMPLAINT.
3. INDICTMENT.
4. EVIDENCE.

1. WHAT IS OR IS NOT DEEMED.

1. **Destruction of property.** Tearing down the roof and chimney of a dwelling-house in the peaceable possession of another, is indictable at common law. State v. Wilson, 3 Mo. 125.

2. On a prosecution for malicious trespass in injuring a toll gate on a turnpike, it was proved that the defendant was traveling with a two horse team, and that on refusing to pay toll, and the gate being closed against him, he sawed the gate down and went through. *Held* that the conviction was proper. Bock v. State, 50 Ind. 281.

3. Severing and taking away a growing crop by one act, is only a trespass. By the statute of New York, such an act, if the property so severed and taken was of more than $25 dollars value, would be grand larceny; but if of the value of $25 or less, the act is not a criminal offense unless charged to have been done maliciously; and if so charged, it is a misdemeanor as a malicious trespass, but not stealing. Comfort v. Fulton, 39 Barb. 56.

4. **Killing dog.** Whether the right of property in dogs is such in South Carolina, that an indictment for malicious trespass will lie for killing them—*query*. State v. Trapp, 14 Rich. 203.

5. **Acts not regarded as criminal.** A man is not liable to a criminal prosecution for destroying timber upon lands which he holds possession of by virtue of a contract obtained by fraud. Howe v. State, 10 Ind. 492.

6. A person without color of title, cannot defeat a criminal prosecution for malicious trespass upon lands by setting up a title thereto in himself. But where he has a paper title apparently valid on its face, and claims in good faith to be the owner, and is in possession, either by himself or others occupying by his direction, he cannot be prosecuted criminally for a trespass committed thereon by him to the damage of a third person, although such third person, in the end, may prove to have the better title. Windsor v. State, 13 Ind. 375.

7. Where a person has used a private way for a long period, supposing that he had a right so to use it, he will be guilty of malicious trespass in tearing down a fence placed across the way. Palmer v. State, 45 Ind. 388; s. c. 2 Green's Crim. Reps. 718.

8. The stopping of a train of cars by a passenger by pulling the signal-rope attached to a bell upon the engine is not a

criminal obstruction of the train within the statute of Massachusetts (Genl. Stats. ch. 63, § 107). Com. v. Killian, 109 Mass. 345.

**9.** An indictment cannot be maintained against a person for being in the habit of going frequently to the house of another, and so maltreating his family as to render their lives uncomfortable. Com. v. Edwards, 1 Ashm. 46.

2. Complaint.

**10. What it ought to contain.** An affidavit and complaint for malicious trespass must allege the ownership of the property injured, and the nature of the injury. State v. Jackson, 7 Ind. 270; see Boswell v. State, 8 Ib. 499.

3. Indictment.

**11. Averment of injury.** An indictment for malicious trespass, alleging that the defendant maliciously and mischievously injured and caused to be injured a certain house, the property of one M., of the value of fifty dollars, contrary to the form of the statute, &c., was held insufficient in not showing what injury was done to the house. State v. Aydelott, 7 Blackf. 157.

**12.** Where, under an information for cutting trees upon another's land, the value of the trees is the basis of the penalty, the damage to the owner need not be alleged. State v. Shadley, 16 Ind. 230.

**13. Description of property.** An indictment for maliciously injuring a dwelling-house occupied by a tenant at will of the owner, may describe the house as the tenant's. State v. Whittier, 21 Maine, 341.

**14.** In Indiana, an indictment for malicious trespass was held sufficient under the statute (R. S. ch. 53, § 71), which alleged that the defendant did unlawfully, maliciously, and mischievously injure and destroy several windows belonging to a certain county seminary, the property of the county of S. Read v. State; on appeal, 1 Carter, 511.

4. Evidence.

**15. Ownership of property.** An indictment for malicious trespass in killing a dog, charged that the animal was owned by A. It was proved that the dog was the property of B., a son of A., who was eighteen years of age, and lived with his father, it having been presented to B. by his sister. *Held*, that the variance was fatal. State v. Trapp, 14 Rich. 203.

**16. Malicious intent.** On the trial of an indictment for a malicious trespass, it is erroneous for the court to charge that it is competent for the jury to consider as a circumstance tending to prove a malicious intent on the part of the defendant the relation existing between the family in which he lived and the owner of the property. State v. McDermott, 36 Iowa, 107.

*See* Malicious mischief; Trespass.

## Mandamus.

**Ground for.** On an application for a mandamus against the Hartford and New Haven Railroad Company, it appeared that the company was incorporated with power to construct and operate a railroad from Hartford to the navigable waters of New Haven harbor, and that a steamboat company was afterward chartered to run in connection with it, and that the line thus established was maintained with great public benefit for several years, and until a side track was constructed by the railroad company a mile and a half from its terminus on the harbor, running to the station of the New York and New Haven Railroad Company, when the Hartford and New Haven company discontinued the conveyance of passengers to the original terminus, to the great detriment of public travel. *Held* that the application ought to be granted. State v. Hartford and New Haven R. R. Co. 29 Conn. 533.

## Manslaughter.

*See* Homicide.

## Mayhem.

1. What constitutes.
2. Indictment.
3. Evidence.
4. Verdict.

1. What constitutes.

**1. At common law.** To constitute mayhem at common law, the injury must have been permanent. A temporary disabling of a finger, an arm, or an eye would not be sufficient. It is the same in Alabama, under the statute of 1807. State v. Briley, 8 Porter, 472.

**2.** The breaking into a man's dwelling-house in the night time, and cutting off his ear, is indictable at common law. Com. v. Newell, 7 Mass. 245.

**3. In New York.** To constitute the offense of mayhem under the statute of New York, the disabling must be done with premeditation, and not be the result of an unexpected instantaneous encounter, or of the excitement produced by the fear of bodily harm. Burke v. People, 11 N. Y. Supm. N. S. 481: Godfrey v. People, 12 Ib. 369.

**4. In North Carolina.** To constitute mayhem under the statute of North Carolina, by biting off an ear, it is sufficient if only a part is taken off, provided it changes and impairs the natural personal appearance, and to ordinary observation renders the person less comely. State v. Gerkin, 1 Ired. 121.

**5. In Alabama.** To support an indictment for putting out the eye of a person under the statute of Alabama, it is sufficient if the defendant maliciously and on purpose does the act, in pursuance of a design formed during the conflict. State v. Simmons, 3 Ala. 497.

**6.** In Alabama, to constitute mayhem, the member need not be wholly mutilated; but there must be so much of it mutilated as to disfigure the person on ordinary inspection. State v. Abram, 10 Ala. 928.

**7. In Arkansas.** Under the statute of Arkansas, maiming consists in unlawfully disabling a human being, by depriving him of the use of a limb or member, or rendering him lame, or defective in bodily vigor; and it is immaterial by what means, or with what instrument the injury is effected, provided the crime is consummated by depriving the party of the use of a limb or member of his body. Baker v. State, 4 Ark. 56.

2. Indictment.

**8. Necessary averments.** The indictment at common law and under the statute of Tennessee, in addition to stating the injury, must charge that the party was thereby maimed. Chick v. State, 7 Humph. 161. In Alabama, an indictment for mayhem need not charge that the act was done feloniously. State v. Absence, 4 Porter, 397. In North Carolina, an indictment under the statute (act of 1791, R. S. 339) for biting off an ear, must charge that the offense was committed on purpose as well as unlawfully. State v. Ormond, 1 Dev. & Batt. 119. But an indictment under the statute of North Carolina (R. S. ch. 34, § 48), for maiming by biting off an ear, need not state whether it was the right or the left ear. State v. Green, 7 Ired. 39. An intent to disfigure will be inferred. State v. Gerkin, 1 Ib. 121.

**9. Description of injury.** In Virginia, an indictment under the statute against mayhem, charged a shooting with intent to maim, disfigure, disable *and* kill; while the statute used the disjunctive or, instead of the conjunctive as in the indictment. *Held* that the indictment was good. Angel v. Com. 2 Va. Cas. 231.

**10.** An indictment for mayhem which charges that the defendant slit, cut off and bit off the ear of a person, is not bad for duplicity. State v. Ailey, 3 Heisk. 8.

**11.** An allegation that the nose of the prosecutor was bitten off, is within a statute, so as to imply a cutting off of the nose. State v. Mairs, Coxe, 453.

**12.** In Oregon, it was held proper to designate as mayhem the maliciously and feloniously tearing off of an ear. State v. Vowels, 4 Oregon, 324.

3. Evidence.

**13. Guilty intent.** In North Carolina, on the trial of an indictment under the statute (R. S. ch. 34, § 48), malice aforethought, or a previous intention to commit the mayhem, need not be proved. State v. Gerkin, 1 Ired. 121.

**14. Restoration of member.** Where on a trial for maiming, it is proved that the

person injured lost a member of his body by the willful act of the defendant, a conviction will be sustained, although it also appear that the member was afterward put back and grew in its proper place. Slatterly v. State, 41 Texas, 619.

**15. Justification.** In order to make a previous assault on the defendant, who is charged with mayhem, a good justification, it must be proved that the striking by the defendant was in his own defense, and in proportion to the attack made on him. Hayden v. State, 4 Blackf. 546.

4. Verdict.

**16. May be for assault.** Under an indictment for an assault with intent to commit mayhem, the defendant may be convicted of simple assault. McBride v. State, 2 Eng. 374.

**17.** Under an indictment for aiding and abetting a mayhem, if it does not appear from the evidence that the aider or abettor knew that the principal intended to commit a mayhem at the time aid was given, the abettor can only be convicted of assaulting and beating. State v. Absence, 4 Porter, 397.

*See* Assault and battery.

# Misdemeanor.

1. What constitutes.
2. Indictment.
3. Trial.
4. Evidence.
5. Verdict.
6. Judgment.

1. What constitutes.

**1. In general.** To constitute a misdemeanor, there must have been a violation of public law, through the joint operation of act or intention, or criminal negligence. Yoes v. State, 4 Eng. 42.

**2. At common law.** The following have been held misdemeanors at common law: Riding, or going armed with unusual and dangerous weapons, to the terror of the people. State v. Huntley, 3 Ired. 418; the proposal to receive a bribe. Walsh v. People, 65 Ill. 58; forging a receipt for a note of hand, which would be in full when paid. People v. Hoag, 2 Parker, 36; the disturbance of a religious meeting. State v. Jasper, 4 Dev. 323; throwing the dead body of a person into a river without the rites of burial. Kanavan's Case, 1 Maine, 226; disinterring the dead. Com. v. Cooley, 10 Pick. 37; giving a person unwholesome food. State v. Smith, 3 Hawks, 378.

**3. Other acts deemed.** It is a misdemeanor to keep open a tippling house on the Sabbath. Hall v. State, 3 Kelly, 18. But see Van Zart v. People, 2 Parker, 168. And the keeping of a bawdy-house is a misdemeanor. Ross v. Com. 2 B. Mon. 417. So is malicious mischief done to any kind of property. Loomis v. Edgerton, 19 Wend. 419; Com. v. Eckert, 2 Browne, 249. Breaking into the house of another, and making a great noise, whereby a woman in the house miscarries, is a misdemeanor. Com. v. Taylor, 2 Binn. 277. And encouraging and aiding another to commit a misdemeanor, is itself a misdemeanor. Com. v. Harrington, 3 Pick. 26; Pennsylvania v. McGill, Addis. 21.

**4.** Where a person, after request not to do it, discharged a gun unnecessarily, within the hearing of a person who was ill, and likely to be affected thereby, and the consequence was, that the person was seriously disturbed, it was held a misdemeanor. Com. v. Wing, 9 Pick. 1.

**5.** It is a misdemeanor, when the act proposed to be committed by the counsel, advice, or enticement of another, is of a high and aggravated character, tending to breaches of the peace, and other great disorder and violence. Com. v. Willard, 22 Pick. 476.

**6.** It is a misdemeanor to persuade another to steal a conveyance of land. Pennsylvania v. McGill, Addis. 21; and the destruction of a tree standing on public ground is indictable as a misdemeanor. Com. v. Eckert, 2 Browne, 249.

**7.** In Massachusetts, the sale of spirituous liquors without being a physician or apothecary licensed for that purpose, is a misde-

meanor under the statute of 1838. But the purchase from such person, although implying an inducement held out to commit a misdemeanor, is not in itself a misdemeanor. Com. v. Willard, 22 Pick. 476.

8. In New York, a person found guilty of petit larceny as a first offense is not convicted of a felony, but a misdemeanor. People v. Rawson, 61 Barb. 619.

**9. Attempt to commit.** The attempt to commit a misdemeanor, shown by an overt act, is a misdemeanor, whether the offense is created by statute, or by common law. Com. v. Kingsbury, 5 Mass. 106; Smith v. Com. 54 Penn. St. 209.

**10. What is not.** The breaking and entering the close of another, unless attended by circumstances constituting a breach of the peace (such as entering the dwelling-house with offensive weapons in a manner to cause terror and alarm to the family and inmates of the house), is only a civil injury, to be redressed by an action of trespass, and cannot be treated as a misdemeanor. Henderson v. Com. 8 Gratt. 708.

**11. Compounding.** The offense of compounding crime, extends as well to misdemeanors as to felonies. Jones v. Rice, 18 Pick. 440.

**12. Degrees of guilt.** In misdemeanors there are no accessories. All who procure, counsel, aid, or abet the commission of the crime, are principals. Com. v. Atee, 8 Dana, 28; Williams v. State, 12 Smed. & Marsh. 58; State v. Westfield, 1 Bail. 132; State v. Cheek, 13 Ired. 114; Com. v. Macomber, 3 Mass. 254; Com. v. Barlow, 4 Ib. 439; Curlin v. State, 4 Yerg. 143; U. S. v. Gooding, 12 Wheat. 460; Lowenstein v. People, 54 Barb. 299. Those personally present at the commission of the offense, are guilty in the first degree. Such as are not personally present, but who are so connected with the offense charged that in the eye of the law they are constructively present, are guilty as principals in the second degree. But unless there is some evidence of guilty complicity before the commission of the offense, there cannot be a conviction upon proof of subsequent acts. U. S. v. Harries, 2 Bond, 311.

2. INDICTMENT.

**13. When it will lie.** Where a statute contains a prohibitory clause, and a specific remedy in a subsequent clause, without any mention of indictment, an indictment will lie for the misdemeanor committed in violation of the prohibition. State v. Thompson, 2 Strobh. 12.

**14. Need not be precise.** An indictment for a misdemeanor, does not require that technical nicety as to form, which has been adopted and sanctioned by long practice in cases of felony. U. S. v. Lancaster, 2 McLean, 431; Bilbro v. State, 7 Humph. 534; Taylor v. State, 6 Ib. 285; Martin v. State, Ib. 204; Sanderlin v. State, 2 Ib. 315; U. S. v. Schmer, 5 Biss. 195.

**15. Name of county.** Where the name of the county is stated in the body of an indictment for a misdemeanor, it will be held sufficient, although not named in the margin. Tefft's Case, 8 Leigh, 721.

**16. Description of offense.** As a general rule, it is sufficient in indictments for misdemeanor, to describe the offense in the words of the statute. State v. Blaisdell, 33 New Hamp. 388; State v. Rust, Ib. 438.

**17.** Where an indictment charged that the defendant sold spirituous liquors to a slave, the property of A. B., without a permit from his master, it was held that the name of the slave and the name of his master need not have been alleged. Martin v. State, 6 Humph. 204.

**18.** An indictment for a misdemeanor, charging the defendant with being a common Sabbath breaker and profaner of the Lord's day, was held to be insufficient, in not stating how, or in what manner he was a Sabbath breaker. State v. Brown, 3 Murphy, 224.

**19. Joinder of offenses.** In indictments for misdemeanor, there may be counts for different offenses, if the judgments on the different offenses are of the same nature. Stone v. State, 1 Spencer, 404.

**20.** A count for a misdemeanor at common law, and a count for a misdemeanor *contra formam statuti*, may be united in the same indictment. State v. Thompson, 2 Strobh. 12.

**21.** Where several misdemeanors are joined

in the same indictment, a conviction for all may take place at the same time, and the prosecution cannot be compelled to elect for which it will proceed. People v. Costello, 1 Denio, 83.

22. An indictment against three persons for misdemeanor charged distinct offenses in different counts, and on the trial, the evidence tended to show that two offenses had been committed. There being no evidence against one of the defendants in respect to one of the offenses charged, though there was evidence tending to show them all guilty of the other offense, the defendants applied to court to compel the prosecution to elect for which offense it would proceed. *Held* that it should have been required to make such election. People v. Costello, *supra*. As such application was addressed to the discretion of the court before which the trial was had, whether a decision denying it could be corrected by the appellate court upon a bill of exceptions—*query*. Ib.

**23. Defective as to degree of offense charged.** An indictment defective as to a felony charged, may be good for a misdemeanor, and a conviction of the latter will bar a subsequent indictment for the former. The record would be conclusive that the acts were committed with the intent charged, and the prosecution could not allege a different intent so as to constitute a different offense. Lohman v. People, 1 Comst. 379; affi'g s. c. 2 Barb. 216.

**24. Effect of overruling demurrer to.** If the defendant demur to an indictment for a misdemeanor, and the demurrer is overruled, the decision operates as a conviction, and the judgment will be final. Wickwire v. State, 19 Conn. 477.

3. Trial.

**25. Absence of defendant.** In Kentucky, where a person has been recognized to appear and answer for a misdemeanor, he may be tried, although he do not appear. Canada v. Com. 9 Dana, 304.

4. Evidence.

**26. Weight and sufficiency of.** Where on the trial of an indictment for a misdemeanor, the court charged the jury that the evidence must show the guilt of the defendant to their reasonable satisfaction, that their best judgment must be that the defendant was guilty, so that the mind might rest easy in the conclusion of guilt, it was held not error also to charge them that the prosecution need not show that the defendant was guilty beyond all reasonable doubt. Purkey v. State, 3 Heisk. 26.

**27.** In Tennessee, on the trial of an indictment for misdemeanor under the statute (of 1837–8), prohibiting the wearing, concealed about the person, any bowie-knife, Arkansas tooth-pick, or other similar weapon, it was proved that the knife carried by the defendant was a Mexican pirate knife. *Held* sufficient to support a conviction. Haynes v. State, 5 Humph. 120.

**28.** On the trial of an indictment for a misdemeanor in secreting the book of records of the town of A., it was held no defense that one of the principal inhabitants of the town knew that the book of records was left with the defendant, and that persons had seen it there; or that the defendant did no act to conceal the book, other than to deny that it was in his possession, and that he had any knowledge of it; or that the book being left in the defendant's custody, was kept openly with his own books and papers, and he did no more than refuse to surrender it when demanded, and refused to tell where it could be found. State v. Williams, 30 Maine, 484.

**29.** On the trial of a police justice for a misdemeanor, in unlawfully letting a prisoner to bail without authority, and without notice to the district attorney, it is not error in the court to charge the jury that in order to sustain the indictment, there need not be proof of corruption. People v. Bogart, 3 Parker, 143; approved 5 N. Y. Supm. N. S. 678.

**30.** On a prosecution against the consignee of goods, under a statute making it a misdemeanor for the consignee to fail to deliver to the consignor the proceeds or profits of sales on demand, the demand must fairly apprise the consignee that he will be subject to the penalties of the statute if he fails to comply. Wright v. People, 61 Ill. 382.

**31. Good character.** It is erroneous to charge the jury on a trial for a misdemeanor, that evidence of good character goes only to the question of the defendant's guilt, and is not to be regarded in mitigation of the fine they may think proper to assess against him. Rosenbaum v. State, 33 Ala. 354.

**32. Proof of felony.** If on the trial of an indictment for a misdemeanor, the evidence prove a felony, the prisoner must be acquitted of the misdemeanor, in order to be indicted for the felony. Com. v. Roby, 12 Pick. 508. But unless it appears that the same act involves both offenses, the lesser is not merged. Johnson v. State, 2 Dutch. 313. A conspiracy to commit a misdemeanor is not merged in carrying out the object of the conspiracy. State v. Murray, 15 Maine, 100.

5. Verdict.

**33. Where defendant is not present.** In the case of inferior misdemeanors, a verdict may be given in the absence of the defendant. The court, after verdict, if the defendant do not appear, should call him and his bail, and then issue a warrant to apprehend the defendant, and bring him before the court for sentence. Sawyer v. Joiner, 16 Vt. 497.

**34. For attempt.** On a trial for a misdemeanor, the defendant may be convicted of an attempt to commit the offense charged. Wolf v. State, 41 Ala. 412.

6. Judgment.

**35. Upon conviction of felony.** Under an indictment for a misdemeanor, and a conviction of felony, there cannot be a judgment for a misdemeanor. State v. Wheeler, 3 Vt. 347.

**36. Under general verdict of guilty.** In Virginia, where on a trial for misdemeanor under the statute, the jury rendered a general verdict of guilty, without assessing the fine, it was held on motion in arrest, that judgment of imprisonment must pass against the defendant. Com. v. Frye, 1 Va. Cas. 19.

**37. Arrest of.** It is too late after conviction of misdemeanor, to arrest the judgment for an alleged variance between the information and presentment. Jones' Case, 2 Gratt. 555.

# Murder.

*See* Homicide.

# New Trial.

1. Jurisdiction of court, and when exercised.
2. Grounds for.
   (*a*) *On account of indictment.*
   (*b*) *Irregularity in summoning or impaneling jury.*
   (*c*) *Disqualification of jurors.*
   (*d*) *Improper admission or exclusion of evidence.*
   (*e*) *Erroneous proceeding or instruction.*
   (*f*) *Tampering with jury.*
   (*g*) *Misconduct of jury.*
   (*h*) *Surprise.*
   (*i*) *Newly discovered evidence.*
   (*j*) *Irregularities in the care or conduct of the jury.*
   (*k*) *Improper rendering of verdict.*
   (*l*) *Wrong verdict.*
3. Effect of setting aside verdict.

1. Jurisdiction of court, and when exercised.

**1. U. S. courts.** The Circuit Courts of the United States have power to grant new trials. U. S. v. Williams, 1 Cliff. 5; overruling U. S. v. Gibert, 2 Sumner, 19; U. S. v. Keene, 1 McLean, 429; U. S. v. Conner, 3 Ib. 573.

**2. State courts.** In New York, a court of Oyer and Terminer may grant a new trial on the merits, after conviction of felony. People v. Stone, 8 Wend. 39; People v. Morrison, 1 Parker, 625; disapproving People v. Judges of Dutchess Oyer and Terminer, 2 Barb. 282. In New York, courts of Oyer and Terminer have power to grant new trials to prisoners who have been found guilty upon insufficient evidence, or where verdicts have been rendered against evidence. But it has been held that when they

exercise this power, the case ought to be such as to have made it the duty of the court to advise the jury to acquit the defendant, or that it was unsafe for them to convict him. People v. Goodrich, 3 Parker, 518.

**3.** The Supreme Court of New Hampshire may grant new trials. State v. Prescott, 7 New Hamp. 287; and so may the Municipal Court of Boston. Com. v. Benesh, Thach. Crim. Cas. 684; and the Supreme Court of Massachusetts. Com. v. Green, 17 Mass. 515.

**4. Application for new trial, upon what predicated.** A motion for a new trial is based upon the supposition that injustice has been done, and unless such is shown to have been the case, the application is invariably denied. State v. Camp, 23 Vt. 551.

**5. Duty of court.** Where an error is committed on the trial that materially affects the case of the prisoner to his prejudice, it is the duty of the court to grant him a new trial, although there be no doubt of his guilt upon the evidence. Gardiner v. People, 6 Parker, 155.

**6.** Where error has clearly intervened, the general rule is that the judgment must be reversed; but not if, during the subsequent proceedings, the foundation of the error is overthrown, and the complaining party can no longer say he has been injured. People v. Anderson, 26 Cal. 129.

**7.** Courts have no power to affirm a judgment merely because the judges are persuaded that, upon the merits of the case, the judgment is right. If any error intervenes in the proceeding, it is presumed to be injurious to the prisoner, and he is, in general, entitled to a reversal of the judgment. People v. Williams, 18 Cal. 187.

**8. Discretionary power of court.** It is in the discretion of the court to grant a new trial, although no error appears on the record. Com. v. Green, 17 Mass. 515.

**9.** The statute of New York (2 R. S. 741, § 24), which provides that "if the Supreme Court shall reverse the judgment rendered, it shall either direct a new trial, or that the defendant be absolutely discharged, according to the circumstances of the case," does not vest in the court an absolute discretion. Where less than one-third of the time for which the prisoner had been sentenced had expired, and there was nothing in the case from which the court could infer that he was not guilty, it was held error to discharge absolutely, and a new trial was ordered. People v. Phillips, 42 N. Y. 200.

**10.** In Illinois, the discretion of the Circuit Court in granting or refusing a new trial will not be reviewed. Pate v. People, 3 Gilman, 644; Martin v. People, 13 Ill. 341. See *post*, *sub.* 263.

**11.** In Missouri, the Supreme Court will not interfere with the finding of the facts by the jury, unless manifest injustice has been done; nor exercise any control over the discretion of the lower courts in granting or refusing new trials, except in cases "strong and unequivocal." State v. Cruise, 16 Mo. 391.

**12.** It must be a very clear case of error which will induce the Supreme Court of Georgia to control the court below, where it has a discretion to grant or refuse a new trial. Jones v. State, 1 Kelly, 610; Hodgins v. State, 2 Ib. 173; Roberts v. State, 3 Ib. 310.

**13.** In Arkansas, where no exceptions are taken in the court below to the refusal to grant a new trial, the Supreme Court will take no notice of the appeal. Robinson v. State, 5 Ark. 659. In North Carolina, where it appeared from the certificate of the judge that a case was intended to be made by him, but none was sent up with the record, a new trial was granted. State v. Powers, 3 Hawks, 376. And see State v. Upton, 1 Dev. 268.

**14.** Whether the Supreme Court of Texas will entertain an application based on the refusal of the court below to grant a new trial on a question of fact—*query*. Herber v. State, 7 Texas, 69.

**15. In case of vacancy in court.** After a conviction of murder, the court having become vacant by death pending a motion for a new trial, and new judges commissioned to fill the vacancies, it was held that the new court would not sentence the prisoners, but that it would allow those of them

who desired it a new trial; and the court declined to hear any evidence as to what opinion the former court had entertained in regard to the motion for a new trial. U. S. v. Harding, 1 Wall. Jr. 127.

**16. In case of acquittal.** A new trial will not be granted on a motion in behalf of the prosecution where there has been a verdict in favor of the prisoner. State v. De Hart, 2 Halst. 172; State v. Taylor, 1 Hawks, 462; State v. Martin, 3 Ib. 381; State v. Wright, 3 Brev. 421.

**17.** Where some of several tried at the same time are acquitted, and others found guilty, the court may grant a new trial as to such as were convicted, without setting aside the entire verdict. Campbell v. State, 9 Yerg. 333; State v. Ayer, 3 Foster, 321.

**18. Application for new trial, where made.** A motion to set aside the verdict and for a new trial is not properly addressed to the court sitting *in banc*, but must be addressed to, and be heard and determined by, the judge at *nisi prius*. State v. Smith, 54 Maine, 33.

**19.** In New York, the Supreme Court cannot, on a writ of error, entertain a motion for a new trial, on the ground that since the trial material evidence favorable to the prisoner has been discovered. The motion, if it can be made in any court, must be in the Oyer and Terminer. Fralich v. People, 65 Barb. 48.

**20.** In Delaware, a retrial was had at the same term, the first jury having been discharged by the court. State v. Updike, 4 Harring. 581.

**21. Absence of prisoner.** Where the prisoner, after conviction of receiving stolen goods, concealed himself, it was held that a motion for a new trial would not be entertained until he was present. State v. Rippon, 2 Bay, 99.

**22. Hearing of motion.** When the exceptions and the motion for a new trial are to be considered and decided by the same court, both may be heard together, or the one or the other considered first, according to the circumstances. Com. v. Peck, 1 Metc. 428.

**23.** In a capital case, the prisoner may, on motion for a new trial, bring before the court for review any ruling which denies him a substantial right, whether objected to by him at the time or not. Rakes v. People, 2 Kansas, 157.

**24.** Where a female is found guilty of an offense which is punishable by imprisonment, her pregnancy is not a ground for a new trial. Coleman v. State, 8 Eng. 105.

**25.** A person who wishes a new trial, must receive it as to the whole case. Morris v. State, 1 Blackf. 37.

**26. Affidavits of prisoner.** The motion should be supported by the affidavits of other persons than the prisoner. Pleasant v. State, 8 Eng. 360. The unsupported affidavit of the defendant that the testimony of a material witness was false, that he was surprised by it, and that he felt certain he could prove it false upon another trial, was held not sufficient to obtain a new trial. Riley v. State, 9 Humph. 647.

**27.** The affidavits of the prisoner's counsel as to information from jurors concerning what took place in the jury room are not admissible on a motion for a new trial. Wilson v. People, 4 Parker, 619.

**28. Affidavits of jurors.** Although the court will hear the affidavits of jurors in support of their verdict, it will not receive such affidavits for the purpose of impeaching the verdict. Cannon v. State, 3 Texas, 31; Bishop v. State, 9 Ga. 121; Ward v. State, 8 Blackf. 101; People v. Carnal, 1 Parker, 256; State v. Ayer, 3 Foster, 321; Anderson v. State, 5 Ark. 445; People v. Baker, 1 Cal. 403.

**29.** On a motion for a new trial, the affidavits of jurors that the jury misunderstood the instructions of the court are competent. Packard v. U. S. 1 Iowa, 225; Norris v. State, 3 Humph. 333.

**30. Waiver of motion.** It is too late to move for a new trial after a motion in arrest of judgment, because the latter assumes that the verdict is correct. McComas v. State, 11 Mo. 116.

2. Grounds for.

(*a*) *On account of indictment.*

**31. Finding.** The fact that one of the

grand jurors who found the indictment was also one of the petit jury, although good cause of challenge, is not ground for arrest of judgment or a new trial. State v. Turner, 6 La. An. 309.

**32. Insufficiency.** In Georgia, a motion for a new trial may be sustained on the ground that the indictment is fatally defective, though strictly a motion in arrest of judgment is the proper mode of raising the objection. Wood v. State, 46 Ga. 322.

**33. Absence of.** The mere fact that the indictment was stolen or missing, and could not be sent up with the writ of error, is not a ground for reversing the judgment. Smith v. State, 4 Greene, 189.

(*b*) *Irregularity in summoning or impaneling jury.*

**34. Objection, how made.** When any error or irregularity has intervened in summoning or impaneling the petit jury, the defendant, if he would avail himself of the objection, unless he can present the question in the form of an exception to some decision upon the trial, must bring it before the court upon a motion for a new trial. He cannot make it a ground for reversing the judgment upon error. People v. McCann, 3 Parker, 272.

**35. Failure to return venire.** Where a prisoner was tried and convicted without a *venire* returned and filed, it was held error, and the judgment was arrested and a new trial granted. People v. McKay, 18 Johns. 212.

**36. Omission to place names in box.** The neglect of the clerk to place the names of all the persons returned as jurors in a box from which juries for the trial of issues are to be drawn pursuant to the statute, is not ground for setting aside the verdict, where the court is satisfied that the party complaining has sustained no injury from the omission. People v. Ransom, 7 Wend. 417.

**37. Error in drawing.** The statute of New York as to drawing and impaneling juries is directory to the clerk, and a neglect to conform to its provisions will not *per se* be a sufficient ground for setting aside the verdict when the court see that the prisoner has not been prejudiced. Ferris v. People, 48 Barb. 17; s. c. 35 N. Y. 125.

**38.** In New York, the object of the statutory regulations as to drawing and summoning of jurors is merely to secure a fair and impartial distribution of the jury duty among the citizens. Consequently, in the absence of any suggestion of fraud or misconduct other than the failure to observe the regulations, the public only can complain. Friery v. People, 54 Barb. 319; affi'd 2 Keyes, 424; 2 N. Y. Ct. of Appeals Decis. 215.

**39.** A new trial was moved for on the ground that the grand jury was drawn by a boy thirteen years of age, and that such illegal drawing might have affected the composition of the petit jury. *Held* that the objection came too late; that it should have been made by a challenge to the array before the petit jury was sworn. State v. Underwood, 6 Ired. 96.

**40.** Although on the trial of a capital case the original *venire* should be first drawn and tendered, yet if the court, there being only eleven of the original panel, should direct tales jurors to be drawn with them, the defendant is not for this reason entitled to a *venire de novo* if an opportunity was afforded him to accept or reject all of the original *venire*. State v. Lytle, 5 Ired. 58.

**41.** When one of the venire having been challenged by the prosecution and directed to stand aside until the panel was exhausted was not afterward recalled, the prisoner not asking to have it done, and it being known that the juror was one of the prisoner's witnesses, it was held not a ground for a *venire de novo*. Ib.

**42. Setting aside juror.** A motion for a new trial, or in arrest of judgment, will not be granted on the ground that the court ordered one of the jurors to stand aside, who on his *voir dire* stated that he had formed an opinion from having conversed with the defendant, but that he then felt himself in a state of mind to do justice between the parties. Stoner v. State, 4 Mo. 614.

**43. Withdrawal of juror.** Where the prisoner not objecting, one of the jurors was

withdrawn who was supposed to be incompetent at the time, but who was found, after the trial had proceeded by the substitution of another juror, to be competent, it was held not ground for a new trial. Com. v. Stowell, 9 Metc. 572.

**44.** When a juror becomes unable to go on with the trial, the court on ascertaining the fact, should either suspend the trial or discharge him altogether, and impanel another juror in his place and commence the trial over again. Baxter v. People, 3 Gilman, 368.

**45. Insufficient number.** Where after conviction of larceny, it appeared that the prisoner was tried by only eleven jurors, the court set aside the judgment and verdict and remanded the cause for a new trial. Brown v. State, 8 Blackf. 561.

(*c*) *Disqualification of jurors.*

**46. Disqualification must have been unknown.** The incompetency of a juror, to be ground for a new trial, must have been unknown to the prisoner when the juror was sworn. Lisle v. State, 6 Mo. 426; Booby v. State, 4 Yerg. 111; Poore v. Com. 2 Va. Cas. 474; State v. O'Driscoll, 2 Bay, 153; Givens v. State, 6 Texas, 344.

**47.** Where the fact that a juror had formed and expressed an opinion before the trial, is not known to the prisoner or his counsel until after the verdict, it is a good ground for arresting the judgment. But if they know of an objection to the panel before verdict, and in time to prevent it and obtain a rehearing before another jury, and do not avail themselves of the opportunity, they will be deemed to have waived the objection. State v. Fuller, 34 Conn. 280.

**48.** A motion for a new trial was made on the ground that one of the jury which had tried the case, had before the trial declared that the community ought to have hung the prisoner without a trial, and that if the juror was on a jury to try him, he would sit there and perish or hang him; and that this declaration had not come to the knowledge of the prisoner until after the trial. *Held* that before the motion could be granted, it must appear by the affidavit of the prisoner's counsel that he too had no knowledge before verdict of the declarations made by the juror. Anderson v. State, 14 Ga. 709.

**49.** Where a juror bet on the result of the trial, and the only proof of the prisoner's ignorance of the bet was that the juror swore that he believed that the defendant did not know it, it was held that there was not sufficient ground for a new trial. Booby v. State, 4 Yerg. 111.

**50. Objection, when to be made.** At common law, an inquiry cannot be made into a juror's impartiality after he has been sworn. The statute of Massachusetts, of 1807, did not change this rule. The objection to the juror must be made as well by the prosecution as by the prisoner, before the juror is sworn, or at least before the jury are impaneled. Com. v. Knapp, 10 Pick. 477.

**51.** A cause of challenge cannot be made ground for a new trial. State v. Fisher, 2 Nott & McCord, 261. Where it appeared that one of the jurors was a member of the grand jury which found the indictment, but that the defendant neglected to challenge him for that cause, it was held that the defendant was not entitled to a new trial. State v. O'Driscoll, *supra*. See however, Com. v. Hussey, 13 Mass. 221. But whenever an objection to a juror would have been good cause of challenge for favor, it will be ground for a new trial, if not discovered until after verdict. Monroe v. State, 5 Ga. 85.

**52.** In Arkansas, after conviction of murder, it was held that if the prisoner neglected to avail himself before trial of any of the means provided by law for ascertaining the incompetency of a juror on account of prejudice, the prisoner would not be entitled to a new trial. Meyer v. State, 19 Ark. 156; Collier v. State, 20 Ib. 36.

**53.** Where a defendant fails to interrogate the jurors at the proper time, in respect to their being householders of the county, it is too late to raise the objection afterward; and a new trial will not be granted on the ground that one of the jurors was not a householder. Kingen v. State, 46 Ind. 132.

**54. Insanity.** When the insanity of a juror is alleged as ground for a new trial, it must be shown by clear evidence. State v. Scott, 1 Hawks, 24.

**55.** On the trial of an indictment for assault with intent to murder, the defense was insanity, which it was claimed was constitutional in the prisoner's relatives, one of whom (the prisoner's second cousin) was a juror in the case. *Held* that the fact of the juror's relationship to the defendant, although a proper matter to be addressed to the discretion of the court, if brought to its notice in season, was not a sufficient reason for setting aside the verdict. State v. Andrews, 29 Conn. 100.

**56. Bias or prejudice.** Where it appears that a juror was not open to conviction on the evidence, but decided the case in his own mind before the trial, it is good ground for setting aside the verdict. Com. v. Flanagan, 7 Watts & Serg. 415.

**57.** After conviction of treason, a new trial was granted, where it appeared that one of the jurors had made declarations, as well in relation to the prisoner personally, as to the general question at issue, showing prejudice. U. S. v. Fries, 3 Dall. 515.

**58.** Where after conviction of murder, it was proved that one of the jurors stated before he was impaneled that if he were on the jury he would hang the prisoner, it was held that there must be a new trial. Bishop v. State, 9 Ga. 121. And the same was held where a juror, after he was summoned and before trial, declared that if he served on the jury he would have to find the prisoner guilty. Cody v. State, 3 How. Miss. 27.

**59.** Where, after a verdict of guilty, on a trial for murder, it was proved that one of the jurors had stated the day before the trial that "if the evidence was the same as on a former trial which he had heard, the prisoner was guilty of murder, and should be hung," it was held ground for a new trial. Sam v. State, 31 Miss. 480.

**60.** On a trial for murder, one of the jurors, when examined on his *voir dire*, said that he had not formed or expressed an opinion as to the prisoner's guilt or innocence, but it was proved after conviction that several months before the sitting of the court the juror told a person that from the best information he could get he was of opinion that the prisoners ought all to be hung. *Held* that they were entitled to a new trial. Troxdale v. State, 9 Humph. 411.

**61.** Where it was proved that a juror who had stated that he had no prejudice, said before the trial that the prisoner "had killed a poor, innocent soldier, and ought to have his neck broke," which was not known to the defense when the jury were impaneled, it was held that the prisoner was entitled to a new trial. Henrie v. State, 41 Texas, 573.

**62.** After conviction of murder it appeared that one of the jurors who sat on the trial, soon after the homicide, declared that "the people ought to take the prisoner out of jail and hang him;" and that another juror stated that "the prisoner ought to be hung, and if he was at the Bay he would be hung before night." *Held* ground for a new trial. People v. Plummer, 9 Cal. 298.

**63.** Where a juror, when interrogated, stated that he had formed no opinion respecting the guilt or innocence of the prisoner, and after verdict it appeared that before the trial he had said if he (the prisoner), is not hung, there is no use of laws, it was held that a new trial should be granted. Busick v. State, 19 Ohio, 198.

**64.** After conviction of forgery, it was proved by the affidavit of a person that the forman of the jury, on the morning of the day of trial, had had a conversation with such person about the prisoner, in which he declared that he had come from home to hang every damned counterfeiting rascal, and that he was determined to hang the defendant, at all events, or words to that effect. *Held* ground for a new trial. State v. Hopkins, 1 Bay, 373. But affidavits calling in question the verdict of a jury should be received with caution. State v. Duesloe, 1 Bay, 377.

**65.** Where a person who was afterward on the jury declared that the prisoner ought to be hung, that there was nothing that could save him, and a short time before the trial

told the prisoner that if he served on the jury he (the prisoner) would not be hung, and when sworn as a juror on the trial said that he had formed no opinion, it was held that there must be a new trial. Sellers v. People, 3 Scam. 412.

**66. Opinion which is not fixed will not disqualify.** After conviction of murder in the second degree, the prisoner moved for a new trial, on the ground that one of the jurors, before the trial, said, in the hearing of another person, that the prisoner ought to be hung. *Held* that as the declaration did not appear to have been a fixed opinion, it was not sufficient cause for setting aside the verdict. Smith v. Com. 2 Va. Cas. 6. And see Com. v. Flanagan, 7 Watts & Serg. 415.

**67.** Where it was proved that one of the jurors admitted in a conversation with some young men, who were questioning him as to the propriety of the verdict, that he had formed the opinion that the prisoner was guilty before the trial, it was held that as the conversation was not of a serious character, and was elicited by an improper criticism of the verdict, there was no cause for a new trial. Monroe v. State, 5 Ga. 85.

**68.** Where, in a capital case, a juror, before he was impaneled, declared that if the prisoner killed the man, he ought to be hung, it was held that as the declaration was hypothetical, it was not cause for granting a new trial. Com. v. Hughes, 5 Rand. 655. And the same was held where a juror stated before trial that if the testimony was as he had heard it, the prisoner was guilty, and would be hung. Mitchum v. State, 11 Ga. 615.

**69. Opinion founded on rumor.** The loose impressions and conversations of a juror, founded upon rumor, are not, when disclosed after verdict, ground for a new trial. Howerton v. State, Meigs, 262; Kennedy v. Com. 2 Va. Cas. 510; Brown v. Com. Ib. 516; Smith v. Com. Ib. 6; Monroe v. State, 5 Ga. 85.

**70.** On a trial for arson, a juror testified on his *voir dire* that he had not formed an opinion as to the prisoner's guilt or innocence, but upon being challenged peremptorily by the defense, remarked: "It was well I was rejected, for if I were on the jury, I would send her the other side of Boston." Afterward the defense chose this person as a juror, not then having any knowledge of his remarks. *Held* no ground for a new trial. Com. v. Hailstock, 2 Gratt. 564.

**71. Examination of juror on oath.** Where a person called as a juror in a capital case, testified that he had not formed or expressed an opinion respecting the guilt or innocence of the prisoner, and, after the verdict it was proved that he had declared a few minutes before, to another person, that he could not serve, because he had made up his mind, which was unknown to the prisoner when he accepted the juror, it was held not cause for a new trial, first, because such declaration by the juror was not on oath, and secondly, because it was contradicted by the juror on oath. State v. Scott, 1 Hawks, 24. And see Heath's Case, 1 Rob. 735.

**72.** Where before the jury were impaneled for the trial of an indictment for arson, one of the jurors expressed an opinion unfavorable to the prisoner, but being subsequently examined on oath, stated that he was wholly impartial, it was held that there was no ground for a new trial. Curran's Case, 7 Gratt. 619.

**73.** A statement of the prisoner's former trial, was published in a paper in the county in which his second trial took place, by the judge, commenting severely on his character and conduct. But the jury, on their *voir dire* denied that they had formed any opinion, and it also appeared that the writer of the statement was not known until after the second trial. *Held* not ground for a new trial. Vance v. Com. 2 Va. Cas. 162.

**74. Denial by juror of previous bias.** Where a new trial is moved for on the ground that a juror had expressed the opinion before the trial, that the prisoner was guilty, the juror is competent to testify in denial of the bias imputed to him. State v. Howard, 17 New Hamp. 171; State v. Pike, 20 Ib. 344. If the court, upon hearing the explanation of the juror, and any testimony he may present by affidavits, is satisfied that the juror was competent, the

verdict will not be disturbed; especially when he was not put upon his *voir dire*, and no questions were asked him. Jim v. State, 15 Ga. 535. See Anderson v. State, 14 Ib. 709.

*(d) Improper admission or exclusion of evidence.*

**75. Witness not sworn.** After a conviction for misdemeanor, no exceptions having been taken during the trial, the defendant moved to set aside the verdict, on the ground that a witness for the prosecution testified without being sworn. *Held* that as it did not appear but that the defense knew that the witness was not sworn at the time he testified, nor appear that the witness testified falsely, or that the defendant had sustained any injury, the motion must be denied. State v. Camp, 23 Vt. 551.

**76. Withdrawal of witness.** Where a girl six years of age, upon whom it was charged the defendant committed an assault with intent to commit a rape, after being sworn as a witness, was withdrawn before she had testified, it was held that the fact that her appearance on the stand was calculated to excite the sympathies of the jury, was no ground for a new trial. People v. Graham, 21 Cal. 261.

**77. Irrelevant evidence.** Where irrelevant testimony has been admitted, and the chances are equal that it may have injuriously affected the minds of the jury, a new trial should be granted. Hoberg v. State, 3 Minn. 262.

**78.** Where the prosecution was permitted to introduce proof of the violent temper of the accused, such evidence being irrelevant to the issue, it was held ground for a new trial. State v. Merrill, 2 Dev. 269.

**79.** Where upon a trial for passing a counterfeit bank bill, the prosecution proved the passing by the prisoner of two other bills two or three days after the transaction for which he was upon trial, which latter passing did not appear to have any connection with the alleged offense, it was held that as the evidence was calculated to excite suspicion and prejudice against the prisoner, and had no legal bearing upon the issue, its admission was ground for a new trial. People v. Dibble, 5 Parker, 28.

**80.** But where evidence is admitted which is only competent in connection with other proposed evidence, and the latter is not introduced, and the court charges the jury to disregard the former, its admission is not error. People v. Pitcher, 15 Mich. 397.

**81. Admission of illegal evidence.** If illegal evidence be admitted against the prisoner, after objection, it will be ground for a new trial. Com. v. Bosworth, 22 Pick. 397; State v. Allen, 1 Hawks, 6; State v. Merrill, 2 Dev. 269; Com. v. Green, 17 Mass. 515. The admission of illegal evidence cannot be disregarded or excused upon the ground that the other evidence in the case was sufficient to justify a conviction. The conviction must be had by legal evidence only. Rosenweig v. People, 63 Barb. 634. Where improper evidence has been received which might have influenced the jury, a new trial will be granted, even though there be sufficient other evidence to sustain the verdict. Peck v. State, 2 Humph. 78.

**82. Illegal evidence presumed injurious.** The intendment of law is, that an error in the admission of evidence is prejudicial to the party objecting, and will be ground for the reversal of the judgment, unless the intendment is clearly repelled by the record. Coleman v. People, 58 N. Y. 555.

**83. Presumption of injury may be rebutted.** But although the reception of illegal evidence is presumptively injurious to the party objecting to its admission, yet where it appears from an examination of the whole record that the result would have been the same if the objectionable proof had been rejected, the error furnishes no ground for reversal. People v. Gonzales, 35 N. Y. 49; Eggler v. People, 3 N. Y. Supm. N. S. 796; State v. Engle, 1 Zabr. 347; State v. Ford, 3 Strobh. 517, *note*.

**84.** Under an indictment for selling adulterated milk, it was held not a ground for a new trial, after a verdict of guilty, that the certificate of an inspector of milk was admitted in evidence, the inspector testifying

to all the facts set forth in the certificate. Com. v. Waite, 11 Allen, 264.

**85. Misdirection of evidence.** Where the testimony on a trial for murder is relevant, but its logical and legal effect is misdirected to the prejudice of the defendant, which is mainly due to the course adopted by the prosecution in provoking both sides of the case, and then undertaking to rebut so much of the evidence as tends to justify the homicide, a new trial will be granted. People v. Taylor, 36 Cal. 255.

**86. Failure to object.** Where illegal evidence is allowed to go to the jury without objection, either when it is introduced or in the argument of the case, the illegality is waived, and its admission will not be ground for a new trial. Bishop v. State, 9 Ga. 121. Where therefore on the trial of an indictment charging a single assault, evidence was submitted to the jury of two different and distinct assaults, without objection from the defendant, it was held that he was not entitled to a new trial. Drake v. Com. 10 B. Mon. 225. And the same has been held in capital cases, where improper evidence has gone to the jury without objection. State v. Gordon, 1 R. I. 179; Stone v. State, 4 Humph. 27; Bishop v. State, 9 Ga. 121; Drake v. Com. *supra;* State v. Camp, 23 Vt. 551; *contra,* Rakes v. People, 2 Neb. 157.

**87.** But where a prisoner is convicted of a capital offense, and an indispensable element to constitute such offense is unsupported by any evidence tending to prove the same, the judgment will be reversed, although no exception was taken on the trial. McCann v. People, 6 Parker, 629.

**88. Inability to present evidence.** It is not in general a ground for a new trial that the evidence of persons who were jointly indicted with the defendant, but who were not convicted, is material to prove his innocence. State v. Bean, 36 New Hamp. 122.

**89.** Where several are joined in the prosecution to prevent their being used as witnesses for the defense, the party desiring their testimony should ask for a separate trial; or if there be no testimony against one of several defendants, he should move for a separate verdict, which motion being granted, he would be a competent witness for the defense. A neglect in such case to move for a separate trial or separate verdict would be cause for refusing a new trial for the purpose of giving the parties convicted the desired testimony. State v. Ayer, 3 Foster, 321.

**90.** But in Texas, where one of two joint defendants was acquitted and the other convicted, it was held that the latter was entitled to a new trial upon showing that his codefendant was a material witness in his behalf, but could not testify by reason of being joined in the indictment. Lyles v. State, 41 Texas, 172.

**91.** A new trial will be granted where it appears that material evidence for the defense was excluded by reason of the form in which the indictment is drawn. Com. v. Manson, 2 Ashm. 31.

**92. Withholding evidence from jury.** Where the court improperly excludes competent evidence in relation to part of the offense charged, and the prosecution afterward abandons that part, the erroneous ruling will not be ground for a new trial. People v. Cunningham, 1 Denio, 524.

**93.** Where on the trial of an indictment for conspiracy to defraud, a letter from the defendant to his brother which was given in evidence was not delivered to the jury with the other papers in the case, and it appeared that the letter was not needed by the jury in their deliberations, its absence was held not a ground for setting aside the verdict. State v. Pike, 20 New Hamp. 344.

**94. Jury viewing premises in absence of prisoner.** The fact that the jury on a trial for murder were permitted by the court to view the scene of the alleged crime in custody of the sheriff without being accompanied by the prisoner is no reason for setting aside the verdict, especially if he neither objected nor asked leave to go with them. People v. Bonney, 19 Cal. 426. See *post, sub.* 216.

**95. Credibility of witness.** A new trial will not be granted where the sole question is the credibility of an accomplice, although

he was the only witness. Keithler v. Com. 10 Smed. & Marsh. 192.

**96.** Where the granting of a new trial depends upon the credibility of a witness, a denial of the motion by the court below will not be regarded as error. Weinzorflin v. State, 7 Blackf. 186.

**97. Improper argument.** Where the prosecution is permitted, contrary to the defendant's objection, to argue to the jury from matters not in evidence, and it is probable that the defendant was thereby prejudiced, the verdict will be set aside. State v. Foley, 45 New Hamp. 466.

**98. Evidence to be set out.** Upon an an application for a new trial, upon the ground of the admission of improper evidence, the evidence should be set out, in order that the court may see whether or not it is illegal. State v. Clark, 12 Ired. 151.

(*e*) *Erroneous proceeding or instruction.*

**99. Must have caused injury.** A new trial should not be granted, even for a misdirection, when it is evident that justice has been done. Johnson v. State, 14 Ga. 55; Lester v. State, 11 Conn. 415; People v. Ransom, 7 Wend. 417; State v. Camp, 23 Vt. 551. No error ought to avail a prisoner to escape punishment, unless it manifestly appears that it may have done him some material injury. Fralich v. People, 65 Barb. 48, per Mullin, P. J.

**100.** An error of the court to be ground for a reversal of the judgment, must affect the substantial rights of the defendant; and the burden is on him to show that such is the case. People v. Brotherton, 47 Cal. 388; s. c. 2 Green's Crim. Reps. 444.

**101.** Where a minor who was charged with larceny, was inquired of in court if he was of age and replied that he was supposed to be, and the trial proceeded without the appointment of a guardian *ad litem*, it was held after conviction, that he was not entitled to a new trial. State v. James, 37 Conn. 355.

**102.** When judgment is rendered against the defendant for the amount of a fine, and that he remain in the custody of the sheriff until the fine and costs are paid, and on a subsequent day of the term, the court in his absence also sentences him to imprisonment in the county jail, the latter judgment only will be reversed, and the cause remanded. Young v. State, 39 Ala. 357.

**103. Must be exceptions.** As a general rule, counsel cannot be heard to assail the charge of the court, if he has not excepted to it, or if it is too general to be available. Fralich v. People, 65 Barb. 48; State v. Avery, 44 New Hamp. 392.

**104.** But in a capital case, where instructions do not announce correct legal principles, or are inapplicable to the case, a new trial will be granted, although no exceptions were taken. Falk v. People, 42 Ill. 332.

**105. Error in admitting or excluding jurors.** Where on a trial for grand larceny, the effect of the improper disallowance by the court, of the defendant's challenge of a juror for cause, was to contract the number of peremptory challenges to which the defendant was entitled, it was held ground for a new trial. People v. Weil, 40 Cal. 268.

**106.** Where the court improperly excused a juror, it was held ground for a new trial. Boles v. State, 13 Smed. & Marsh. 398.

**107. Uncalled for remark by judge.** After a witness for the prosecution had testified, the defendant's counsel, for the sole purpose of contradicting him, introduced in evidence the written testimony of the witness taken before the examining magistrate, which was objected to by the prosecuting attorney. The judge in admitting it said that "the defendant's attorney had let down the fence, and all is now before the jury." *Held* that this remark was ultra-judicial and misleading, and ground for a new trial, as it implied that the written statement was evidence of all the facts contained in it, and that it was the more impressive as proof offered by the defendant himself. Coppage v. Com. 3 Bush, Ky. 532; see Lanham v. Com. Ib. 528.

**108. Where the jury may have been misled.** If the testimony in a capital case be not free from doubt, and there is reason to suppose that the jury have been misled

by the court in charging them as to the evidence, a new trial will be granted, notwithstanding the charge was correct in point of law. Foxdale v. State, 9 Humph. 411. Although the prosecuting attorney is permitted by the court to state the law incorrectly to the jury, yet the verdict will not for that reason be set aside, if the court afterward in its charge corrected the error. People v. Jenness, 5 Mich. 305.

**109. Intimation of opinion.** In Massachusetts, where the judge reasoned upon the facts, and intimated his opinion of the evidence, it was held not ground for a new trial. Com. v. Child, 10 Pick. 252.

**110.** Where the judge in his charge, after alluding to the influence of proof of good character in a doubtful case, called the attention of the jury to the absence of such proof in the case before them, it was held no cause for granting a new trial. People v. White, 22 Wend. 167; *contra*, s. c. 24 Ib. 520.

**111. Appeal to prejudices of jury.** If no legal error was committed in the submission of the cause, the judgment cannot be reversed on the ground that the charge of the court was an appeal to the passions and prejudices of the jury. Boyce v. People, 55 N. Y. 644.

**112.** On the trial of an indictment for assault and battery, the court charged the jury as follows: "I am not a little surprised that there should be an attempt made to acquit this defendant, but it is nevertheless your duty to find according to the evidence," and then proceeded to define the offense, and to instruct the jury to acquit or convict according to the evidence. *Held* not cause for a new trial. Keaton v. State, 7 Ga. 189.

**113. Neglecting or refusing to charge.** Where on a trial for murder, the evidence tended to show that it was manslaughter only, and the judge in his charge neglected so to instruct the jury, or to tell them the distinction between murder and manslaughter, it was held ground for setting aside the verdict. State v. Donnell, 32 Vt. 491.

**114.** In New York, a new trial was denied where the objection was that the judge, although requested, refused to charge the jury, the trial closing so late on Saturday night that had the jury been charged they must have been dismissed or kept over Sunday. People v. Gray, 5 Wend. 289.

**115. Charging a second time.** On the trial of an indictment for libel, the judge charged the jury a second time after they returned into court and reported that they could not agree, although they did not ask for further instructions. *Held* not ground for a new trial. Com. v. Suelling, 15 Pick. 321.

**116. Failure to interrogate prisoner.** Upon the reversal of the judgment of a Court of Oyer and Terminer, after conviction for murder, on the ground that the return to the writ of error does not show that the prisoner was asked if he had anything to say why sentence should not be pronounced, a new trial will be granted. Graham v. People, 63 Barb. 468.

### (*f*) *Tampering with jury.*

**117. By prosecutor before trial.** Where it appeared that on a trial for perjury, papers calculated to make an unfavorable impression on the jury, were exhibited by the prosecutor at several public places and read in the hearing of the jurors during the sitting of the court before the trial, the verdict was set aside. State v. Hascall, 6 New Hamp. 352.

**118. By counsel for prosecution.** Where after the jury were impaneled on a trial for robbery, one of the counsel for the prosecution took care of, fed and provided during the night for the horses of two of the jurors, free of charge, it was held ground for a new trial. Springer v. State, 34 Ga. 379.

**119. By witness for prosecution.** After conviction it was proved that a witness for the prosecution made remarks in the presence of one of the jurors, prejudicial to the prisoner's character, and to the effect that he believed the prisoner guilty. But it was further proved that as soon as the witness saw the juror he stopped talking, that he did not know the juror was present, and that the juror told him afterward that he did not take any notice of the conversation.

*Held* no ground for a new trial. State v. Ayer, 3 Foster, 301.

**120. By stranger.** Although where a communication is made to a jury while deliberating, by a party in whose favor the verdict is rendered, it will avoid the verdict, yet a verdict will not in general be set aside by reason of such communication, when it is made by the losing party or by a stranger. People v. Carnal, 1 Parker, 256.

**121.** In North Carolina, it has been held that where it is not shown that there was, but only that there might have been, improper influence brought to bear on the jury, a new trial is in the discretion of the presiding judge; but that where such influence is proved, the Supreme Court will, as matter of law, direct a retrial. State v. Tilghman, 11 Ired. 513.

**122.** Where, during a trial for murder, a person spoke to one of the jurors, in the presence of the court, about the health of the juror's family, it was held not ground for a new trial. Rowe v. State, 11 Humph. 491.

**123.** Where the sheriff took the jury to a private house, and there left them in the parlor, in company with three other men, it was held that this was sufficient ground for a new trial, although it appeared from the affidavits of the three persons that no conversation was had with the jury during the sheriff's absence in relation to the trial. Com. v. Wormley, 8 Gratt. 712.

**124.** On the trial of an indictment for an assault with intent to murder, S., one of the standing jurors of the term, but not sitting in the cause, stated to a juror after they had retired for the night, in a bed-room which they both occupied, that he guessed the defendant had a hard case; that he had heard that when he was in the book business at the South, a person refused to take a book subscribed for, and that the defendant drew two pistols, and threatened to blow the person's brains out if he did not take it. S., also, while the case was on trial, told substantially the same story in a public stage-coach, in which with several passengers were two other jurors. *Held* that the former conversation was cause for setting aside the verdict, but not the latter. State v. Andrews, 29 Conn. 100.

**125.** On a trial for malicious stabbing, it appeared that the jury, being in a room in charge of an officer, the officer left the room for wood and water, and that, in his absence, a person walked into the room, and on being told by the jury to take a seat, did so apart from the jury, but that there was no conversation between this person and the jury until the officer came back, when the intruder was removed. *Held* not a ground for a new trial. Luster v. State, 11 Humph. 169.

**126.** On a trial for passing a counterfeit bank note, the jury, after they retired to deliberate, found a placard on the wall of their room, which stated that one of their number was a counterfeiter, and that he had purposely got on the jury; and it appeared that all of the jury read the placard. *Held* that there was no cause for a new trial, unless it appeared that the juror, by reason of the placard, was disconcerted, or that the jurors were thereby influenced in giving their verdict. Hall's Case, 6 Leigh, 615.

**127.** By consent of the prisoner, the jury, on a trial for murder, were taken by the officer in charge of them to a hotel, there to be kept until they could agree. At the hotel they were taken to the public table, where they ate, the officer sitting between them and the guests. Rooms were prepared for them at the hotel; and at their request, a barber was sent for to shave some of them and cut their hair. The barber was in the room more than an hour, and for a few minutes of that time he was there in the absence of the officer. *Held* that although there was no evidence that the jury had been tampered with, the prisoner was entitled to a new trial. Boles v. State, 13 Smed. & Marsh. 398.

**128. By officer.** Where, on a trial for murder, it appeared that two of the officers who had the jury in charge spoke of the enormity of the offense, by saying that it was a worse case than D.'s, and one of them said public opinion was against the prisoner, it was held sufficient cause for a new trial. Nelms v. State, 13 Smed. & Marsh. 500.

**129.** Where it appeared, after conviction for an aggravated assault, that the officer in charge of the jury went into their room while they were considering their verdict, and argued with them that the defendant ought to be punished severely, it was held ground for a new trial. Dansby v. State, 34 Texas, 392.

**130.** Where refreshments were given to the jury in a capital case by the officer who had charge of them and another person, but it appeared that neither the officer nor the other person had any conversation with the jury, it was held that there was no cause for a new trial. Com. v. Roby, 12 Pick. 496.

**131. Person not sworn taking charge of jury.** Where, on a trial for murder, a person not sworn to take charge of the jury, went to the jury room in the absence of the proper officer, and took charge of them, it was held ground for a new trial. Hare v. State, 4 How. Miss. 187.

**132. Judge communicating with jury after they have retired.** If the judge communicate with the jury respecting his charge after they have retired, except publicly and in the presence of the prisoner, it will be ground for a new trial. Kirk v. State, 14 Ohio, 511.

**133.** It is error for the judge, after the jury have retired to deliberate, to give private instructions to them out of the hearing of counsel. Where, therefore, after conviction of manslaughter, it appeared that one of the jurors went to the judge, saying that he had come under the charge of the sheriff, at the request of the jury, who had found their verdict, to ask the judge whether it was competent for the jury to attach to their verdict a recommendation of the prisoner to mercy, and that the judge replied that it was perfectly competent for them to do so, it was held ground for a new trial. State v. Frisby, 19 La. An. 143.

**134.** The jury, after being out a long time, were called into court, and in answer to the judge, stated that there was no prospect of their agreeing. The judge thereupon told them that he must have a verdict, that the case was one of peculiar character, and that he had reason to believe, from information received, that some of the jury had been approached and tampered with previous to the trial. The jury then retired and found the defendant guilty of manslaughter. *Held* that as the remarks of the judge had a tendency to coerce the jury, they were ground for a new trial. State v. Ladd, 10 La. An. 271.

**135.** After the jury had retired to deliberate, and the court had adjourned, the jury sent a note to the judge asking for information on two points. The judge returned the note to them without any reply, but directed the officer to tell the foreman of the jury to read to them from 1 Pickering, 342, to the effect that no communication whatever ought to take place between the judge and the jury after the cause had been submitted to them, unless in open court and in the presence of the respective counsel. *Held* not ground for a new trial. Com. v. Jenkins, Thach. Crim. Cas. 118.

**136.** While the jury were deliberating on a trial for murder, one of them sent the officer who had charge of them to the court, to request that some book containing the law of manslaughter might be sent to them. The officer returned and told the jury that "Judge Edmonds said they had nothing to do with manslaughter;" and they found the prisoner guilty of murder. *Held* that the communication of the judge to the jury was not ground for a new trial. People v. Carnal, 1 Parker, 256.

*(g) Misconduct of jury.*

**137. Will not be presumed.** On a motion for a new trial on the ground of misconduct of the jurors, the presumption is that they performed their duty in accordance with their oaths; and to overthrow this presumption, there must be direct and positive testimony. People v. Williams, 24 Cal. 31.

**138. Taking notes.** Where jurors, contrary to the defendant's objection, and after the court has told them they must not do so, persist in taking notes of the evidence, it will be ground for a new trial. Cheek v. State, 35 Ind. 492. But not if the defendant does not object, and the jurors do not act in

disobedience to the orders of the court. Cluck v. State, 40 Ib. 263.

**139. Juror sleeping.** Where it appeared after verdict that during the progress of a trial for conspiracy one of the jurors was asleep, it was held that the defendant should have called attention to the fact at the time, and that not having done so, it was not ground for a new trial. U. S. v. Boyden, Lowell, 266.

**140. Separation without improper motive.** A brief separation of the jury, for necessary purposes, without any imputation of improper motives, even in a capital case, and contrary to the directions of the court, will not be ground for a new trial. But if there be the least suspicion of abuse, the verdict should be set aside. People v. Douglass, 4 Cow. 26; State v. Lytle, 5 Ired. 58; Whitney v. State, 8 Mo. 165; Jarnagin v. State, 10 Yerg. 529; Thomas v. Com. 2 Va. Cas. 479. Where a juror withdrew from his fellows in consequence of illness, but while absent talked with no one about the case, and was subject to no improper influences, it was held not good cause for complaint. People v. Reynolds, 2 Mich. 422. For the separation to vitiate the verdict, it must be shown that the jurors might have been tampered with, or improperly influenced, or some means exerted over them in consequence of their separating, so as to influence their verdict. Reins v. People, 30 Ill. 256.

**141.** In Missouri, the rule has been long established that the mere fact of the separation of the jury in a criminal case will not be ground for a new trial, unless it appear that they were tampered with, or that they misbehaved. State v. Dougherty, 55 Mo. 69; s. c. 2 Green's Crim. Reps. 610.

**142.** In Texas, it has been held that verdicts in minor offenses, will not be set aside on the ground that the jury separated without the permission of the court, unless it is manifest that injury has thereby been done. Cannon v. State, 3 Texas, 31.

**143.** On a trial for rape, one of the jurors left his seat while the court was in session, went out of the court house, passed through a group of persons, and after a moment's absence returned to the jury box. *Held* not ground for a new trial. Porter v. State, 2 Carter, 435.

**144.** On a trial for murder, the jury slept in five rooms in the third story of a hotel, opening on a common passage, which communicated with the street below by flights of stairs, the doors of their chambers being unfastened, and there being no doors at either end of the passage. *Held* not a separation in law, calling for a new trial. Thompson, v. Com. 8 Gratt. 637.

**145.** During the same trial, one of the jurors went down stairs to the pavement before the door of the hotel, in order to meet a passer by to send a message to his family, and after remaining there about five minutes, and seeing no one passing, returned to the rest of the jury. *Held* not a cause for a new trial. Ib.

**146.** The officer took charge of the jury without being sworn to do so; and the jury were allowed to separate. But it was proved that the separation was casual, that there was no tampering or opportunity to tamper with them, and that the officer did not speak to them about the case. *Held* that there was no cause for a new trial. Stone v. State, 4 Humph. 27.

**147.** After conviction of murder, the following was held not a ground for a new trial: Before the termination of the trial, and while the jury was in charge of an officer, one of them was permitted by the officer to go to his house for the purpose of changing his shirt, and was absent from three to five minutes, being seen by the officer to go upstairs and enter a room, the rest of the jury remaining below until he rejoined them. State v. O'Brien, 7 R. I. 336.

**148.** On the trial of an indictment for a felonious assault, one of the jurors, after the jury had retired to consider their verdict, was seen on the public square unattended by an officer, in conversation with a bystander; but upon what subject, and how long, was not shown. *Held* not a ground for a new trial. State v. Igo, 21 Mo. 459.

**149.** Where on a trial for grand larceny, after the jury had retired to deliberate, one of them, in company with the officer in

charge, went home, a distance of about five hundred yards, and while going through the street was spoken to by several persons on matters not connected with the case, it was held not a ground for a new trial. State v. Jones, 7 Nev. 408.

150. The jury on a trial for murder, retired to deliberate, Thursday, at six o'clock P. M., and rendered their verdict Saturday, at ten A. M. Members of the jury left the jury room at various times, in charge of an officer, and went about fifty yards to obey the calls of nature, going one at a time and returning as soon as practicable; the rest of the jury remaining together in the jury room with the door locked. One of the jurors being ill went in charge of the officer to a drug store one hundred and fifty yards distant, to get medicine, the keeper of which asked him if they had agreed on their verdict, to which he replied that they had not. Another juror left the jury room and conversed outside near the door, ten or fifteen minutes with a third person. The jury violated the injunction of the court not to eat or drink, contrary to the wishes of the officer. Several of the jurors wrote notes and dropped them from the windows of the jury room, and received notes in reply. Some of the jurors talked from the windows to persons in the street about the case, and on other subjects, but what was said did not appear. Servants and small children visited the jury room, the servants in order to carry food and clothing to the jurors, and the children to see their fathers. *Held*, that although these irregularities might, in the discretion of the presiding judge, have been good cause for setting aside the verdict, yet that they did not justify the Supreme Court in declaring, as matter of law, that there was a mistrial. State v. Tilghman, 11 Ired. 513.

151. **Separation of jury presumed injurious.** The prisoner need not show that the jury were subjected to improper influence during their separation. It is sufficient if they might have been. People v. Backus, 5 Cal. 275; People v. Lee, 17 Ib. 78; People v. Bonney, 19 Ib. 426. Where part of the jury, after separating without the permission of the court, remain absent for a considerable length of time, it will be presumed that they were tampered with. State v. Fox, Ga. Decis. pt. 1, 35; State v. Peter, Ib. 46; Hines v. State, 8 Humph. 597; State v. Prescott, 7 New Hamp. 287; Stone v. State, 4 Humph. 27; Riley v. State, 9 Ib. 646. In Vermont, in case of separation of the jury, the burden of proof to show injury, is on the party seeking to set aside the verdict. State v. Camp, 23 Vt. 551.

152. **Unexplained separation of jury, fatal to verdict.** In cases of a higher grade than misdemeanor, and especially in capital cases, a separation of the jury without the leave of the court, will be fatal to a verdict against the prisoner, unless it be shown affirmatively by the prosecution, that no injury to the prisoner could have resulted therefrom. Eastwood v. People, 3 Parker, 25; Cornelius v. State, 7 Eng. 782.

153. Where during a trial for murder, which lasted several days, some of the jury, after they had retired from the court for the night, frequently absented themselves from their fellows, without being under the charge of an officer, and remained absent for fifteen or twenty minutes at a time, it was held cause for a new trial. McLain v. State, 10 Yerg. 241.

154. After the jury had retired to deliberate on a trial for murder, one of them separated himself from his fellows without the attendance of the officer having the jury in charge. The juror was gone a very short time, and it was not shown that he communicated with any one while absent. *Held* ground for a new trial. Maher v. State, 3 Minn. 444.

155. On a trial for murder, the judge having charged the jury, gave them a recess of five minutes, and they were allowed to leave the court room and go at large without being in charge of an officer. At the expiration of the time, having returned, the sheriff was sworn to take charge of them, and they retired to deliberate. *Held* error, and that the prisoner was entitled to a new trial. State v. Parrant, 16 Minn. 178.

156. Where on a trial for manslaughter, the jury separated, and several persons went

into the jurors' room and talked with them, it was held cause for a new trial. State v. Sherbourne, Dudley, Ga. 28.

**157.** The bailiff in whose charge the jury retired to consider of their verdict, was a portion of the time away from the building in which their deliberations were held. A person held communication with the jury while the bailiff was absent. Three of the jurors separated from the jury unattended by an officer; and one of them was seen talking with a person. The bailiff told a person how the jury stood while they were still deliberating; and the bystanders generally seemed to know the state of their deliberations. *Held* error in the court below to refuse to grant a new trial. Madden v. State, 1 Kansas, 340.

**158. Separation of jury by consent.** In New York, the trial of a capital case is not vitiated by the separation of the jury before retiring to deliberate on their verdict, with the consent of the prisoner and permission of the court. Stephens v. People, 19 N. Y. 549; affi'g s. c. 4 Parker, 396. The contrary has been held in Tennessee. Wesley v. State, 11 Humph. 502; Wiley v. State, 1 Swan, 256. In Pennsylvania, where the jury on a trial for murder were allowed to separate by consent of the prisoner's counsel, the conviction was set aside. Peiffer v. Com. 15 Penn. St. 468.

**159.** In Mississippi, the separation of the jury during the trial of a capital case, even by permission of the court, either with or without the consent of the prisoner, except in case of great necessity, or the separation of any of the jurors from their fellows during the trial without being attended by an officer, will vitiate the verdict. Woods v. State, 43 Miss. 364.

**160.** In Louisiana, the separation of the jury in criminal cases, after the evidence is closed and the jury charged before verdict, vitiates the verdict, notwithstanding such separation was with the consent of the prisoner or his counsel. State v. Populus, 12 La. An. 710.

**161. Jury taking refreshments.** If the jury take refreshments before they have agreed, at the charge of the prosecutor, it will be ground for a new trial. State v. Sparrow, 3 Murphy, 487. But see Com. v. Roby, 12 Pick. 496.

**162. Drinking of spirituous liquors by jury, when excusable.** In Missouri and Tennessee, the use of intoxicating drinks by jurors while in the discharge of their duties will not be ground for a new trial unless used to excess, or supplied from an improper source, or calculated to affect the verdict. State v. Upton, 20 Mo. 397; Stone v. State, 4 Humph. 27; Rowe v. State, 11 Ib. 491. Substantially the same has been held in New Jersey, Illinois and Nevada. State v. Cucuel, 31 N. J. 249; Davis v. People, 19 Ill. 74; State v. Jones, 7 Nev. 408.

**163.** After the charge of the judge, one of the jurors in open court stated that he had been unwell for several days and was still so, and that it was impossible for him under the circumstances to confine himself to water without danger to his health, and he asked permission for such spirits as might be required for his health; to which request the counsel for the prisoner consented and the indulgence was granted. *Held* not a ground for setting aside the verdict. U. S. v. Gibert, 2 Sumner, 19.

**164.** During a trial for murder, one of the jurors not in the habit of drinking was ill, and took for medicinal purposes without medical advice some brandy and blackberry balsam. It was not shown or claimed that its effects were intoxicating or other than remedial, or that the occurrence was not known to the defendant and his counsel at the time and before the cause was submitted to the jury. *Held* not a ground for setting aside the verdict. State v. Morphy, 33 Iowa, 270.

**165.** After the jury had retired to deliberate, the bailiff having charge of them carried a bottle of liquor into the jury room without the knowledge or permission of the court to a sick juror, who drank of the liquor. It did not appear that any one else drank, and the liquor was in the jury room a very short time, during which the bailiff was present. *Held* not a ground for a new trial. Pope v. State, 35 Miss. 121.

**166.** Where it appeared that one of the

witnesses for the prosecution met the jury at the hotel where they lodged, and invited them in the presence of the officer who had charge of them to drink liquor with him, it was held that this act, though one for which the jurors were liable to a fine, was not ground for a new trial. Thompson v. Com. 8 Gratt. 637.

**167. Drinking of liquor by jury, when fatal to verdict.** In New York, the jury on a trial for murder being allowed to leave the court house during the trial, under the charge of two sworn constables, two of them separated from their fellows, went to their lodgings, a distance of thirty rods, ate cakes, took some cakes with them on their return, and drank spirituous liquors, though not enough to affect them, and one of them conversed on the subject of the trial; they came back, heard the trial through, and found the prisoner guilty. *Held* cause for a new trial. People v. Douglass, 4 Cow. 26.

**168.** In New Hampshire, it has been held that the use of stimulating liquors by the jury while deliberating on their verdict, without first showing good reason for such use and getting leave of the court, is good cause for setting aside a conviction, whether the use was intemperate or otherwise. State v. Bullard, 16 New Hamp. 139.

**169.** The separation of a juror from his fellows, after the case has been finally submitted and before they have agreed upon a verdict, for the purpose of obtaining and drinking intoxicating liquors, when not shown to be excusable, will entitle the prisoner to a new trial. Weis v. State, 22 Ohio, N. S. 486.

**170.** After the jury on a trial for murder had retired to deliberate, the officer who had them in charge went to a liquor and billiard saloon with two of them, and asking the keeper of the saloon if he could not "fix up something for these jurors for the diarrhœa," procured for each of them "a drink of brandy, ginger wine, nutmeg and sugar," which they drank, and which was paid for by one of them. It did not appear where the other jurors were while the two were in the saloon with the officer, and there was no attempt to show that the jurors were really suffering with diarrhœa, how much liquor they drank, or what effect it had upon them. *Held* ground for a new trial. Davis v. State, 35 Ind. 496.

**171.** On a prosecution for adultery, after the jury had retired in charge of the bailiff, two of them, each separately at different times, were permitted to separate from the balance of the jury, and during their absence from the jury room, which was for a necessary purpose, one of such jurors went to a grocery store to buy tobacco, and while there procured and drank a glass of ale, and then returned with the bailiff to the jury room. *Held* ground for a new trial. State v. Baldy, 17 Iowa, 39.

**172. Evidence.** A new trial will not be granted upon the reported observations of jurors as to their misconduct, hearsay evidence not being admissible on an application to set aside the verdict. Stone v. State, 4 Humph. 27.

(*h*) *Surprise.*

**173. Disqualification of juror.** Where the objection to a juror would be sufficient cause of challenge to the favor if discovered before trial, it will furnish cause for a new trial if not discovered until after verdict. Anderson v. State, 14 Ga. 709; Monroe v. State, 5 Ib. 85.

**174.** But although it appear that the prisoner had good cause of challenge, which he did not avail himself of in consequence of ignorance of the facts, yet if no injustice has been done by the verdict, he is not entitled to a new trial. State v. Howard, 17 New Hamp. 171.

**175.** The fact that a juror is an alien, though cause of challenge, is not ground for a new trial, notwithstanding it was unknown to the prisoner or his counsel until after the verdict. Presbury v. Com. 9 Dana, 203; *contra*, Seal v. State, 13 Smed. & Marsh. 286.

**176.** Where a juror before trial made the prisoner believe that he was in his favor, for which reason the prisoner did not exercise his right of challenge for cause, which he would have done had the deceptive conduct

of the juror not misled him, it was held not ground for a writ of error. Poore v. Com. 2 Va. Cas. 474

**177. Names of witnesses not on indictment.** Where the prisoner has a right to have the names of the witnesses for the prosecution written on the indictment, to enable him to prepare for his defense, the objection that this requirement was neglected, comes too late after verdict, and is not therefore ground for a new trial. Ray v. State, 1 Iowa, 316.

**178. Artifice or management.** When the purposes of justice have been perverted to the injury of the accused, by practices *dehors* the trial, as by procuring improper persons to sit upon the jury, by management on the part of any person which could not be guarded against by ordinary care and attention, or the like, or by an accident without the fault of the prisoner, the same court in which the miscarriage took place may set aside the verdict as for a mistrial. Willis v. People, 32 N. Y. 715.

**179.** Where a person indicted for horse stealing, was induced to go to trial by the artifice of concealing from him the fact that certain witnesses for the prosecution were present, and making him believe that they were not there when in fact they were, and had been concealed by the attorney for the State, it was held that the prisoner was entitled to a new trial. Curtis v. State, 6 Cold. Tenn. 9.

**180. Omission or mistake.** Although a new trial may be granted for surprise, yet after the prisoner has submitted his case, he cannot upon discovering that the verdict is against him, ask the court to relieve him from the consequences of a mistake or omission, by granting him a new trial. People v. Mack, 2 Parker, 673.

**181.** Insufficient preparation, or a mistake in conducting the trial, or the want of such evidence or defense as it was in the prisoner's power to have produced, or a discovery of the incompetency of the witnesses examined, are not grounds for setting aside the verdict. Com. v. Benesh, Thach. Crim. Cas. 684.

**182.** A new trial will not be granted because the public prosecutor, by mistake, withholds in his hands papers important to the defendant, unless the latter use diligence to obtain them. People v. Vermilyea, 7 Cow. 369.

**183.** It is doubtful whether surprise founded upon mistake of law, is ground for a new trial. It cannot be when it arises from the party's own negligence. That the defendant or his counsel were guilty of laches in preparing the cause, is not a ground for disturbing the verdict. People v. O'Brien, 4 Parker, 203.

**184. Neglect to obtain witness.** Where on a trial for forgery, the prisoner neglected to obtain witnesses in rebuttal in consequence of counsel advising him that certain testimony for the prosecution which was allowed, would not be received, it was held that he was entitled to a new trial on the ground of surprise. State v. Williams, 27 Vt. 724.

**185.** Where it was shown that the prisoner having been informed before the trial, that a certain person would be a material witness in his favor, interrogated him and was told by him that he knew nothing about the case, but that after conviction the prisoner learned that this person could testify to facts which would be likely to produce a different verdict, it was held ground for a new trial. Phillips v. State, 33 Ga. 281.

**186. Absence of witness.** On a trial for murder, the prisoner's counsel stated that they would be able to procure the attendance of a material witness for the defense, who was absent, on the following day. The trial accordingly proceeded, but the absent witness was not obtained, though nearly everything was proved which the defendant expected to show by the absent witness. *Held* not ground for a new trial. Young v. Com. 4 Gratt. 550.

**187.** In the same case, a material witness for the defense, who was present at the commencement of the trial was taken ill before the evidence for the prosecution was closed, and did not attend and testify. But what the absent witness was expected to swear to was shown by other witnesses. *Held* no ground for a new trial. Ib.

**188. Intoxication of witness.** On a trial for murder, the defense having introduced a witness who was so much intoxicated as not to be capable of understanding the obligations of an oath, the court would not permit him to be sworn, but told the defense that they might recall the witness when he was sober. The defense examined other witnesses, but did not recall this one. *Held* that the granting or refusing a new trial on this ground was in the discretion of the court. State v. Underwood, 6 Ired. 96.

**189. Witness leaving court.** Where a witness, subpœnaed by the prosecution, but not examined, leaves the court, it is not cause for a new trial on behalf of the prisoner. If the testimony of the witness was material to the defense, it should have subpœnaed him. State v. Blennerhassett, Walker, 7.

**190. Perjury of witness.** A new trial will not be granted to enable a party to impeach a witness who testified on a former trial. Com. v. White, 5 Mass. 261; State v. Henry, R. M. Charlt. 505; Herber v. State, 7 Texas, 69; Porter v. State, 2 Carter, 435; Deer v. State, 14 Mo. 348. This rule is subject to rare exceptions. Thompson's Case, 8 Gratt. 637.

**191. Incapacity of interpreter.** The incompetency of an interpreter employed by the court to interpret the evidence of witnesses testifying in a language not understood by the court, counsel, or jury, is not ground for a new trial, the objection coming too late after verdict. State v. Lemodelio, 23 La. An. 16.

**192. Intoxication of defendant.** Where, after conviction on a charge of felony, it was proved that the prisoner during the trial was too drunk to understand the nature of the proceedings, it was held ground for a new trial. Taffe v. State, 23 Ark. 34.

**193. Unexpected evidence.** It being proved on a trial for murder that there was blood on the prisoner's clothes, after conviction he filed his affidavit stating that he was surprised by this proof; that he did not know that it would be produced against him, or know that he could explain it until after the trial. *Held* not a ground for arresting the sentence of the court and granting a new trial. Gilbert v. State, 7 Humph. 524.

**194.** The defendant, having been convicted of obstructing a highway, moved for a new trial on the ground that he was surprised by proof that the point of obstruction was different than he had supposed, for which he was not prepared to defend. *Held* that he was not entitled to the relief asked. Wholford v. Com. 4 Gratt. 553.

**195. Improper admission by counsel.** A. and B., being confined in jail on a charge of burglary, made a deadly assault upon the jailer and his assistants. Having been tried and convicted for this offense, they moved for a new trial on the ground that their commitment to jail was irregular and void, and that their counsel, supposing it to be valid, in order to avoid prejudicing the minds of the jury by showing the cause of the commitment, admitted the legality of the imprisonment, by reason whereof they were found guilty. *Held* that they were not entitled to the relief asked. Lester v. State, 11 Conn. 415.

(*i*) *Newly discovered evidence.*

**196. When ground for relief.** To render newly discovered evidence cause for a new trial, the applicant must show: 1st, that the evidence has come to his knowledge since the trial; 2d, that it was not owing to the want of due diligence that it did not come sooner; 3d, that it is so material that it would probably produce a different result if the new trial were granted; 4th, that it is not cumulative; 5th, that the affidavit of the witness himself should be produced or its absence accounted for; 6th, that the object of the testimony is not merely to impeach the character or credit of a witness. State v. Carr, 1 Foster, 106; Lester v. State, 11 Conn. 415; Holman v. State, 8 Eng. 105; Pleasant v. State, 2 Ib. 300; Ditto v. Com. 2 Bibb, 17; People v. Vermilyea, 7 Cow. 369; Thompson's Case, 8 Gratt. 637; White v. State, 17 Ark. 404; Berry v. State, 10 Ga. 511; State v. McLaughlin, 27 Mo. 111; State v. Ray, 53 Ib. 345. In California, newly

discovered evidence is not ground for a new trial under the statute (Wood's Dig. 304, § 440). People v. Bernstein, 18 Cal. 699.

**197. Must have been unknown, and no want of diligence.** Newly discovered evidence is a ground for a new trial when it was not known to the party at the time of the trial, and it was owing to no want of diligence that it was not known and produced. Wise v. State, 24 Ga. 31; Milner v. State, 30 Ib. 137.

**198.** A. having been arrested and put in jail on a charge of assault with intent to murder, which was alleged to have occurred in a fight between a foreman and employees, the attorney of A., upon asking those who were present, was told that they did not know what part A. took in the affair. But after conviction, they stated that they were ready to testify that A. did not make the assault. *Held* ground for a new trial. Thomas v. State, 52 Ga. 509.

**199.** Where the prosecution had a witness testify who had been convicted of an infamous crime, and no objection was made, it was held that a new trial could not be granted the defendant upon discovering the incompetency of the witness after conviction. Com. v. Green, 17 Mass. 515.

**200.** Where the newly discovered evidence was a confession of the prisoner's wife to third persons, during the trial, that she committed the crime, and that her husband had no knowledge of it, the court refused a new trial. State v. J. W. 1 Tyler, 417.

**201. Must be material.** Newly discovered evidence which would not be likely to produce a different result, is not ground for a new trial. Jones v. State, 48 Ga. 163; s. c. 2 Green's Crim. Reps. 586.

**202.** After a conviction of manslaughter, a new trial will not be granted on the ground that since the trial it has been discovered that the deceased, some weeks previous to the homicide, bought a pistol, saying that he intended to kill the accused, there being no evidence of notice to the accused of the threats. Carr v. State, 14 Ga. 358.

**203.** On the trial of an indictment for obtaining goods by false pretenses, the prosecution introduced in evidence a book purporting to contain an entry of the false statements of the defendant, made in the book at the time the goods were obtained. After the conviction of the defendant, it was discovered that the entry in the book was made some time after the obtaining of the goods. *Held* that the discrepancy was not ground for a new trial. Com. v. Benesh, Thach. Crim. Cas. 684.

**204.** Where after conviction of stealing cattle, it appeared that the defendant took the cattle under a color of title, a new trial was granted. State v. Simons, Dudley, Ga. 27.

**205.** Where after conviction for murder, it was ascertained that a written confession which was given in evidence against the defendant, did not contain the entire confession, it was held that the defendant was entitled to a new trial on the ground of newly discovered evidence. Powell v. State, 37 Texas, 348.

**206. To prove alibi.** The propriety of granting a new trial for the purpose of letting in the defense of an *alibi*, depends so much upon the circumstances of the case, that a court of review will rarely interfere with the decision of the court below. Thompson v. State, 5 Humph. 138.

**207. Must not be cumulative.** A new trial will not be granted on account of newly discovered evidence which is merely cumulative. Roberts v. State, 3 Kelly, 310; Com. v. Flanagan, 7 Watts & Serg. 415; Com. v. Murray, 2 Ashm. 41; Com. v. Williams, Ib. 69; Giles v. State, 6 Ga. 276; Williams v. People, 45 Barb. 201; People v. McDonnell, 47 Cal. 134; s. c. 2 Green's Crim. Reps. 441.

**208. To impeach witness.** The discovery of such new evidence as would only impeach the evidence of a witness on the former trial, is not a sufficient ground for a new trial. Bland v. State, 2 Carter, 608; State v. Henry, R. M. Charlt. 505; Herber v. State, 7 Texas, 69; Leving v. State, 13 Ga. 513; Porter v. State, 2 Carter, 435; Com. v. Waite, 5 Mass. 261; Deer v. State, 14 Mo. 348; Wright v. State, 34 Ga. 110; Hoye v. State, 39 Ib. 718.

**209.** Where a material witness had stated before the trial, that he would hang the

prisoner by his testimony, if he could, and the prisoner knew nothing of the declaration until after the trial, it was held that this was no cause for staying sentence. Com. v. Drew, 4 Mass. 391.

(*j*) *Irregularities in the care or conduct of the jury.*

**210. Jury not in care of officer.** In Mississippi, where the jury during a portion of the trial, and after they had retired, were not under the charge of a sworn officer, it was held ground for a new trial. McCann v. State, 9 Smed. & Marsh. 465.

**211.** In Tennessee, where the jury retired for deliberation on their verdict, to a room of the building in which the court sat, without an officer, and it did not appear that they improperly separated, or held communication with any person not of their body, it was held that there was no cause for a new trial. Jarnagin v. State, 10 Yerg. 529.

**212. Change of officer.** The jury retired to deliberate with an officer who had been sworn to take charge of them; but before the court adjourned a second officer was sworn in court to attend upon them; and after the court adjourned, another officer was sworn for the same service. *Held* not ground for a new trial. Com. v. Jenkins, Thach. Crim. Cas. 118.

**213. Papers handed to jury by officer.** Where on a trial for murder the sheriff, after the jury had retired to deliberate, handed to them loose papers purporting to be evidence, it was held that the refusal of the court below to grant a new trial was error. Pound v. State, 43 Ga. 88.

**214.** But where after the jury had retired to deliberate on a trial for murder, a constable, upon the request of one of their number, handed him a paper on which was marked the several punishments fixed by law for the different degrees of manslaughter, it was held not a ground for a new trial, it appearing that the prisoner had not been prejudiced thereby. Wilson v. People, 4 Parker, 619.

**215. Jury taking out documents.** Where the jury took to their room two papers which were in evidence, inadvertently without the permission of the court, but through no improper intervention of any one, and it was not shown what, or whether any use of them was made by the jury in their deliberations, it was held not a ground for a new trial. Bersch v. State, 13 Ind. 434.

**216. Examination of statutes.** On a trial for murder, after the jury had retired, one of their number inquired of a constable who was in attendance whether the jury could not bring in a verdict of manslaughter, saying that if they could do so, the jury would agree. He said he thought they could, but added that they had better consult their foreman, who being a justice of the peace, would probably know. The Revised Statutes were then sent for by the jury and examined in relation to murder and manslaughter. *Held* that this was sufficient to vitiate the verdict, unless it appeared beyond all reasonable doubt that no injury had resulted to the prisoner therefrom. People v. Hartung, 4 Parker, 256.

**217. Reading newspapers.** Suffering jurors to have daily access to newspapers containing imperfect accounts of the trial being had before them, with comments upon the person and character of those connected with it, is ground for setting aside the verdict. Walker v. State, 37 Texas, 366.

**218.** Where it appeared that after the jury were impaneled on a trial for murder, they saw newspaper accounts of the testimony, but that such accounts had no influence on their minds in finding the verdict, it was held not to be sufficient ground for a new trial. U. S. v. Reid, 12 How. U. S. 361.

**219.** And where the jury, while being kept together in a capital case, were allowed by the officer in charge of them to read the newspapers, the officer first inspecting the papers and cutting out everything which related to the trial, it was held that there was no cause for setting aside the verdict. U. S. v. Gibert, 2 Sumner, 10.

**220. Receiving additional evidence.** Where, after a cause has been submitted, the jury receive additional evidence which is material, it will be fatal to the verdict.

Hudson v. State, 9 Yerg. 408; Booby v. State, 4 Ib. 111.

**221.** Where, on a trial for murder, after the evidence was all in, several of the jury while taking exercise, with the consent of the court accompanied by an officer, visited and examined the locality of the homicide, it was held good ground for a new trial. Eastwood v. People, 3 Parker, 25. See *ante*, *sub.* 94.

**222.** On the trial of an indictment for burglary and larceny, the jury came into court after they had retired, and asked for an explanation from a witness, whereupon the witness stated a fact to which he had not testified before, but the jury were instructed by the court not to regard the additional testimony. *Held* not a ground for a new trial. Hudson v. State, *supra*.

**223.** Where, on a trial for murder, after the prosecution had rested, one of the jurors at the adjournment of the court, took up and examined the skull of the murdered man, which was on the district attorney's table, it was held not a ground for a new trial. Wilson v. People, 4 Parker, 619.

**224. Juror communicating information to his fellows.** Where, on a trial for felony, the evidence on a material point is conflicting, and after the jury retire to deliberate, one of their number makes statements not previously disclosed, conducing in some degree to the determination of the controverted point against the prisoner, the verdict will be set aside. In such case, the burden is not upon the prisoner to show that he has been prejudiced. It is sufficient that he may have been. Sam v. State, 1 Swan, 61.

**225.** Where, after the jury had retired to deliberate, one of their number stated to the others that the defendant had stolen a hog, which was not proved on the trial, but which the jury regarded as evidence, it was held that the defendant was entitled to a new trial. Booby v. State, 4 Yerg. 111.

**226.** Where one of the jurors told the others, after they had retired, that he had heard the principal witness in the case examined before the grand jury, and that the witness then made the same statement that he made at the trial, and it appeared that such declarations of the juror had a powerful influence on them in finding the prisoner guilty, it was held ground for a new trial. Donston v. State, 6 Humph. 275.

(*k*) *Improper rendering of verdict.*

**227. Resorting to calculation.** Where the jury, in order to agree on the period of imprisonment, arranged that each juror should write his figures, the whole be added, the amount divided by twelve, and the quotient be their finding, it was held ground for a new trial. Crabtree v. State, 3 Sneed, 302.

**228.** But where, on a trial for murder, the jury having agreed as to the guilt of the prisoner, and the only question being as to the punishment, the result was arrived at by each juror setting down the number of years he thought the offense merited, adding these numbers, dividing the aggregate by twelve, and adopting the quotient for their verdict, it was held not cause for a new trial. Thompson v. Com. 8 Gratt. 637.

**229. Disclosing verdict.** The fact that the jury disclosed their verdict by order of the court, is not ground for a new trial, as it might be if disclosed without such order. State v. Bryant, 21 Vt. 479.

**230. Absence of prisoner.** The fact that the prisoner's counsel are present in court during the trial, and at the return of the verdict, and do not raise any objection on account of his absence, does not constitute a waiver of his right to be present. Rose v. State, 20 Ohio, 31.

**231.** If after conviction of assault with intent to commit murder, the record does not show that the prisoner was present in court when the verdict was delivered, a new trial will be granted. But if the irregularity consists in pronouncing sentence in the prisoner's absence, the judgment will be reversed, and the cause remanded, with instructions to pronounce judgment in accordance with law. Cole v. State, 5 Eng. 318. And see Rose v. State, *supra*.

**232. Jury not polled.** In South Carolina, where after conviction of murder, the judge refused the prisoner's application to have the jury polled, it was held not a ground for

a new trial. State v. Wise, 7 Rich. 412; State v. Whitman, 14 Ib. 113.

**233. Jury not acquiescing in verdict.** On the trial of an indictment for an affray, the jury having intimated their intention to acquit one of the defendants, the court told them that if they believed the evidence, both of the defendants were guilty; whereupon the prosecuting attorney directed the clerk to enter a verdict of guilty as to both, which was done, and the jury, being asked if that was their verdict, made no direct assent, but by a nod from each of them. *Held* that there must be a new trial. State v. Shule, 10 Ired. 153.

**234.** One of the jurors filed his affidavit, in which he stated that he believed that the prisoner was not guilty; that he was made to believe by some of the jurors, that there were fatal defects in some part of the proceedings which would prevent the prisoner from being sent to the penitentiary; that they would find a verdict of guilty, and recommend him to the mercy of the court, and that the recommendation being sent to the Governor, would procure his pardon. *Held* that there must be a new trial. Cochran v. State, 7 Humph. 544.

**235.** Where on the trial of an indictment for grand larceny, it was the duty of the jury to fix the term of imprisonment, which they neglected to do, and were discharged but were all recalled by the judge before leaving the court room, excepting one, who had gone away a short distance with the deputy sheriff, it was held that the verdict must be set aside. Mill's Case, 7 Leigh, 751.

**236.** Where after conviction for murder, one of the jurors said that he did not agree to find the prisoner guilty of murder, but only of manslaughter, and through mistake of his duty believed that he must coincide with the other jurors, it was held not ground for a new trial. Com. v. Drew, 4 Mass. 391.

**237.** Upon the jury being polled on a trial for murder, one of them stated that when he first went out, he was not in favor of finding the prisoner guilty, but that a majority of the jury being against him, he agreed to the verdict as delivered by the foreman. When again asked "What is your verdict now?" he replied, "I find the prisoner guilty." *Held* no ground for setting aside the verdict. State v. Godwin, 5 Ired. 401.

### (*l*) *Wrong verdict.*

**238. Insufficient for judgment.** Although when a verdict does not pronounce on the facts necessary to enable the court to give judgment, the jury should be directed to retire for further deliberation, yet if the court does not do this, it does not entitle the defendant to a discharge, but a new trial may be granted. State v. Arthur, 21 Iowa, 322.

**239.** Under an indictment containing a count for selling liquor by measure in quantities less than five gallons, and also a count for selling liquor by the glass to be drank upon the premises, without having a license therefor, the proof was of a sale of less than five gallons not drank on the premises, and a sale of one glass on Sunday, drank upon the premises, and a general verdict of guilty. It was held that although there was sufficient evidence to have warranted the jury in convicting the defendant under the first count, yet as their verdict was general, and the court could not say that it was based on that offense, there must be a new trial. People v. Brown, 6 Parker, 666.

**240. Against law or evidence.** Where the jury render a verdict of guilty, manifestly against law and evidence, a new trial will be granted. State v. Sims, Dudley, Ga. 213; State v. Jones, 2 Bay, 520; State v. Powers, Ga. Decis. pt. 1, 150; U. S. v. Duval, Gilpin, 356; State v. Rabon, 4 Rich. 260; Ball's Case, 8 Leigh, 726; State v. Spenlove, Riley, 269; Grayson's Case, 6 Gratt. 712.

**241.** Where there is a great preponderance of evidence against the verdict, a new trial will be granted. Keithler v. State, 10 Smed. & Marsh. 192; Cochran v. State, 7 Humph. 544; Leake v. State, 10 Ib. 144; Bedford v. State, 5 Ib. 552; State v. Lyon, 12 Conn. 487.

**242.** But the courts will grant a new trial with reluctance, where the proceedings have been regular, and no misconduct is at-

tributable to the jurors, merely because the jury may have mistaken the law of the case, or the weight of evidence. Wickersham v. People, 1 Scam. 130; State v. Hooper, 2 Bail. 29; State v. Anderson, Ib. 565; State v. Jeffrey, 3 Murph. 480; Hall's Case, 2 Gratt. 594; State v. Sartor, 2 Strobh. 60; Bivens v. State, 6 Eng. 455; Mains v. State, 8 Ib. 285; Bennett v. State, Ib. 694; Giles v. State, 6 Ga. 276; State v. Fisher, 2 Nott & McCord, 261; Kirby v. State, 3 Humph. 289.

**243.** Where, however, the evidence is not sufficient to sustain the verdict, a new trial may be granted, although it may not be a case in which a like course would have been pursued in a civil action. Bedford v. State, 5 Humph. 552. Where the prisoner has been twice tried for murder, and found guilty each time, the court being of opinion that the evidence was wholly insufficient to sustain the verdict, awarded a new trial. Grayson v. Com. 7 Gratt. 613. But a new trial will not be always granted although the court is not satisfied beyond a reasonable doubt of the guilt of the accused. Kirby v. State, *supra*.

**244.** The prisoner having been convicted of murder in the first degree, the Supreme Court in reversing the judgment, stated that the facts would authorize a conviction of murder in the second degree. On the second trial, the jury, notwithstanding this intimation of the court, again found the prisoner guilty of murder in the first degree. *Held* that there was no cause for a new trial. Mitchell v. State, 8 Yerg. 514.

**245.** Where after conviction of rape, it appeared that the prosecutrix was of doubtful character, that she did not speak of the offense until asked about it, that the accused did not flee, that the prosecutrix was uncorroborated, that the place of the alleged crime was such that she might have been heard, and she made no outcry, it was held that the defendant was entitled to a new trial. Whitney v. State, 35 Ind. 503.

**246.** Where under an indictment against two, for grand larceny, the evidence against both being the same, the jury found one guilty of grand and the other of petit larceny, a new trial was granted. State v. Lorumbo, Harper, 183.

**247.** Under a statute limiting prosecutions for the offense to one year from the time the offense was committed, an indictment for gaming was found in March, and the evidence showed that the alleged gaming was some time during the year previous. It was further proved that the defendant sat behind a table, commonly called a faro table; that he dealt or drew cards from a box, and used pieces of bone for the purpose of carrying on the game; but it was not proved that any money was played for, or that any game was actually played. The defendant having been convicted, it was held that there was no cause for a new trial. Stevens v. State, 3 Ark. 66.

**248.** On a trial for Sabbath breaking, a witness testified that on Sunday he went to the back door of the defendant's store and applied to him for goods, which the defendant refused to sell him, assigning as a reason that it was Sunday; that the witness then helped himself to the goods; that the defendant did not charge the goods in his account against the witness, or at any time demand payment, but that he afterward received pay for them from the witness. The defendant having been found guilty, it was held that there was no cause for a new trial. Bennett v. State, 8 Eng. 694.

**249. Withholding from prisoner benefit of doubt.** If the jury withhold from the prisoner the benefit of a doubt, a new trial will be granted. State v. Hammond, 5 Strobh. 91. Where the judge before whom the prisoner was tried, considered his guilt doubtful, a new trial was ordered upon the consent of the prosecuting attorney. Dilby v. State, Riley, 302. And where on a trial for murder, the evidence left it doubtful whether one of the defendants was present at the homicide, a new trial was granted as to him. State v. Rabon, 4 Rich. 260.

**250. Verdict variant from charge.** On the trial of an indictment for breaking and entering a dwelling-house with intent to commit a felony, the court instructed the jury that "if they believed the defendants (however they may have got into the house)

broke out of it, they were guilty. *Held* that as they could not be convicted of that with which they were not charged, the instruction was erroneous, and ground for a new trial. State v. McPherson, 70 N. C. 239.

**251.** In South Carolina, on the trial of an indictment for stealing fifteen hogs, under a statute imposing a penalty of five dollars for each hog stolen, it was proved that the defendant only stole three hogs. *Held* that the defendant was entitled to a new trial on the ground that the charge was not proved as laid, notwithstanding the prosecution offered to obtain a remission of the penalty, excepting for the three hogs. State v. Herring, 1 Brev. 159.

**252.** On the trial of an indictment for arson, charging the defendant in the first count with burning a barn, parcel of the mansion house, and in the second count with burning a barn not being parcel of the mansion house, the evidence sustained the second count, but the jury notwithstanding, found the defendant guilty under the first count, and acquitted him as to the second. *Held* ground for a new trial. State v. Stewart, 6 Conn. 47.

**253.** Where under an indictment for the larceny of several books, the evidence showed that the defendant stole but a part of the books, and the jury found a general verdict of guilty, it was held that there must be a new trial, although the punishment was the same for stealing a part as the whole. State v. Somerville, 21 Maine, 20.

**254.** Where there is a general verdict of guilty, under an indictment charging two distinct offenses, differently punished, a new trial will be granted. State v. Montague, 2 McCord, 257.

**255.** Under an indictment for receiving stolen goods and charging a former conviction, the jury rendered a general verdict, nothing having been said to them as to the former conviction. *Held* that the verdict must be set aside. Com. v. Briggs, 5 Pick. 429.

**256. Where no injustice has been done.** On the trial of an indictment for receiving stolen goods, which misdescribed a part of the goods, but contained a sufficient description of the residue, the court charged the jury that there was no misdescription, and a general verdict of guilty was rendered. *Held* not ground for a new trial, it appearing from the bill of exceptions that the question of the prisoner's guilt was the same in respect to the whole of the goods, he having received them from the same person by a single act. People v. Wiley, 3 Hill, 194.

**257. Presumption in favor of verdict.** The presumption is in favor of the verdict, and unless affirmatively overthrown by the record, the verdict will not in general be disturbed. Waller v. State, 4 Ark. 87. But the court may grant a new trial, although no error appear on the record. Com. v. Green, 17 Mass. 515.

**258.** Where the instructions of the court contain an abstract proposition of law, it will be presumed that the jury correctly applied it to the case before them. People v. Reynolds, 2 Mich. 422.

**259.** If on the trial of an indictment for libel, the question of malice has been properly left to the jury, and they have found malice, a new trial will not be granted on the ground that the alleged libel was not malicious. Taylor v. State, 4 Ga. 14.

**260.** Where it is the duty of the jury to assess the fine, a new trial will not be granted unless the fine be so excessive, as to show partiality or corruption. State v. Blennerhassett, Walker, 7.

**261. Relief when granted.** After a conviction for murder, the court are required to order a new trial, when they are satisfied that the verdict is against evidence or against law, or that justice requires a new trial. Manuel v. People, 48 Barb. 548.

**262.** Where the bill of exceptions purports to set out all the evidence, and the proof does not sustain the indictment, the court will set aside the verdict, although no special instruction was asked for by the defendant. Com. v. Merrill, 14 Gray, 415.

**263. Review of decision.** In Illinois, Arkansas and Georgia, the decision of the court below, refusing a new trial on the ground that the verdict was contrary to evidence, will not be reviewed. Halliday

v. People, 4 Gilman, 111; Mayers v. State, 2 Eng. 174; McLane v. State, 4 Ga. 335; Glory v. State, 8 Eng. 236.

**264.** In Virginia, where the prisoner was found guilty upon circumstantial evidence, and the court before which the trial was had refused to grant a new trial, it was held on a hearing before the general court, that the verdict could not be set aside, although the evidence did not appear to be sufficient. McCune's Case, 2 Rob. 77; Cottrell's Case, Ib. And see Hill's Case, 2 Gratt. 594.

**265.** In New York, on certiorari to a Court of Sessions, the Supreme Court will not reverse the judgment on the ground that the jury mistook a question of fact. People v. Butler, 3 Parker, 377; see *ante*, *sub.* 10–14.

3. Effect of setting aside verdict.

**266. Prisoner to be tried again.** After conviction and reversal of the judgment for error in the proceedings, the prisoner may be tried again, notwithstanding the provision of the bill of rights that the accused shall not be twice put in jeopardy for the same offense. Com. v. Gibson, 2 Va. Cas. 70; Sutcliffe v. State, 18 Ohio, 469.

**267. Subject of rehearing.** When a new trial is granted, the prisoner can only be tried upon those counts in the indictment on which he was convicted, and not upon those of which he was acquitted. Lithgow v. Com. 2 Va. Cas. 297.

**268.** But in South Carolina, where under an indictment containing two counts against road commissioners for obstructing a road, the defendants were convicted on the second count, it was held that a new trial restored the case to the position in which it stood upon the finding of the indictment. State v. Commissioners, Riley, 273.

*See* Appeal; Bill of exceptions; Certiorari; Writ of error.

## Nolle Prosequi.

**1. In United States courts.** Although in a case calling for such action, the court might decline to grant a motion made by the district attorney before verdict for leave to enter a *nolle prosequi*, until the government should have had sufficient time to protect itself against collusion, yet aside from this, the motion must be granted as a matter of right. U. S. v. Watson, 7 Blatchf. 60.

**2.** While an accusation is under investigation, before either a commissioner or the grand jury, the United States district attorney has no absolute power over the case. Although his duty requires him to attend the sessions of the grand jury, to advise them of the law, to examine witnesses, and when directed, to draw indictments, yet he cannot control the action of that body. But after indictment found and until the jury is impaneled, he can enter a *nolle prosequi*, even without the consent of the court. U. S. v. Schumann, 2 Abb. 523.

**3. In the State courts.** In New Hampshire, the prosecuting officer has a general discretionary power to enter a *nolle prosequi* before or after a verdict is rendered against the prisoner. State v. Smith, 49 New Hamp. 155. In Vermont, it was held that although the prosecution might enter a *nolle prosequi* before the trial commenced, yet that after that time, it could only be done by leave of the court. State v. Roe, 12 Vt. 93; but not against the wish of the defendant. State v. I. S. S. 1 Tyler, 178.

**4.** In New York, although the entry of a *nolle prosequi* cannot be directed by the court, yet the district attorney can only enter it with leave of the court. People v. McLeod, 1 Hill, 377. The necessity of procuring the consent of the court, is of comparatively recent statutory regulation; and this restriction applies to district attorneys only, the attorney general still having power to enter a *nolle prosequi* upon any indictment without the consent of the court. People v. Bennett, 49 N. Y. 137; per Church, C. J. The New York Court of Sessions has no authority to direct a *nolle prosequi* on an indictment for an offense not triable therein. People v. Porter, 4 Parker, 524.

**5.** In Massachusetts where on the trial of an indictment for burning a barn, the allegation of ownership was not proved as charged, it was held that a *nolle prosequi* could not be

entered, but that the defendant must be acquitted. Com. v. Wade, 17 Pick. 395.

6. But in the same State it has been held that, although after the jury are impaneled the defendant is entitled to demand a verdict, yet if he do not do so, it is not a valid ground of exception that a *nolle prosequi* was entered. Com. v. Kimball, 7 Gray, 328.

7. In Tennessee, before conviction, the attorney general and the court may discharge the prisoner, without acquittal, by *nolle prosequi*. State v. Fleming, 7 Humph. 152. In North Carolina, the attorney general may enter a *nolle prosequi*, but the court will interfere if the power be oppressively exercised. State v. Thompson, 3 Hawks, 613. In South Carolina, before the jury is impaneled, a *nolle prosequi* may be entered at the pleasure of the prosecuting officer; but if entered afterward, without the consent of the prisoner, it will operate as an acquittal. State v. McKee, 1 Bailey, 651.

8. In Georgia, the prosecution may enter a *nolle prosequi* upon a first, or any subsequent indictment, for the same offense, before the case has been submitted to the jury, either for defects in the pleadings, want of proof, or any other cause. Durham v. State, 9 Ga. 306. But see Reynolds v. State, 3 Kelly, 53. In Virginia, it was held that the prosecuting attorney could not enter a *nolle prosequi* without the consent of the court. Anon. 1 Va. Cas. 139.

9. The meaning of "jeopardy," in the Constitution of Alabama, is that which arises on the first trial, and commences as soon as the parties are at issue upon a sufficient indictment. After the case is submitted to the jury, the State cannot enter a *nolle prosequi* without the consent of the defendant; and if done, the defendant is entitled to be discharged, as upon an acquittal. Grogan v. State, 44 Ala. 9.

10. **To part of charge.** After verdict, a *nolle prosequi* may be entered as to a part of a count, whereby the charge, as set forth, is reduced in its degree of criminality. State v. Burke, 38 Me. 574.

11. Where the defendant was charged with receiving stolen goods, and in the same indictment it was alleged that he had before been convicted of the like offense, it was held that if there was a general verdict, a *nolle prosequi* as to the aggravation might be entered after conviction. Com. v. Briggs, 7 Pick. 177.

12. In New York, it has been held that when a *nolle prosequi* is entered to part of an indictment containing a single count, it operates upon the whole, and entitles the prisoner to his discharge. People v. Porter, 4 Parker, 524. In Tennessee, it has been held that where an indictment for a felonious assault contains but one count, a *nolle prosequi* entered as to the felony is a discharge of the entire accusation. Brittain v. State, 7 Humph. 159.

13. **To some of several counts.** Where the defendant is found guilty under an indictment containing two counts, the prosecution may enter a *nolle prosequi* as to one of the counts. State v. Bruce, 11 Shepl. 71.

14. In Massachusetts a complaint before a justice of the peace for selling spirituous liquor without a license, contrary to the statute (R. S. ch. 143, § 5), contained six counts, upon all of which the justice found the defendant guilty. On appeal to the court of Common Pleas, the jury found the defendant guilty on one of the counts, but disagreed as to the other counts. The attorney for the prosecution thereupon entered a *nolle prosequi* as to the latter counts. *Held* proper. Com. v. Stedman, 12 Metc. 444.

15. Two slaves being charged with manslaughter, and a severance granted, one of them was found "guilty as charged in the first count," and a *nolle prosequi* entered in his case as to the second count. The other defendant, in whose case a demurrer was erroneously sustained to the second count, was tried and acquitted on the first count. *Held* not good ground for arrest of judgment after a second conviction on the first count in the case of the first defendant. Aaron v. State, 39 Ala. 75.

16. An indictment charged the prisoner in one count with the murder of Lucy McLaughlin, and in another with the murder of Kate Smith. The counsel for the prisoner moved the court that the prosecution be required to elect upon which count the pris-

oner should be tried. The court reserved the question. During the trial it was proved by the prosecution that the deceased was usually known by the name of Kate Smith, but there was some evidence tending to show that her name was Lucy McLaughlin. At the close of the evidence the prosecution entered a *nolle prosequi* as to the count charging the murder of Lucy McLaughlin, and the prisoner was found guilty upon the other count for the murder of Kate Smith. *Held*, that as there was nothing to mislead the prisoner, there was no error. O'Brien v. People, 48 Barb. 274; affi'd 36 N. Y. 276.

**17.** Where an indictment contained three counts, the first of which charged the burning of a dwelling-house in the night, the second the burning of a barn in the night, by means of which said dwelling-house was burned, and the third the burning in the night of a barn within the curtilage of said dwelling-house, it was held that the want of an averment that the different counts were different descriptions of the same act, was cured by the entry of a *nolle prosequi* of the first and second counts, which was proper after a motion to quash had been overruled, but before the jury had been impaneled. Com. v. Cain, 102 Mass. 487. See Com. v. Holmes, 103 Ib. 440.

**18. Is not a bar to further prosecution.** A *nolle prosequi*, even where it is to the whole indictment, is not a bar to another indictment for the same offense. Com. v. Wheeler, 2 Mass. 172; State v. McNeill, 3 Hawks, 183; State v. Haskett, Riley, 97; State v. Thornton, 13 Ired. 256; State v. Dover, 46 New Hamp. 452.

**19.** In North Carolina, a *nolle prosequi* having been entered to an indictment in the county court, a second indictment was found against the defendant in the Superior Court for the same offense. *Held* proper, the defendant being amenable to another indictment in any court having jurisdiction of the offense. State v. McNeill, *supra*.

**20.** In Alabama, it was held that the statute (Penal Code, ch. 8, § 11) which authorized the entry of a *nolle prosequi* where the prisoner would not consent to the amendment of the indictment, the variance between the allegations and the proof being such as would entitle him to acquittal, could not be extended by construction so as to permit a *nolle prosequi* to be entered and a new indictment to be found with allegations essentially dissimilar, and that such second indictment would not come within the saving clause in respect to the statute of limitations. State v. Dunham, 9 Ala. 76.

**21. Effect on bond.** The entry of a *nolle prosequi* is a release of the bond and its forfeiture. State v. Langton, 6 La. An. 282.

**22. Withdrawal of.** Where leave was granted the prosecution to enter a *nolle prosequi* as to certain portions of the indictment, and the same was entered on the docket, and afterward, during the progress of the trial, leave was granted the prosecution to strike this entry off, it was held proper, none of the rights of the prisoner being thereby impaired. State v. Nutting, 39 Maine, 359.

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# Nuisance.

1. Nature and requisites.
2. Acts endangering life.
3. Acts detrimental to health.
4. Obstructing highway.
5. Neglect to repair highway or bridge.
6. Obstructing river.
7. Disorderly house.
8. Gaming house.
9. Bowling alley.
10. Trial.
11. Indictment.
12. Evidence.
13. Verdict.
14. Judgment.
15. Abatement of nuisance.

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## 1. Nature and requisites.

**1. Must be an annoyance to the public.** To render an act indictable as a nuisance, it must be inconvenient and troublesome to the whole community, and not merely to individuals. State v. Schlottman, 52 Mo. 164; s. c. 1 Green's Crim. Reps. 553. Public profanity is indictable as a common

nuisance. State v. Graham, 3 Sneed, 134. But where persons assembled in a public place, and with loud quarreling and profane swearing disturbed and broke up a a singing school, it was held that they were not guilty of a nuisance. State v. Baldwin, 1 Dev. & Batt. 195.

2. In Massachusetts, an indictment for a public nuisance in uttering loud cries and exclamations in a public street was held sustained by proof that one or two persons were awakened from sleep and disturbed thereby. Com. v. Oaks, 113 Mass. 8. In the same State, to constitute the offense of uttering loud exclamations and outcries, and thereby drawing together a number of persons, to the great damage and common nuisance of all the citizens, the act must be of such a nature as tends to annoy good citizens, and does in fact annoy such of them as are present and not favoring it. But the fact that there are also persons present who give encouragement and countenance to the illegal act is no defense. Com. v. Harris, 101 Ib. 29. See Com. v. Smith, 6 Cush. 80.

**3. Nature of the acts to be regarded, and not time.** To constitute the offense of disturbing the public peace by the assembly of noisy and dissolute persons in a house or tenement, and thus creating a common nuisance, the nature of the acts are to be regarded, and not the length of time during which they are committed. Com. v. Gallagher, 1 Allen, 592.

4. On the trial of an indictment for keeping a disorderly house, it appeared that the dwelling of the defendant where the disorder occurred was in the country, not on or near a public road, and that there were only five families within a mile; that two of these families were often disturbed at a late hour of the night by the drunken orgies of the sons of the defendant, but that the other three families were not disturbed by them; that the defendant did not join his sons in making the noise, and at times tried to keep them quiet. *Held* that the house was not a common nuisance. State v. Wright, 6 Jones, 25.

5. On the trial of an indictment for keeping a disorderly common tippling house, the jury found a special verdict that the defendant on one occasion kept a house in which there was a collection of twenty or thirty negroes, who got drunk, danced and disturbed the neighborhood with noise. *Held* not sufficient to support a conviction. Dunnaway v. State, 9 Yerg. 350.

**6. Must be obnoxious in fact.** The common council of a city cannot declare that to be a nuisance which is not such in fact, and they must confine their prohibitory action aimed at fixing the locality of any business to future erections. Wreford v. People, 14 Mich. 41.

7. In Massachusetts, under the statute (Gen. Stats. ch. 64), the determination of the mayor and aldermen of a city of the places in which the poles of telegraph companies may stand is conclusive upon the rightfulness of their erection within the limits of a highway, so that they cannot lawfully be removed by the city or any of its officers or treated as a public nuisance. Com. v. City of Boston, 97 Mass. 555.

8. A statute which legalizes an existing nuisance may be repealed. Reading v. Com. 11 Penn. St. 196.

### 2. Acts endangering life.

**9. Keeping explosives.** A nuisance at common law, may consist in the keeping or manufacture of gunpowder, naphtha, or other explosive or inflammable substances in such quantities and places, or in such a manner as to be dangerous to the persons and property of the people of the neighborhood. Com. v. Kidder, 107 Mass. 188.

**10. Spring guns.** The mere act of setting spring guns on one's own premises is not unlawful; but the doing of it may make the person responsible for any injury thereby occasioned to individuals, and he may be indictable for the erection of a nuisance, if the public are subjected to danger and annoyance. State v. Moore, 31 Conn. 479.

11. In Connecticut, the placing of spring guns in a shop for its protection against burglars is lawful, and the person so doing, will be justified, although the death of the burglar be thereby occasioned. Placing however, a loaded gun in a shop so as to

range over a highway, cocked, and with strings attached to the trigger, so that it may be discharged by an object coming in contact with the string, and sufficiently near and unprotected to inflict injury if any one should then be within its range on the highway, is a public nuisance; but otherwise, if the shot would not pass through the side of the shop with sufficient force to inflict injury, although persons passing on the highway are annoyed and alarmed, and apprehensive of danger from an accidental discharge of the gun. State v. Moore, *supra*.

**12. Improper driving.** An indictment may be maintained at common law for driving through a crowded street in such a way as to endanger the lives of the citizens. U. S. v. Hart, Pet. C. C. 390.

3. Acts detrimental to health.

**13. Offensive trade.** While an offensive or unwholesome trade or business is carried on at a point so remote from others as in no manner to affect or disturb them, the pursuit is lawful. But it becomes unlawful when the adjacent territory is devoted to domestic or business uses, and the inhabitants are disturbed and rendered uncomfortable by the continuance of the establishment. Taylor v. People, 6 Parker, 347.

**14.** The defendants were indicted for creating a nuisance by unwholesome smells, smokes and stenches, rendering the air corrupt, offensive, uncomfortable and unwholesome. The Legislature had authorized them to manufacture gas to be used for lighting streets and buildings in the city of New York. It also required that the act be favorably construed in all the courts for the purposes expressed therein. It appeared that persons residing near were much disturbed, and sometimes sickened, by the oppressive smell in certain conditions of the atmosphere. *Held*, that although private persons might perhaps maintain an action for damages, yet that the people were barred by the act of the Legislature from making a public complaint by indictment for such a cause while the defendants conducted their business with skill and care. People v. N. Y. Gas Light Co. 64 Barb. 55.

**15.** The continuance of an offensive business for more than twenty years before the existence of a public way or dwelling-houses in the vicinity, is no defense to an indictment for a nuisance. Com. v. Upton, 6 Gray, 473.

**16.** In Maine, it was held not a defense to an indictment for carrying on a noxious trade, that the selectmen had not previously assigned some place for exercising the trade under the statute (ch. 164, § 2). State v. Hart, 34 Maine, 36.

**17. Corrupting water.** It is indictable to render water unwholesome by throwing a dead animal into it. State v. Buckman, 8 New Hamp. 203.

**18.** An information for a nuisance, was held sufficient at common law, which charged the defendant with urinating in a spring of water near a public highway, out of which many persons in the vicinity and travelers along the road were accustomed to use water, thereby rendering the spring unfit for use and indecent, and to the obstruction of the free use of the water thereof by the citizens of the State. State v. Taylor, 29 Ind. 517. See Sloan v. State, 8 Ib. 312.

**19. Poisoning air with stagnant water.** Where a mill-dam across a stream, by causing the water to stagnate, corrupts the air, producing sickness in a whole neighborhood; or if without occasioning sickness, it renders the enjoyment of life and property in the community uncomfortable by disagreeable smells, it is a public nuisance, for which an indictment will lie, notwithstanding the dam has been kept up in the same place for seventy years, and it only became offensive during the last year of its existence. State v. Rankin, 3 South Car. 438; s. c. 1 Green's Crim. Reps. 503.

**20.** But to constitute a nuisance in damming up the water of a stream, thereby making it stagnant, it must be proved that the dam was placed in the stream so near the highway, or some public place, that the stagnant water affected the public. Com. v. Webb, 6 Rand. 726.

**21.** Where the authorities of a city by changing the grade of a street in front of the defendant's premises caused water to ac-

cumulate, which became putrid and noxious, it was held that an indictment against the defendant for keeping and permitting a nuisance could not be sustained. Barring v. Com. 2 Duvall, Ky. 95.

22. Where a pond, without creating sickness, produces smells which impair the enjoyment of life and property in the neighborhood, it is indictable as a public nuisance, and no length of time will legalize it. But if other causes to which the owner of the pond does not contribute, and which do not arise from his agency, produce the unpleasant effects, he is not liable. State v. Rankin, 3 Rich. N. S. 438.

23. It is no defense to an indictment for a nuisance in maintaining a mill-dam whereby the surrounding country is flooded with stagnant water, that the dam is not more detrimental to the public health than such structures usually are, or that the dam was erected before that section was settled. Douglass v. State, 4 Wis. 387.

4. Obstructing highway.

**24. Highway, how created.** Land does not become a public highway by dedication without user for twenty years, or acceptance. Repairing it by a surveyor of highways does not constitute such acceptance. State v. Bradbury, 40 Maine, 154.

25. The mere use of a way or road by the people of a neighborhood for a long period of time to go to church, and other neighboring places, the road not being of the width prescribed by law for highways, nor treated as a highway by the appointment of an overseer with laborers to keep it in repair, is not a public road which it is indictable to obstruct. State v. McDaniel, 8 Jones, 284.

26. In New Hampshire, it has been held that a highway may be accepted by a vote raising money, or other act recognizing an obligation to repair, or by twenty years' user, or by substituting it for an ancient highway which has been allowed to go to decay. State v. Atherton, 16 New Hamp. 203. Selectmen are required in the exercise of their power in laying out a road, to proceed upon their own convictions of what the public good and convenience demand. Where a road was laid out by them in pursuance of the instructions of the town, it was held illegal; the record not showing that their doings were of that judicial character that the law exacts, or that improper influences were not brought to bear upon them. State v. Newmarket, 20 Ib. 519. Where no notice was given of the laying out of a highway over land on which there was a house, it was held that an indictment for a nuisance in continuing the house in the highway could not be maintained. State v. Reed, 38 Ib. 59.

**27. What deemed a highway.** On the trial of a complaint for a nuisance in erecting and continuing a fence upon "a public highway, and traveled road," the following instruction was held correct: That if the jury found there was at the time of the acts complained of, and had been for more than twenty years before, a road or way open to the whole public without limitation or restriction, and it was in fact so used by travelers on foot, or with horses and carriages, during all that time, and was recognized as such public way by the town, by expending money on it for repairs during all those years, it was such a highway or public road as would sustain the complaint. State v. Bunker, 59 Maine, 366.

28. In New York, a road used as a common highway subsequent to the year 1777, but not recorded as such, was held not a public highway within the meaning of the statute relative to highways (Sess. 36, ch. 33, § 24), so as to render an obstruction of it a nuisance. People v. Lawson, 17 Johns. 277.

29. The public easement is not necessarily limited to the traveled path and the ditches on each side. But where the road has been fenced out for many years, about the usual width, and there is nothing to control it, a jury will be justified in finding that the whole space between the fences is a public highway. State v. Morse, 50 New Hamp. 9.

**30. Right of way.** Where a town has a right of way, it will be deemed a private way, and if any one other than an inhabitant of the town passes over it, he will be a trespasser. If obstructed, an indictment cannot be maintained for the obstruction; and

the town will not be liable for neglecting to repair it. Com. v. Low, 3 Pick. 408.

31. Where a way has always been used as a public highway by the land owners for access to their farms, and for farming purposes, the public right will not be deemed to have been lost by abandonment. State v. Morse, 50 New Hamp. 9.

32. A way of necessity does not give the public a permanent easement in the adjoining land. State v. Northumberland, 44 New Hamp. 628.

33. **Acts rendering party liable.** The obstruction of any road laid by public authority is a nuisance. State v. Mobley, 1 McMullan, 44. And although a road be opened as a highway by an erroneous judgment of the court, it will be a nuisance to obstruct it before the judgment is reversed. State v. Spainhour, 2 Dev. & Batt. 547.

34. The proprietors of a distillery in a city were in the habit of delivering the grains after distillation to purchasers, by passing the grain through pipes to the public street, opposite their distillery, where it was received into casks standing in wagons and carts, which were accustomed to collect there in great numbers to receive and take away the article; and in consequence of their remaining there to await their turns, and of the strife among the drivers for priority, and of their disorderly conduct, the street was obstructed. *Held* that the defendants were liable to indictment for nuisance. People v. Cunningham, 1 Denio, 524.

35. Placing or maintaining a building, stones, or other obstructions, in a public highway without lawful authority, is an indictable nuisance at common law. Com. v. Blaisdell, 107 Mass. 234. The temporary obstruction of part of a street or highway, by persons engaged in building, or in receiving or delivering goods, is allowed, from the necessity of the case; but not the systematic and continued encroachment upon a street, though for the purpose of carrying on a lawful business. People v. Cunningham, *supra*.

36. Officers who obstruct a highway by holding sales therein, may be indicted as a nuisance. Com. v. Williams, 13 Serg. & Rawle, 403.

37. Where a person who occupies land over which a public road runs, maintains a fence across the road, which he did not originally erect, he is liable to an indictment for a nuisance. State v. Hunter, 5 Ired. 369.

38. Where an act of the Legislature authorized the owner of land lying on the East River to construct wharves and bulkheads in the river in front of his land, and there was at that time a public highway through said land terminating at the river, it was held that he could not, by filling up the land between the shore and the bulkhead, obstruct the public right of passage from the land to the water, without being liable to indictment for nuisance. People v. Lambier, 5 Denio, 9.

39. Where a public highway was discontinued for a time, and a new road used by the public, by permission of the owners of the land, it was held that any obstruction placed across the old road was a nuisance. Elkins v. State, 2 Humph. 543.

40. **Partial encroachment.** A mere encroachment upon some portion of the highway limits, whereby the highway is rendered less commodious, is a nuisance. State v. Merrit, 35 Conn. 314.

41. Where a petition to county commissioners for laying out a highway prayed that it might be laid across a bridge thirty-two feet wide, it was held that they might lay out the way fifty feet wide, if they thought that the public convenience required it; but that if they so adjudged, and afterward determined that only thirty-two feet in width should be completed at that time, an obstruction on the unfinished part was a nuisance for which an indictment might be maintained. Com. v. Boston & Lowell R. R. Corp. 12 Cush. 254.

42. **Sidewalk.** In Pennsylvania, it is an indictable offense to obstruct a sidewalk. Reading v. Com. 11 Penn. St. 196.

43. **Passageway.** The obstruction of a passageway from one highway to another is a nuisance, such passageway being deemed a highway. State v. Duncan, 1 McCord, 404.

44. But to make the obstruction of a way

an indictable offense, it must injuriously affect some public right. An alley or *cul de sac* in the interior of a city block, not forming a passage from one street to another, is not a way for the obstruction of which an indictment will lie. People v. Jackson, 7 Mich. 432.

**45. Encroachment by railroad.** The unlawful obstruction of a highway by a railroad is a nuisance, and the remedy is by indictment against the company. Com. v. Vt. & Mass. R. R. Corp. 4 Gray, 22; State v. Vt. Cent. R. R. Co. 27 Vt. 103.

**46.** A railroad company is liable to indictment for a nuisance in erecting and continuing a building and leaving their cars in the highway; and it is liable for the acts of its agents done by its implied authority, though there be no written appointment under seal, nor a vote of the company constituting the agency. State v. Morris & Essex R. R. Co. 3 Zabr. 360.

**47.** But an indictment cannot be maintained against a railroad company for a nuisance in obstructing a street by a switch when the street, which was dedicated to public use by the owner, has never been accepted by the town. Gedge v. Com. 9 Bush, Ky. 61.

**48.** And when a railroad is in the hands of a receiver, and the company are under an injunction not to intermeddle with its concerns, the company is not liable to an indictment for a nuisance in blocking up a highway with freight cars, engines, &c. State v. Vt. Cent. R. R. Co. 30 Vt. 108.

**49. Encroachment on public square.** Where a public square was illegally sold by city authorities, and private houses erected thereon, it was held that the owners of the houses were indictable for a nuisance in erecting them. Com. v. Rush, 14 Penn. St. 186.

**50.** Where county buildings were erected on part of a public square, and occupied several years, when new buildings were erected on another part of the same square, and the old buildings rented for other than county purposes—*held* that the county commissioners, and also the persons who occupied the old buildings, were liable to an indictment for a public nuisance. Com. v. Bowman, 3 Barr, 202.

**51.** Though the fee of land be in a town or be private property, yet if the use be given to the public, and it is so used for a long time, an obstruction of it may be prosecuted by indictment. State v. Atkinson, 24 Vt. 448.

**52. Cattle in street.** Where the ordinance of a city provided that no owner or person having the care of cows or other grazing animals should permit them to go at large, or stop to feed on any street, it was held that a complaint which alleged that the defendant having the care of two cows, permitted them to stop and feed in certain streets, was insufficient even after verdict, the manifest intention of the statute being to prohibit the grazing of cattle in the streets. Com. v. Bean, 14 Gray, 52.

**53. Obstructing railroad.** As placing a single piece of timber on a railroad track constitutes an unlawful obstruction, the fact that the indictment charges that several pieces of timber were placed upon it, and it is proved that only one was placed there, is not a variance. Allison v. State, 42 Ind. 354.

**54.** On the trial of an indictment for placing obstructions on a railroad track, it is proper for the court to refuse to charge that "if the jury believe from the evidence that the defendant owns the land where the obstruction was laid upon the railroad track, and the railroad company had not obtained the right of way over the same, the defendant had a right to place what he pleased upon his own land, and should be acquitted." State v. Hessenkamp, 17 Iowa, 25.

**55.** The defendant, with a heavily loaded team, was on a public street, with one of his wheels on the track of a horse railroad, when the cars came up behind him. The defendant's team was moving at the usual rate for teams of that class, but at a less rate of speed than the cars were in the habit of moving, with room outside the track for vehicles to pass. The conductor requested the defendant to remove his team from the track, which he did not do, but continued upon it at the same rate of speed several hundred feet, and

then turned off. *Held* that he was liable to indictment for the willful and malicious obstruction of the railroad, and that it was no excuse that he did not get upon the track in the first instance with the intention of obstructing the passage of the cars, or slacken his pace on their approach. Com. v. Temple, 14 Gray, 69.

5. Neglect to repair highway or bridge.

**56. May be punished criminally.** The party obliged by law to repair a public highway or toll-bridge is liable criminally for neglecting to do so; and, in general, an indictment may be maintained whenever an action for damages will lie. State v. Inhabs. of Madison, 63 Maine, 546.

**57. Liability of turnpike company.** In Tennessee, where a turnpike company neglected to repair their road, and thereby forfeited their right to toll, it was held that the company was liable to indictment for a nuisance. Simpson v. State, 10 Yerg. 525.

**58.** In Massachusetts, where by the turnpike law (R. S. ch. 39, § 42), the corporation is amenable to indictment whenever a person liable to pay toll has sustained injury by reason of the road being out of repair, it is likewise amenable, although no person paying toll has sustained injury by reason of such want of repair. Com. v. Hancock Free Bridge Corp. 2 Gray, 58.

**59.** Where, by the act of incorporation of a turnpike and bridge company, it was made the duty of the president and directors to keep the road in repair, and the neglect to do so was declared a misdemeanor in the president and individual directors for the time being, it was held that an individual director might be indicted for such neglect, either separately or jointly with his codirectors, and on conviction might be punished separately, although the board of directors consisted of several members, and the concurrence of a majority was necessary to the doing of a corporate act. Kane v. People, 8 Wend. 203.

**60. Neglect of town to repair road.** The conditional acceptance of a road by a town is void; and where it was covered by water and only traveled in the winter upon the ice, it was held that such travel could not establish the road by user, for the nonrepair of which in summer the town could be indicted. State v. Calais, 48 Maine, 456. But if a town has neglected to repair a part of the road which it is its duty to maintain, it is no defense that this part would be of no immediate practical use because a bridge company has also been guilty of a neglect of duty. Com. v. Inhabs. of Deerfield, 6 Allen, 449.

**61.** An order of court establishing a highway having length but no definite width, imposes no duty or obligation on the town to open and work such highway. State v. Town of Leicester, 33 Vt. 653. The granting of a writ of *certiorari*, however, to quash the proceedings of the county commissioners in laying out a highway is not tantamount to quashing such proceedings; but it is to be regarded as a valid and subsisting highway until judgment to quash is rendered. State v. Inhabs. of Madison, 63 Maine, 546.

**62. Neglect to repair streets.** Where the mayor and aldermen of a municipal corporation are bound to keep the streets in repair, they may be indicted and punished individually for neglect of that duty. Hill v. State, 4 Sneed, 443.

**63. Duty to repair bridge.** When the duty of building and keeping in repair a public bridge is imposed by law upon any person or corporation, such person or corporation is liable to indictment at common law for neglecting this duty. State v. Morris Canal Co. 2 Zabr. 537.

**64.** When a flood in a river has washed away a part of its banks, and so widened the bed of the stream, the obligation of a corporation having the franchise of a toll-bridge across the river to maintain and keep the bridge in repair will require the extension of the bridge to the new bank thus created, if there is no other limitation of the franchise; and this will carry with it a like duty as to the abutments and approaches to the bridge to that which devolved upon the corporation when the bridge was first built. Com. v. Inhabs. of Deerfield, 6 Allen, 449.

**65.** In Maine, a structure for the passage

of travelers over a railroad where it crosses a highway, is a bridge within the statute, for the want of repair of which by the railroad company an indictment will lie. State v. Inhabs. of Gorham, 37 Maine, 451.

66. Towns lying on the Connecticut and Merrimack rivers extend to the center of the river, and are liable to indictment for neglecting to build the portion of the bridge required in their town for a public highway across the river. State v. Canterbury, 28 New Hamp. 195.

67. Where the proprietor of a mill constructs a canal across a public road, and erects a bridge over the canal, he is not liable to indictment for suffering the bridge to be out of repair. State v. Yarrell, 12 Ired. 130.

**68. Neglecting to keep bridge lighted.** Where the charter of a bridge company provided that the bridge should "at all times be kept in good, safe, and passable repair," it was held that the company was bound to keep the bridge artificially lighted during the night, provided such lighting was necessary to the safety and convenience of the public, and that a neglect of the duty rendered the company liable to indictment for a nuisance. Com. v. Centr. Bridge Corp. 12 Cush. 242.

### 6. Obstructing river.

**69. Indictable at common law.** Where a river up to a certain point had been frequently used by the public as a navigable river, and by an act of the Legislature was placed in charge of public officers, and worked by the public, it was held a public highway, for the obstruction of which an indictment would lie at common law. State v. Thompson, 2 Strobh. 12.

70. The unauthorized erection of a bridge over a public navigable river, thereby obstructing the navigation, is an offense at common law, on the same principle upon which the erection of gates across a public road has been held to be a nuisance. But the Legislature may authorize the construction of a bridge across navigable or tide waters, though the navigation may thereby be injured. State v. Inhabs. of Freeport, 43 Maine, 198.

**71. Erection of dam.** At common law, an indictment cannot be maintained for a nuisance in erecting a dam across a river not navigable by which fish are prevented from ascending the river. Com. v. Chapin, 5 Pick. 199.

72. The statute of 8 Anne, ch. 3, prohibiting the setting, erecting, or making on or across any river, any incumbrances, and enacting that all such incumbrances which hinder the passage of fish are nuisances, is in force in Massachusetts. But a seine or net is not an obstruction within the meaning of the statute. Com. v. Ruggles, 10 Mass. 391.

73. In New Hampshire, the maintenance of dams without fishways in a river not navigable, issuing from an inland lake, and thereby preventing the passage of fish from the sea to the lake is a criminal offense at common law; and a right to so obstruct the river will not be acquired against the State by twenty years of adverse user. State v. Franklin Falls Co. 49 New Hamp. 240.

74. Where the charter of a company permitted them to build a dam across a stream at a certain place, it was held that if they erected the dam higher up the stream, and thereby obstructed navigation, they were liable for a nuisance. State v. Godfrey, 12 Maine, 361.

**75. Where indictable.** An obstruction in the Hudson River above low-water mark, is indictable in New Jersey, while obstructions below low-water mark can only be punished by proceedings in the courts of New York, or of the United States. State v. Babcock, 1 Vroom (30 N. J.) 29.

### 7. Disorderly house.

**76. What is.** A place of public resort in which illegal practices are habitually carried on, or which is the habitual resort of thieves, drunkards, prostitutes, or other idle and vicious persons who gather there for the purpose of gratifying their depraved appetites, or to make it a rendezvous where plans may be concocted for depredations upon society, is a disorderly house. State v. Williams, 1 Vroom (30 N. J.) 102.

77. To constitute a disorderly house, the noises must be usual or common occurrences, and must disturb the neighborhood, and not merely one person. Palfus v. State, 36 Ga. 280.

78. In Iowa, a person is guilty of keeping a disorderly house under the statute, whether the fighting, quarreling, &c., occur in it, or on the sidewalk in front of it, if it was the character of the house which attracted the disorderly persons there and which caused the disturbances. State v. Webb, 25 Iowa, 235. See Cable v. State, 8 Blackf. 531.

79. **Deemed a nuisance.** The habitual disturbance of a neighborhood by the noises of disorderly persons in a house, is a nuisance. People v. Carey, 4 Parker, 238.

80. **Liability of keeper.** The keeper of a disorderly house is liable to indictment for a nuisance; and it need not be alleged that the house was kept for gain. State v. Bailey, 1 Foster, 343.

81. An indictment for a nuisance may be maintained against a person for keeping a house wherein offenses are committed that are punishable by fine. Smith v. Com. 6 B. Mon. 21.

82. A common tippling house is a public nuisance, and the keeper liable to indictment. State v. Berthol, 6 Blackf. 474; Bloomhuff v. State, 8 Ib. 205.

83. **Liability of landlord.** A person who aids and assists others in keeping a house of ill-fame, is equally guilty in the eye of the law, with those who actually hire and control the house. Com. v. Gannett, 1 Allen, 7.

84. One who leases a house, knowing that it is to be used for the purpose of prostitution, is in law a participator in the crime of keeping the house. Smith v. State, 6 Gill, 425.

85. Renting a house to a woman of ill fame, knowing her to be such, with the intent that it shall be used for the purpose of prostitution, is indictable at common law. Com. v. Harrington, 3 Pick. 26; Jennings v. Com. 17 Ib. 80. Brockway v. People, 2 Hill, 558, is not authority so far as it conflicts with this rule. People v. Erwin, 4 Denio, 129.

86. Mere non-feasance on the part of the landlord cannot involve him in the guilt of the tenant. The fact of his being landlord of a disorderly house, receiving the rent of it, and that he has power to expel his tenant for non-payment of rent, does not of itself make him responsible. To make him liable, he must have known for what purpose the house was intended to be used when he rented it, or afterward aid, assist, or give his consent to its being so kept. Ib.

87. One who permits the promiscuous assembling about his shop where spirituous liquor is sold, of persons who make loud noises, quarrel, and swear, may be indicted for keeping a disorderly house. State v. Thornton, Busbee, 252.

### 8. Gaming house.

88. **Indictable at common law.** The keeping of a common gaming house is an indictable offense at common law, by reason of its tendency to bring together disorderly persons, to promote immorality, and to lead to breaches of the peace. People v. Jackson, 3 Denio, 101.

89. Under an indictment at common law for keeping a gaming house, or house of ill-fame, proof of the act alleged, *per se* proves a case of common nuisance. And the same is true where the prosecution is under a statute which declares that all buildings used for certain specified purposes, shall be common nuisances. Com. v. Buxton, 10 Gray, 9.

90. A house in which a faro table is kept for the purpose of gambling, is a nuisance, without proof of frequent frays and disturbances there; and the use of the table is not rendered lawful by a tax. State v. Doon, R. M. Charlt. 1.

91. But maintaining a billiard room without noise or disturbance of the neighborhood, and without any betting, is not a public nuisance, unless it be in a place where it is made a nuisance by statute. People agst. Sergeant, 8 Cow. 139.

### 9. Bowling alley.

92. **Deemed a nuisance.** Erections for the profit of the owner, adapted to sports and amusements which are not useful, are deemed nuisances. This has been held in

respect to a bowling alley for gain and common use, resorted to by the public in the day and night time. State v. Haines, 30 Maine, 65. But the owner of a bowling alley is not liable for the unauthorized use of it by another person. Ib. In New Jersey, it has been held that a ten-pin alley, kept for gain, in a populous village, and open to public use, is not *per se* a nuisance. State v. Hall, 3 Vroom (32 N. J.) 158.

93. An indictment alleged that the defendant kept in a public place, "a certain common, ill-governed and disorderly room, in which for lucre, the defendant procured and suffered disorderly persons to meet by night and day, and to remain there drinking, tippling, cursing, swearing, quarreling, making great noises, rolling bowls in and at a game called ten-pins." *Held* that the offense charged was a public nuisance. Bloomhuff v. State, 8 Blackf. 205.

### 10. Trial.

**94. By jury, right to.** Keeping a bawdy-house being an indictable offense at common law, the Legislature cannot, by classing it with those acts which constitute disorderly persons, withdraw from the accused the right which the Constitution has secured to him of a trial by jury; and if he offer to give bail for his appearance before the next grand jury, it is the duty of the magistrate to take it. Warren v. People, 3 Parker, 544.

### 11. Indictment.

**95. Right to, not affected by penalty.** The right of indicting a public nuisance is not affected by a statute imposing a penalty for the offense, unless there are negative words showing that that is the intention. Renwick v. Morris, 7 Hill, 575.

**96. Who not liable to.** Where an alleged public nuisance is not the natural, direct and proximate result of the defendant's own act, but is occasioned by the acts of others so operating on his acts as to cause the injurious consequences complained of, he is not liable. State v. Rankin, 3 South Car. 438; s. c. 1 Green's Crim. Reps. 503.

97. Where a gate was unlawfully erected across a public road, and the owner of the land afterward sold the land to A., who never actually entered, but leased it to others who kept up the gate, it was held that A. was not indictable for the continuance of the nuisance. State v. Pollock, 4 Ired. 303.

98. In Alabama, it was held that to render a person liable under the act of 1836, for an obstruction erected previous to the passage of the act, he must, subsequent to its passage, have done something showing an intention to continue the nuisance. Freeman v. State, 6 Porter, 372.

99. An infant, two years of age, upon whose land a nuisance is erected, is not liable to indictment. People v. Townsend, 3 Hill, 479.

**100. Liability of attorney.** Where a municipal corporation agreed with the owner of land, that in consideration of a release of damages for widening a street, the corporation would set back the fence and grade the land, but afterward the corporation refused to do so, and the attorney of the owner, the latter being an infant and married woman, replaced the fence in its former position so as to obstruct the street, it was held that the attorney was liable to indictment for a nuisance. Com. v. Smyth, 14 Gray, 33.

**101. Husband and wife** may be jointly indicted, and both be convicted of keeping a common nuisance, by maintaining a house for the illegal sale of intoxicating liquors. Com. v. Tryon, 99 Mass. 442; or they may be prosecuted severally. Com. v. Heffron, 102 Ib. 148.

**102. Landlord and tenant.** In New York, it has been held that an indictment for a misdemeanor in letting a house with the intent that it shall be kept for the purposes of public prostitution, and which is accordingly kept for that purpose, should charge the defendant as the keeper of a common bawdy-house in the ordinary form; and the tenant who lives in and conducts the house, may be joined with the landlord in the indictment. People v. Irwin, 4 Denio, 129.

**103. Corporation.** An indictment for a nuisance will lie against a corporation.

State v. Morris & Essex R. R. Co. 3 Zabr. 360. An information against a railroad company, for neglecting to ring their bell or blow their whistle when about to pass a highway, is sufficient which designates the respondent as "The Vt. Cent. R. R. Co., a corporation existing under and by force of the laws of this State, duly organized and doing business," without alleging when and where the existence of the company commenced. State v. Vt. Cent. R. R. Co. 28 Vt. 583.

**104. Averment of time.** An indictment for letting a house for the purposes of prostitution, must contain an averment of the time of the commission of the offense, and state the name of the person to whom the lease was made, or that such person was to the jurors unknown, and that the lease was received and accepted by the individual to whom it was made. Com. v. Moore, 11 Cush. 600. But see Com. v. Harrington, 3 Pick. 26.

**105. Averment of place.** The indictment, in describing the place of the alleged nuisance, must be certain to a common intent, and allege that it is in the county. State v. Sturdivant, 21 Maine, 9. But where an indictment for a nuisance caused by a mill and dam near a highway, did not describe the mill or state that it was in the county, it was held that the indictment was sufficient after verdict. Stephen's Case, 2 Leigh, 759. And where a nuisance was alleged to have been committed in a certain town, and a part of the nuisance was in fact committed in another town, it was held that the offense was sufficiently charged. State v. Godfrey, 12 Maine, 361.

**106.** An indictment for neglecting to repair a highway must state the town in which the road lies. Com. v. Inhabs. of North Brookfield, 8 Pick. 463.

**107.** An indictment for keeping a disorderly house need not state the precise locality where the offense was committed. If the city or town where the building or tenement is situated be distinctly set out, no further averment of place is required. Com. v. Welsh, 1 Allen, 1; Com. v. Gallagher, Ib. 592.

**108.** In indictments for common nuisances, it is sufficient to name the place, as a certain building, a certain disorderly house, a certain shop, a certain common gaming house, &c., without further description. Com. v. Skelley, 10 Gray, 464.

**109.** An indictment for a nuisance in erecting and continuing a building on a highway need not state what particular part of the building is an encroachment. State v. Atherton, 16 New Hamp. 203.

**110.** An indictment for obstructing a navigable stream must name the stream, state that it is navigable where it is obstructed, describe the place of obstruction, allege that boats cannot pass it, and state that the bed of the stream has not been sold by the Government of the United States. Cox v. State, 3 Blackf. 193.

**111.** An indictment for a nuisance in maintaining a certain mill-dam in and about and across a certain stream of water in said county, called "Elkhart river," is bad for uncertainty. The land on which the dam was constructed should have been described, or reference made to known objects near it. Wood v. State, 5 Ind. 433.

**112.** Where an indictment for a nuisance caused by a mill and dam near a highway, omitted to describe the mill or to state that it was in the county, it was held that the defect was cured by the verdict. Stephen's Case, 2 Leigh, 759.

**113.** An indictment for obstructing a river, and thereby overflowing a highway, need not describe the length and breadth of the overflow on the highway. Resp. v. Arnold, 3 Yeates, 417.

**114. Description of highway.** An indictment against a town for a defective highway need not state the width of the highway, or allege the authority by which it is laid out. State v. Inhabs. of Madison, 63 Me. 546.

**115.** Although in indictments for not repairing highways, and for nuisances therein, it is not necessary to set out the *termini*, yet if they are set out, they must be proved as laid, and any material variance will be fatal. State v. Northumberland, 46 New Hamp. 156.

**116.** Where in an indictment for not making a highway pursuant to an order of court, the highway was described by courses and

distances only, and in the description the signs of degrees and minutes were used instead of words, it was held insufficient on demurrer. State v. Jericho, 40 Vt. 121.

**117.** An indictment described the place of an alleged nuisance as "a certain common public highway and landing place in the town of P., in the county of N., commonly known by the name of The Common, lying west of the highway, leading through a portion of said P. from the town of M., in said county, to B. Ferry, and extending from the highway to the shore in a westerly direction." The evidence produced was the obstruction of a common which lay to the northwest and north of the highway. *Held* that the indictment was not sustained. State v. Peckham, 9 R. I. 1.

**118. Description of building.** In Maine, an indictment under the statute (R. S. ch. 17, § 1) for a nuisance in keeping a liquor shop, need not allege that the shop was "a house of ill-fame," nor that it "was resorted to," instead of "was used," nor state the names of persons to whom liquor was sold, nor describe the place, except by naming the town and county. State v. Lang, 63 Maine, 215.

**119. Ownership of property.** In Vermont, an indictment under the statute (Comp. Stat. 204) for obstructing railroad engines and cars, which alleges that they are the property of a certain railroad company, is insufficient; the expression "railroad company" not necessarily importing that it is a corporation, and the court not being able to take judicial notice of the fact. State v. Mead, 27 Vt. 722.

**120. Statement of facts constituting offense.** As a house kept for tippling and whoring is not a nuisance *per se*, but only becomes so by reason of the public being affected by it, an indictment charging it to be a nuisance must allege the facts making it such; as that it is in a public place, or that people reside near it. Mains v. State, 42 Ind. 327; Leary v. State, 39 Ib. 544.

**121.** Where the defendant is charged with keeping a disorderly house, the acts of disorder must be specified. Frederick v. Com. 4 B. Mon. 7. An indictment which alleged that the defendant kept a disorderly and ill-governed house, and unlawfully caused and procured, for his own lucre and gain, certain persons, as well men as women of evil name and fame, and of dishonest conversation, to frequent and come together in his said house at unlawful times, was held sufficiently definite. Com. v. Stewart, 1 Serg. & Rawle, 342.

**122.** Where an indictment for a nuisance in keeping a disorderly house alleged various purposes for which the premises were used, constituting the means by which the nuisance was created, it was held that the indictment was not bad for duplicity, although each of the purposes was criminal in its nature. Com. v. Kimball, 7 Gray, 328.

**123.** An indictment which alleges that the defendant kept and maintained a building used as a house of ill-fame "to the common nuisance of all good citizens," &c., is sufficient, without averring that he kept and maintained a common nuisance. Wells v. Com. 12 Gray, 326.

**124.** An indictment is not objectionable as embodying distinct offenses, which charges the keeping of a bawdy-house, a tippling house, and a dancing house, to the nuisance of the public; and the defendant may be convicted if the jury find that "the house was conducted in such a manner as to disturb and disquiet the neighbors, or if its business was so carried on as to tend to the corruption of the public morals." People v. Carey, 4 Parker, 238.

**125.** An indictment set forth that "on the first day of June, and on divers other days and times between that day and the first day of October then next ensuing, the defendants knowingly kept and maintained a certain common nuisance, to wit, a certain building, to wit, a house of ill-fame, situate," &c., "and that the said defendants in said house, for their own lucre and gain, certain persons, as well men as women of evil name and fame and dishonest conversation to frequent and come together, did then unlawfully and willfully cause, permit and procure, and said men and women in said house, as well in the night as in the day, then on said other days and times did suffer

and permit to be and to remain whoring, to the common nuisance," &c. *Held* not bad for duplicity. Com. v. Hart, 10 Gray, 465.

**123.** An indictment for a nuisance at common law is good which alleges that "the defendants, on a day named, set up, erected and maintained certain buildings, and on said day, and on divers days and times between that day and the day of the finding of the indictment, did in said buildings unlawfully use and employ, decompose and combine large quantities of acid, guano, tar, oil, bone and dead bodies, and other noxious and offensive substances in the manufacture of acids, colors, chemicals and chemical products, by means whereof divers noxious, offensive and unwholesome smokes, gases, smells and stenches were issued and emitted from said buildings during all the time aforesaid, so that the air then and there was thereby filled and impregnated therewith, and rendered corrupt, offensive and unwholesome, to the great damage and common nuisance of all persons then and there being." Com. v. Rumford Chemical Works, 16 Gray, 231. As to what is a sufficient indictment charging a common-law nuisance, see Reed v. People, 1 Parker, 481.

**127.** A count in an indictment for nuisance which alleges that swine were kept in a certain pen and yard near to the public highway, and that they were fed with offal, &c., does not charge two offenses. State v. Payson, 37 Maine, 361.

**128.** An indictment for a continuing nuisance need not charge that it is such. State v. Hall, 21 Maine, 84. But the indictment must set out all of the facts. State v. Brown, 16 Conn. 154.

**129. Insufficient averment.** An indictment which charges that the defendant suffered and permitted an indecent and disorderly house to be kept on his premises, is bad for uncertainty in not showing that the house was maintained by the defendant, or that he had leased it to another knowing the object for which it was to be used, or that the house was under the defendant's control. Taylor v. Com. 1 Duvall, Ky. 160.

**130.** An indictment alleged that the defendant on a specified day, at L., "unlawfully did keep and maintain a certain common ill-governed and disorderly tenement there situate." *Held* that the indictment did not describe the offense of keeping a disorderly house or any other offense. Com. v. Wise, 110 Mass. 181; s. c. 2 Green's Crim. Reps. 264.

**131.** A complaint alleged that the defendants with force and arms were disturbers and breakers of the peace, to the great disturbance of divers citizens. *Held* that no offense was charged. It should have been alleged that the defendants were disturbers, &c., to the great damage and common nuisance of all of the citizens of the State then inhabiting, being and residing, &c. Com. v. Smith, 6 Cush. 80.

**132.** An indictment charging a party with neglect to make or repair a highway, does not charge a neglect to build and repair a bridge. So, a count is insufficient which alleges the laying out of a new road and an order on the town to build their part, which they neglected to do, without alleging that the road was bad or needed making, or was not passable, and omitting to the common nuisance, &c. State v. Canterbury, 28 New Hamp. 195.

**133.** The charter of a railroad company authorized them to construct bridges across tide waters and navigable rivers, provided they did not prevent the navigating said waters. An indictment against them alleged that they did "unlawfully and injuriously obstruct and impede without legal authority the passage of said navigable river by erecting a bridge across said river, which bridge is so constructed as to prevent the navigating said river," &c., "by means whereof the passage of said river hath been obstructed and impeded, and still is obstructed and impeded," &c., without alleging that the bridge prevented the navigating the river. *Held* bad. State v. Portland, &c. R. R. Co. 57 Maine, 402.

**134. Duplicity.** An indictment which charges the maintenance of a stone building overhanging a public street, and liable and threatening to fall into the same, to the great damage of people passing along the

street, and also the permitting to remain in said building large quantities of filth emitting offensive stenches dangerous to public health, is bad for duplicity. Chute v. State, 19 Minn. 271.

**135. Averment of defendant's duty and liability.** An indictment for permitting a public bridge to become ruinous must state how the defendant became liable to make repairs. State v. King, 3 Ired. 411.

**136.** An information against the trustees of a canal for a nuisance in neglecting to keep a bridge in repair, was held bad in not alleging that the bridge crossed the canal, or that it was the defendant's duty to keep it in repair, and because it did not show by what right they became possessed of the bridge, and how it became their duty to keep it in repair. Butler v. State, 17 Ind. 450.

**137.** An indictment against a bridge company for a public nuisance was held sufficient which, after setting forth the act of incorporation, the building and use of the bridge, alleged that the defendants were bound "to keep and maintain the same in such a condition as to render the same safe and convenient for travelers," &c.; that the defendants, "regardless of their duty in this behalf, negligently and willfully suffered and permitted said bridge to be and remain in such a condition as to render it unsafe and inconvenient for travelers, by neglecting to keep the same properly and suitably lighted in the night time, to the great damage and common nuisance," &c. Com. v. Centr. Bridge Corp. 12 Cush. 242.

**138.** An indictment against a railroad company for the unlawful and willful neglect to erect and maintain fences on the sides of its road must aver that it was the duty of the company to erect and maintain the fences. People v. N. Y. Cent. R. R. Co. 5 Parker, 195.

**139.** In Maine, under the statute (R. S. ch. 51, § 15), which provides that "railroads may cross highways in the line of the road," but that "the conditions and manner of crossing are to be first determined in writing by the county commissioners," an indictment against a railroad company for erecting and maintaining a nuisance in laying their track across a highway, which does not allege that it crosses the highway in a manner not determined by the county commissioners, is fatally defective. State v. Portland, &c., R. R. Co. 58 Maine, 46.

**140.** Under an indictment for not keeping in repair a certain turnpike which defendant and another had been authorized to construct by act of Legislature, the court cannot take judicial notice of the charter, unless it is set out; and if the indictment alleges that the defendant alone accepted the charter, erected toll-gates, and took toll, but does not aver that the charter authorized him to accept alone, or require him to keep the road in repair, it will be fatally defective on demurrer. Moore v. State, 26 Ala. 88.

**141.** An indictment for a nuisance in keeping fifty barrels of gunpowder in a certain building near the dwelling-house of divers good citizens, and near a certain public street, was held insufficient in not alleging that it was negligently and improvidently kept. People v. Sands, 1 Johns. 78.

**142. Guilty intent.** In Massachusetts, an indictment under the statute (Genl. Stats. ch. 63, § 108), which alleged that the defendant, on the fifth of March, intending to obstruct an engine passing upon a railroad, did, on the first of the same month, place a rail across the track, without averring that the act was done with a criminal intent, or that the intent charged was accompanied by any act, was held insufficient. Com. v. Bakeman, 105 Mass. 53.

**143.** An indictment for a nuisance in selling and furnishing unwholesome water to an entire community must either allege that the defendant, his agents or servants imparted to the water its unwholesome quality, or that he knew it was unwholesome. Stein v. State, 37 Ala. 123.

**144.** In Massachusetts, an indictment under the statute (R. S. ch. 130, § 8), for keeping a house of ill-fame, resorted to for the purposes of prostitution and lewdness, need not allege that the defendant kept the house for lucre, or that it was resorted to by divers persons, men as well as women. Com.

v. Ashley, 2 Gray, 356; Com. v. Wood, 97 Mass. 225.

**145.** An indictment against a railroad company for maintaining a nuisance need not contain the word "unlawfully," the words "injuriously and wrongfully" being sufficient. State v. Vt. Cent. R. R. Co. 27 Vt. 103.

**146. Conclusion.** An indictment for a nuisance concluding "to the common nuisance of the commonwealth citizens," was held bad. It should have concluded to the common nuisance of all the citizens of the commonwealth who resided in that place, or had to pass it. Com. v. Farris, 5 Rand. 691. See Com. v. Smith, 6 Cush. 80.

12. Evidence.

**147. Place.** Where a nuisance is charged to be situated on a particular tract of land, the prosecution must prove the location as alleged. Wertz v. State, 42 Ind. 161; s. c. 2 Green's Crim. Reps. 681.

**148.** An indictment charged the obstruction of a public landing. The proof showed that the obstruction was in a road leading to the landing one hundred yards from it. *Held* that the variance was ground for a new trial. State v. Graham, 15 Rich. 310.

**149.** Where, on the trial of an indictment for obstructing a highway, a local description sufficient to identify and fix the precise point of obstruction is given as well as the *termini* of the road, the latter may be disregarded; and proof that a road existed at the place of obstruction is alone necessary. But when the allegation is general that a road leading from one place to another has been obstructed, its existence between the points named must be proved as a matter of essential description. Houston v. People, 63 Ill. 185.

**150.** A variance between the indictment and the evidence as to the precise situation of a dam, by means of which the defendant caused a nuisance in a highway by overflowing the same, and rendering it impassable, is not material, the gist of the offense not being the erection of the dam, but the obstruction of the highway. The nuisance being in New Hampshire, it is not important that the dam is in Maine. State v. Lord, 16 New Hamp. 357.

**151.** An indictment for a nuisance in maintaining a ruinous building, alleged that the building was situated upon lots one and two, in block three. It was proved that the building was in part on lots one, two, and three, in block three. *Held* a case of redundancy of proof, and not a variance. Chute v. State, 19 Minn. 271; s. c. 1 Green's Crim. Reps. 571.

**152.** The offense of keeping a house of ill-fame is local, and must be proved to have been committed in a particular town, and not merely within the county. State v. Nixon, 18 Vt. 70.

**153.** In order to sustain an indictment for keeping a disorderly house, it is not necessary to prove that the whole building was used for the unlawful purpose. State v. Garity, 46 New Hamp. 61. Evidence that a single room was so used, is sufficient. Com. v. Bulman, 118 Mass. 456.

**154. View of premises.** In Minnesota, under the statute (Gen. Stats. ch. 114, § 10), the propriety of allowing the jury to view an alleged nuisance is in the discretion of the court. Chute v. State, 19 Minn. 271; s. c. 1 Green's Crim. Reps. 571. Evidence to show the condition of the premises after the finding of the indictment, is not admissible. Taylor v. People, 6 Parker, 347.

**155. Owner of property.** Where an indictment charged the obstructing of the engines of a railroad company, and the evidence was that the true name was railroad *corporation*, it was held that the variance was fatal. Com. v. Pope, 12 Cush. 272.

**156. Person committing injury.** On the trial of an indictment for a nuisance, it is not sufficient merely to show that the defendant is the owner of the land; but it must be proved that he either erected or continued the nuisance, or in some way sanctioned its erection or continuance. People v. Townsend, 3 Hill, 479.

**157.** In Massachusetts, on the trial of an indictment under the statute (of 1849, ch. 49), for keeping a disorderly house, to the common nuisance, &c., it need not be proved that the house was used by the defendant,

or by whom it was used, or that it was used for all of the purposes alleged. Com. v. Kimball, 7 Gray, 328.

**158. Acts constituting offense.** The keeping of a disorderly house must be shown as a fact, and not by evidence of reputation. State v. Foley, 45 New Hamp. 466. It is not therefore competent to prove that the house was a matter of general complaint in the neighborhood. Com. v. Stewart, 1 Serg. & Rawle, 342.

**159.** On the trial of an indictment for keeping a disorderly house, it is correct to charge the jury that to authorize a conviction, it must be proved that the house was kept in a manner to annoy and disturb the persons living near or having occasion to pass by it; that it need not be proved that all of such persons were thus annoyed; and that it was competent to show that large numbers of disorderly persons were seen going in and out, and conducting themselves in a disorderly manner, though the witnesses did not see or hear what was done inside the house. Com. v. Davenport, 2 Allen, 299.

**160.** In Ohio, where a person was indicted for keeping a disorderly tavern, the journal of the court, with the entering or granting a license, was held sufficient proof that the defendant kept a tavern. Baldwin v. State, 6 Ohio, 15.

**161.** On the trial of an indictment for keeping a disorderly house, after proof of specific acts, other acts not specified, which do not amount to a distinct offense, and for which a distinct prosecution will not lie, are admissible in evidence under the general charge. Frederick v. Com. 4 B. Mon. 7.

**162.** In Connecticut, on the trial of an information for the violation of the statute (of 1845, ch. 20), prohibiting houses of ill-fame, the prosecution must prove—1st, that the general reputation of the house was that of a bawdy-house; 2d, that it was such in fact. To show the character of the house, evidence is admissible to prove that it was reputed to be a house of ill-fame previous to the enactment of the statute. Cadwell v. State, 17 Conn. 467; approved in State v. Blakesley, 38 Conn. 523.

**163.** Land on Charleston Neck was dedicated by the owners to the public, for an open square. The defendants, who were commissioners of roads on the Neck, inclosed the square with a railing, with gates at convenient distances. Being indicted for a nuisance, it was held, that the prosecution must prove that the defendants had violated the public uses of the square, and that in the absence of such proof, the verdict against them must be set aside, and a new trial granted. State v. Comm'rs, 3 Hill, S. C. 149.

**164. Proof must tend to support charge.** On a trial for erecting and maintaining a powder house, and keeping therein a large quantity of powder near a city, a witness for the prosecution testified that he had been in the infantry and artillery service of the United States for three years, and a portion of the time had charge of an ordnance bureau; and he was asked, what was the ordinary mode of constructing powder magazines. *Held* that the question was immaterial and incompetent. Bradley v. People, 56 Barb. 72, Mullin, J., *dissenting*.

**165.** An indictment under a statute in respect to nuisances, prohibiting the erection of a building or other obstruction in a highway, charged that the defendant erected a store in the highway, by which the passage of travelers was obstructed. It was proved that the defendant purchased the store thirty years after it was built, and neglected to remove it from the highway when notified to do so by a committee of the town. *Held* that the variance was fatal. State v. Brown, 16 Conn. 54.

**166.** On the trial of an indictment for maintaining a ruinous building, the court admitted in evidence, against the defendant's objection, the record of the proceedings of the city council in which the building was situated, showing that at a meeting holden on a certain day the defendant was present as an alderman, and that a resolution was then passed declaring the building unsafe, and a public nuisance. *Held* that although the testimony was unobjectionable, if its only effect was to show notice and knowledge on the defendant's

part, of the condition of the building, yet, as it might have influenced the minds of the jury in reference to the main question whether or not a nuisance existed, its admission was error. Chute v. State, 19 Minn. 271; s. c. 1 Green's Crim. Reps. 571.

**167.** An indictment alleged that the defendant, "near a public street and common highway, and also near the dwelling-houses of divers citizens there situate, did unlawfully erect and maintain a certain building for the purpose of making neatsfoot oil, and did unlawfully place and maintain in said building divers furnaces, stoves, caldrons, five coppers, and five boilers, for the purpose of boiling and trying putrid meat, bones, heads, feet, &c., by reason whereof noisome and unwholesome smoke and vapors were emitted and issued, to the great damage and common nuisance," &c. It was proved that the defendant kept hogs in a yard on two sides of his oil-works, and that the bones after being used in the works, were thrown into the hog-yard. It was also shown that the emptying of the kettles, and the carting away of the bones, created a stench. *Held*, that as the nuisance arising from the hog-yard and the carting away of the bones, was not charged in the indictment, the evidence was improper. Com. v. Brown, 13 Metc. 365.

**168.** Under an indictment against a town for a defect in a highway, it was held that as the averment that the defect had been continued "without any sufficient railing or fence, and without any sufficient light hung out or placed in the night time, to prevent the injury and damage that might happen," was not necessary, it need not be proved. State v. Bangor, 30 Maine, 341.

**169.** An indictment for a nuisance in erecting and maintaining a dam, charged that, by reason of the dam, the animal and vegetable substances brought down the stream were collected and accumulated, and became offensive. *Held* supported by proof that the injury resulted from the alternate rise and fall of water in the pond, and from the action of the sun upon the vegetables growing on the margin. People v. Townsend, 3 Hill, 479.

**170.** An indictment for horse-racing on a public road, is sustained by proof of racing with mules. Goldsmith v. State, 1 Head, 154.

**171. Presumptions.** The record of the laying out of a highway, dated thirty-nine years previous, is admissible in evidence as presumptive evidence that the landowners received due notice that compensation was awarded them, and that the road was for the public use; and proof that highway surveyors, in the execution of the warrants committed to them, were accustomed, soon after the supposed laying out of the road, to work it, would tend to confirm the presumption. State v. Alstead, 18 New Hamp. 59.

**172.** Where the record of the laying out of a highway is so ancient as to afford a presumption that by the death of the actors it cannot be amended, and what is recorded leads to the belief that the statute has probably been complied with, although some of its requisites are not stated in the record, a jury will be at liberty to find from such record, with proof that the way was made by the town, and used many years, though less than twenty, that the proceedings were regular. State v. Morse, 50 New Hamp. 9.

**173.** On the trial of an indictment for obstructing a railroad, proof of the granting to the company of its charter, and the public exercise and enjoyment by it of its franchises for many years, are *prima facie* evidence of the existence of such a corporation, of its possession and management of the road, and of its ownership of the engines and carriages. Com. v. Bakeman, 105 Mass. 53.

**174.** On the trial of an indictment for a nuisance in maintaining a coal-yard, the fact that the defendant had been the general agent of the owner of the yard for several years, and until within a few weeks of the doing of the acts complained of, is proper for the consideration of the jury in determining whether his connection with those acts aided and encouraged them. Com. v. Mann, 4 Gray, 213.

**175.** On the trial of an indictment for a nuisance in maintaining a dam, it is error in

the court to refuse to charge that a trial and acquittal of the former owners of the dam under an indictment against them therefor, is a matter for the consideration of the jury; the record of the former prosecution being evidence that the dam was not a nuisance at that time; but not that the dam had not since become a nuisance. Crippen v. People, 8 Mich. 117.

176. Proof of quarreling and collision among drivers while awaiting their turns, is admissible in evidence for the purpose of showing the fact of obstruction. People v. Cunningham, 1 Denio, 524.

177. On a trial for a nuisance in selling and furnishing unwholesome water to an entire community, the prosecution may prove the deleterious effects of the water on particular persons, members of the community, not named in the indictment. Stein v. State, 37 Ala. 123.

178. On the trial of an indictment for a nuisance in keeping a disorderly house for cock-fighting, evidence was admitted of an entry in the cash book of a gas company, showing that the defendant paid for gas used at the house; the object being to prove that the defendant was proprietor and manager of the house. The entry, which was made by a former book-keeper of the defendant, who was beyond the jurisdiction of the court and in parts unknown, was verified by proof of his handwriting. State v. Mace, 6 R. I. 85.

179. On the trial of an indictment for keeping a house of ill-fame, evidence of the general character for chastity of females frequenting the house, is admissible; and it is no justification that there was no noise or disturbance of the peace in the house, or annoyance to persons residing in the neighborhood. Com. v. Gannett, 1 Allen, 7.

180. On a trial for keeping a bawdy-house, so as to be a common nuisance, it is competent to show the character of the women who lived in the house, the character and behavior while there of the men who frequented the house, and also the effect of the house upon the peace of the neighborhood. Clementine v. State, 14 Mo. 112; State v. McDowell, Dudley, S. C. 346.

181. Where, on the trial of an indictment for keeping a bawdy-house, witnesses who frequented the house refuse to answer questions in relation to the conduct of the inmates and visitors, upon the ground that the answer would degrade them, such refusal may be the subject of consideration by the jury. Clementine v. State, *supra*.

182. Guilty intent. On the trial of an indictment for obstructing a railroad, it was held that the jury were properly instructed that if the defendant placed a rail upon the track as alleged, and if the ordinary and usual consequences of so doing would be to obstruct the cars running on said track, and thereby endanger the safety of persons conveyed in the cars, it was competent for them to infer that he did it with that intent, and that it was not necessary, in order to complete the offense, that he should have had any individual in his mind whom he wished to injure, or any purpose other than to destroy property and endanger or destroy life. Com. v. Bakeman, 105 Mass. 53.

183. On the trial of an indictment for willfully and maliciously obstructing a horse-railroad, the actual enjoyment and use of the franchise by the company is sufficient to authorize the jury to find, in the absence of proof to the contrary, that the location of the road was lawful; and it need not be proved that the defendant was requested to remove from the track, and refused to do so, if the jury are satisfied from other evidence that his obstructing the cars was willful and malicious. Com. v. Hicks, 7 Allen, 573.

184. Where, on the trial of a complaint for permitting cattle to go upon the sidewalks of a street, it was proved that the defendant employed two men to assist in driving the cattle, it was held competent for him to show that the owner of the cattle requested him to hire and pay these men, since, if that constituted all his agency in the matter, he would not be liable; but that the way bills on the railroad were not admissible to show that he did not own the cattle. Com. v. Leavitt, 12 Allen, 179.

185. On a trial for nuisance, the prosecution need not prove a criminal intent. Taylor v. People, 6 Parker, 347.

Evidence.

**186. Admissions and declarations.** On the trial of an indictment for a nuisance on the defendants' land, they admitted that the title in fee was in a third person as trustee for them, and that they were *cestuis que trust*. *Held* not an admission that they were owners of the land, or had any estate in it. People v. Townsend, 3 Hill, 479.

**187.** On the trial of an indictment for keeping a disorderly house, the testimony of witnesses as to what was said and done by disturbers of the peace in the highway, at a considerable distance from the house, out of the presence and knowledge of the defendant or his family, is not admissible. Com. v. Davenport, 2 Allen, 299.

**188. Defense.** On the trial of an indictment for a nuisance, it is not competent for the defendant to prove in justification that the public benefit resulting from his acts is equal to the public inconvenience. State v. Kaster, 35 Iowa, 221; s. c. 2 Green's Crim. Reps. 629.

**189.** But where a wharf is extended into the channel of a harbor beyond the line of low water mark, it is not necessarily a nuisance; and the presumption that it is such may be repelled by proof that it has increased the accommodation of the public. Com. v. Wright, Thach. Crim. Cas. 211.

**190.** It is not a defense to an indictment for a nuisance, that the defendant acted as the agent of another. State v. Bell, 5 Porter, 365.

**191.** On the trial of an indictment for maintaining a building overhanging a public street, it is not competent for the defendant, on the question whether the building is or is not a nuisance, or whether he is answerable for maintaining it, to prove that he had consulted competent builders, by whom he was advised that the building was not in danger of falling. Chute v. State, 19 Minn. 271; s. c. 1 Green's Crim. Reps. 571.

**192.** On the trial of an indictment for erecting a nuisance near dwelling-houses, it cannot be proved in bar of the prosecution, that the dwelling-houses were erected after the erection of the alleged nuisance. Ellis v. State, 7 Blackf. 534.

**193.** It is not a defense to an indictment for a nuisance, that it has existed for such length of time as would establish a prescription against individuals. People v. Cunningham, 1 Denio, 524; Com. v. Elburger, 1 Whart. 469.

**194.** The mere fact that under the internal revenue act of the United States, a retailer's tax had been paid, and a retailer's license obtained for the defendant's wife, does not tend to prove that the defendant did not keep a disorderly house, or to justify him in keeping it. State v. Foley, 45 New Hamp. 466.

**195. Weight and sufficiency of proof.** On the trial of an indictment for neglecting to rebuild and keep in repair a bridge across a river, the question whether a bridge at the place in question would be so connected with other public highways as to be convenient and useful to the public, so that the neglect to build or repair it would be a nuisance, is one of fact for the jury. State v. Northumberland, 44 New Hamp. 628.

**196.** On the trial of an indictment against a town, for allowing a highway to be out of repair, the following instruction was held proper: "That the jury must be satisfied, having reference to the nature and amount of the public travel, that there was a substantial inconvenience in the use of the road, burdensome to the traveler, as compared with other similar ordinary roads, and growing out of causes which could be removed by the town by a reasonable expenditure of money." Com. v. Inhabs. of Taunton, 16 Gray, 228.

**197.** An indictment alleged that the defendants' plank-road had been and still was at the finding of the indictment out of repair, to the damage and common nuisance of the people of the State, so that they could not pass over the same without great trouble, annoyance and inconvenience. *Held*, that before the jury would be warranted in finding the defendants guilty, they must find from the evidence, not only that the defendants permitted their road to be out of repair at the time laid, but that it continued and remained out of repair down to the time of finding the indictment. People v. Branchport &c. Plank R. Co. 5 Parker, 604.

198. On the trial of an indictment for obstructing a public road, it was proved that the obstructions were caused by the felling of timber to build the defendant's house, that he was about the premises and saw the obstructions, but did nothing toward their removal, and that he had no control over the workmen engaged in building his house. *Held*, that a verdict of guilty would not be disturbed. Sanders v. State, 18 Ark. 198.

### 13. Verdict.

**199. In case of several defendants.** Where several are joined in an indictment for a nuisance, the jury may find one of the defendants guilty, and the others not guilty. Bloomhuff v. State, 8 Blackf. 205.

### 14. Judgment.

**200. In case of obstruction of highway.** The object of the prosecution by indictment for nuisance to highways, is not for the punishment of the defendant, but the repair of the highway when it is out of repair, or the removal of the nuisance when the highway is obstructed. The judgment in such cases is, that the defendant pay a fine and abate the nuisance. People v. Branchport &c. Plank R. Co. 5 Parker, 604.

**201. Command in, must be to defendant.** A judgment that "the nuisance be abated forthwith, at the cost of the defendant, and the sheriff is charged with the execution of this order," being in effect a command to the sheriff to abate the nuisance, was held erroneous; but it was held that it might be amended so as to command the defendant to abate the nuisance. Campbell v. State, 16 Ala. 144.

**202. For removal of nuisance.** Where the indictment does not aver a continuance of the nuisance, a judgment for the abatement of the nuisance is improper; and if rendered, it will be reversed on writ of error, and the proceedings be remitted, with directions to the court below to pass a proper sentence. Munson v. People, 5 Parker, 16. Where, therefore, the indictment averred that the defendant unlawfully and injuriously slaughtered animals at his slaughter house, and that annoyance and disturbance of the public was occasioned by the offal and other refuse material which he caused and permitted to be and remain near the dwellings and highway, it was held that the court had no power to restrain him from continuing the business of slaughtering at his slaughter house. Taylor v. People, 6 Parker, 347.

### 15. Abatement of nuisance.

**203. By private person.** At common law an individual may abate a nuisance. But no more injury must be done to property than is absolutely necessary to accomplish the object. State v. Moffett, 1 Iowa, 347. Where a railroad bridge across the Neuse river obstructed the navigation of it by the defendants' steamboat, and for that reason they tore the bridge down, it was held that they were justified in so doing. State v. Parrott, 71 N. C. 311; s. c. 2 Green's Crim. Reps. 755; approving State v. Dibble, 4 Jones, 107.

**204.** In Maine, county commissioners have no authority to lay out roads, and construct bridges over creeks or arms of the sea, where canal-boats and other small craft have been accustomed to be floated; and any citizen having occasion to use such waters for the passage of his vessel, may lawfully remove the obstruction. State v. Anthoine, 40 Maine, 435.

**205. By mortgagor.** Where a mortgagor removes from the mortgaged premises a ruinous building, in the performance of his duty to abate a public nuisance, such removal will not make him liable under a statute (of Minnesota, L. of 1869, ch. 64), which makes it a criminal offense for a mortgagor to remove any building situate upon mortgaged real estate, to the prejudice of the mortgagee, "with the intent to impair or lessen the value of the mortgage," without the consent of the mortgagee. Chute v. State, 19 Minn. 271; s. c. 1 Green's Crim. Reps. 571.

*See* Breach of the peace; Lasciviousness.

# Obscene Publications.

**1. Indictment.** An indictment for publishing an obscene book or picture need not so fully describe them as to spread them out on the records of the court. Com. v. Holmes, 17 Mass. 336; People v. Girardin, 1 Mann. 90.

**2.** Although an indictment for publishing an obscene book need not always set out the contents of the book, yet whenever it is necessary to do so, or whenever the indictment undertakes to set out the contents, the alleged obscene publication must be set out in the very words of which it is composed. When, however, the publication is so obscene as to render it improper that it should appear on the record, the statement of the contents may be omitted, and a description of them substituted; but a reason for the omission must appear in the indictment, by proper averments. Com. v. Tarbox, 1 Cush. 66.

**3.** In order to sustain an indictment for the publication of an obscene picture, it is not necessary to allege that the exhibition was in a public place. It is sufficient to state that it was exhibited to sundry persons for money. The indictment need not describe minutely the picture, as to its attitude and posture, or allege that the defendant's house, where the picture is shown, is a nuisance. Com. v. Sharpless, 2 Serg. & Rawle, 91.

*See* Lasciviousness; Libel.

# Obstructing Highway.

*See* Nuisance.

# Officer.

1. Authority and duty.
2. Liability.
3. Resisting officer.
4. Indictment.
5. Evidence.

## 1. Authority and duty.

**1. Magistrate when protected.** Where a magistrate, in issuing a warrant, possessed and was exercising a general jurisdiction of the subject-matter, and not a special jurisdiction over a particular offense created by statute, and thereby restricted as to the manner of proceeding, all that is required to protect him is that the evidence was colorable—something upon which the judicial mind was called upon to act in determining the question of probable cause. Pratt v. Bogardus, 49 Barb. 89.

**2. Who deemed an officer de facto.** An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, where the duties of the office were exercised: 1st, without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be; 2d, under color of a known and valid appointment or election, but where the officer had failed to conform to some requirement or condition, as to take an oath, give a bond, or the like; 3d, under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility being unknown to the public. State v. Carroll, 38 Conn. 449, per Butler, C. J.; disapproving Douglass v. Wickwire, 19 Ib. 488.

**3. Acts of officer de facto, how far valid.** Although a chief of police *de facto*, at the time he serves a warrant, holds another office incompatible with that of policeman, his official act in serving the warrant will be valid as to the public and third persons. State v. Clark, 44 Vt. 636.

**4. Commissioners of excise.** In New York, the duties devolved upon commissioners of excise, by "the act to suppress intemperance and to regulate the sale of intoxicating liquors" (Laws of 1857, ch. 628), call for the exercise of discretion and judgment, and are to some extent judicial. The

commissioners cannot be coerced in the exercise of their discretion. But for an unlawful and corrupt exercise of the powers vested in them, they are answerable criminally. People v. Jones, 54 Barb. 311.

5. **Right to make arrest in default of property.** The statute of New Hampshire (Gen. Stats. ch. 54, § 8), authorizing the collector to arrest the body of the delinquent taxpayer for want of goods and chattels, does not require the officer to search for property, or to incur labor, expense, or risk in taking it; but only to take such property as shall be specifically produced, together with indemnity if required. On the trial of an indictment for assaulting a tax-collector, and opposing and hindering him in the discharge of the duties of his office, it was proved that the defendant having twenty head of cattle in his barnyard, pointed them out to the tax-collector, who was standing in the highway, and said, "There are oxen, cows, steers, &c., take what you will," but refused, when requested to turn them out into the road for the collector. *Held* that the tax-collector was justified in arresting the defendant. State v. Roberts, 52 New Hamp. 492; s. c. 1 Green's Crim. Reps. 157.

6. **Right of justice of the peace to command assistance.** A justice of the peace has the same authority to command assistance in pursuing and retaking an offender whom he has caused to be arrested for an offense committed in his presence, and who has escaped, that he has to command assistance in making the original arrest. Com. v. McGahey, 11 Gray, 194.

7. **Duty to arrest deserters.** When officers are ordered by their superiors to arrest persons specifically named as deserters, they have no right to make their obedience dependent upon the inquiry as to whether the persons to be arrested are or are not deserters. U. S. v. Gleason, 1 Wool. C. C. 128.

8. **May enter house without warrant.** Police officers may enter the house of a person in the night without a warrant and arrest him, whenever his conduct is such as to induce the belief that he intends to commit a felony, or even a breach of the peace. State v. Stouderman, 6 La. An. 286.

9. A constable has the right, by virtue of his office, and without warrant, to enter any house the door of which is unfastened, and in which there is a noise amounting to a breach of the peace, and arrest any person engaged in an affray, or in committing an assault in his presence, and hold him by suitable means for a reasonable time to prevent any further assault. Com. v. Tobin, 108 Mass. 426.

10. **Right to search house.** Where an officer having a warrant for the arrest of a person on a criminal charge, knocks at the door of a house in the night and is admitted, he has a right, acting in good faith and in a proper manner, to search the premises for the offender, if he reasonably and in fact supposes him to be there; and he is not bound to exhibit his warrant to the occupier of the house, if the latter has reasonable notice from the officer's uniform or otherwise, that he is an officer and is acting under a warrant against a person supposed to be there. Com. v. Irwin, 1 Allen, 587.

11. **May break open door of house.** A sheriff or other officer, authorized to execute criminal process, may lawfully break open the door of the house wherein the accused dwells, and enter and search the dwelling to find the offender; and if hindered and obstructed in his attempt to effect an entrance by other persons, they will be liable to prosecution, although at the time the accused was not in the house. This right includes the right to break open the inner doors. The accused need not have owned the house, provided he dwelt there at the time. If the accused neither owns nor dwells in the house, he must have been therein at the time of the breaking and entering, or the officer will not be justified; and in such case the owner, after giving the officer leave to enter, may at any time withdraw it. Hawkins v. Com. 14 B. Mon. 395.

12. **Duty to show his precept.** An officer when called upon by a person arrested to state his authority, is bound to give reasonable information; but not under all circumstances to show his precept. His omission to exhibit or declare his authority can do no more than deprive him of the protec-

tion which the law throws around him when in the rightful discharge of his official duty. A prisoner who escapes without questioning the officer's authority, is not entitled to the same extent to demand the authority when rearrested that he had before his escape. State v. Phinney, 42 Maine, 384.

**13. When justified in taking life.** At common law, if a felony has been committed, an officer in arresting or preventing the escape of the offender, will be justified in taking the life of the offender when there is an absolute necessity for his so doing. Where no process has been issued, a homicide can only be justified, even by an officer, by showing the actual commission of a felony, and that there was a positive necessity to take life in order to arrest or detain the felon. Conraddy v. People, 5 Parker, 234.

**14. May take into his custody stolen property.** An officer charged with the execution of a warrant for grand larceny, may not only make the arrest, but also take into his custody the property described in his warrant if he finds it on the person or in the possession of the accused. But he has no power to search the house or premises for concealed property, another process being required for this purpose. Houghton v. Bachman, 47 Barb. 388.

**15. Right of magistrate to order delivery of stolen property.** In New York, if the evidence adduced before the magistrate satisfies him judicially that the property found on the accused has in fact been stolen, and that the claimant is the actual owner, he has authority in his judicial capacity to order its delivery to such claimant. 3 N. Y. R. S. 5th ed. 1042. The order of the magistrate in such case is not an estoppel upon the question of title. It simply disposes of the possession of property already in the custody of the law, leaving the title open to vindication by any party claiming to have it. Houghton v. Bachman, *supra*.

**16. Has custody of prisoner.** An officer who arrests a party upon a warrant returnable before a justice of the peace, is deemed to have the party in custody by virtue of the original warrant, until he is discharged by the court, or a new warrant for commitment is made and delivered to him by the justice. Com. v. Morihan, 4 Allen, 585.

**17. Duty to return warrant.** Although a writ issued by a court having jurisdiction of the subject-matter, and regular on its face, will protect the officer who executes it, yet to have that effect, the warrant must be regularly returned. Slomer v. People, 25 Ill. 70. The fact that a warrant does not command the officer to make due return of it, with his doings thereon, is not a valid ground for the discharge of the prisoner. Com. v. Boon, 2 Gray, 74.

### 2. Liability.

**18. Neglect of duty.** Whenever a duty of a public nature is cast on a person, any neglect of the duty or act done in violation of it is indictable. Robinson v. State, 2 Cold. Tenn. 181.

**19. Fraudulent conversion.** It is not a defense to an indictment against an officer for the fraudulent conversion of moneys, that he and his sureties are liable for the same on his bond, and that it is not public money until paid into the treasury. State v. Walton, 62 Maine, 106.

**20. Overdrawing account.** In New Jersey, it is a misdemeanor under the statute (R. S. 125), for a director or officer of a bank knowingly to overdraw his account with the bank, although done without fraudulent intent, and without defrauding the bank; and the indictment need not allege the manner, by whose checks, in how many checks, or in what funds, he overdrew his account. State v. Stimson, 4 Zabr. 478.

**21. Buying order.** It is not a defense to an indictment against a county treasurer for buying an order on the county for less than its par value, that the person of whom he bought had no title to the order. Wilder v. State, 47 Ga. 522.

### 3. Resisting officer.

**22. What is.** To constitute the offense of resisting an officer, the officer or person resisted must be authorized to execute the process in the execution of which he is resisted; the process must be legal, and this

must be alleged and proved. A general averment that it was lawful process, and the person resisted a public officer, authorized to execute the same, is a sufficient allegation of the validity of the process and the jurisdiction of the officer. Bowers v. People, 17 Ill. 373.

23. To constitute the offense of resisting an officer in the lawful execution of process, within the statute of Wisconsin (R. S. ch. 167, § 18), the resistance must be direct and forcible. The mere frightening away or removing horses from a field to prevent their seizure by an officer under a writ, is not sufficient. But threats against the officer with the present ability and apparent intention to execute them, might constitute the offense. State v. Welch, 37 Wis. 196.

**24. Hindering person deputed to serve process.** In Connecticut, the hindering and obstructing an indifferent person regularly deputed to serve a writ of attachment, while such person is engaged in the performance of his duty in serving such process, has been held to be a violation of the statute (Rev. Stat. p. 261), which provides that "Every person who shall hinder, obstruct, resist or abuse any justice of the peace, or resist hinder, obstruct, or abuse any sheriff, deputy sheriff, constable, or other officer, in the execution of his office, shall be punished," &c. State v. Moore, 39 Conn. 244; s. c. 1 Green's Crim. Reps. 296.

**25. Resistance by tax-payer.** In New Hampshire, a tax-payer will not be justified in resisting the officer, even though the assessment of the tax was irregular, or the tax illegal, or the warrant defective. State v. Roberts, 52 New Hamp. 492.

**26. Resisting seizure of property.** It is not a defense to an indictment for obstructing an officer in the service of process of attachment, that the goods attached belonged to the defendant, and not to the party to the process. State v. Fifield, 18 New Hamp. 34; State v. Richardson, 38 Ib. 208.

27. Whenever the question of property is so far doubtful that the creditor and officer may be supposed to act, and do in fact act in good faith and on reasonable grounds for believing the property to be that of the debtor, the owner has no right to resist an execution or attachment by a breach of the peace. Faris v. State, 3 Ohio, N. S. 159.

28. After an officer has taken possession of the right personal property under a defective writ, a person who has been tried and convicted for resisting the seizure cannot reverse the conviction on the ground that the writ was defective. Nolty v. State, 17 Wis. 668.

**29. Duty of soldier to obey orders.** A soldier is only bound to obey the lawful orders of his superiors. U. S. v. Carr, 1 Woods, 480. If in obeying an illegal order, he commits an offense, the order will be no justification. But a soldier would be bound to obey any order given by his superior officer which did not show its illegality on its face; and such an order would be a protection to him. Riggs v. State, 3 Cold. Tenn. 85.

### 4. Indictment.

**30. For misconduct in office.** An indictment charged that the defendant being register of deeds, made and signed a certificate that he had examined the title to a certain lot and found no incumbrance thereon, whereas, there was an incumbrance on it by attachment which was entered in the registry; that the defendant knew the fact when he gave the certificate, and knew that his certificate was false, and knowingly, designedly, and unlawfully issued the same. *Held* that the facts set forth showed "misconduct in office" within the statute of Maine (Stat. of 1857, ch. 7, § 15), although there was no intent to defraud, and it was no part of the defendant's duty to make such examination or issue such certificate; that the writ of attachment need not be set out; and that the allegation, "all of which then and there appeared by the records of said registry of deeds" sufficiently averred that the attachment was recorded. State v. Leach, 60 Maine, 58.

31. An indictment for the willful neglect of duty and misbehavior in office as a justice of the peace charged that the defendant, having in his possession as justice of the

peace $60 20, received by him in satisfaction of a judgment recovered before him by one A., did "willfully, corruptly, and fraudulently withhold it" from A.; that A., having called on him and made inquiry of him about said judgment, he "willfully and corruptly, and with intent to injure and defraud the said A.," withheld from him the knowledge that the judgment had been satisfied, and neglected to pay over to him the amount received in satisfaction of the judgment, and "then and there willfully and corruptly advised the said A. to sell the said judgment;" and that afterward he paid of the money so received to B. $51, and did then and there willfully and corruptly reserve to himself the remainder of said judgment money, amounting to $9 20, "with intent to injure and defraud the said A." *Held* that the indictment was bad for duplicity, and in not showing that any crime had been committed. State v. Coon, 14 Minn. 456.

**32. Taking unlawful fee.** An indictment under a statute punishing the taking or receiving for an official service or duty a greater fee or compensation than is authorized by law, must state the service or duty for which the money was taken. State v. Packard, 4 Oregon, 157. And see State v. Perham, lb. 188.

**33. Failure to execute warrant.** Where a constable is indicted for not executing a warrant commanding him to arrest a person charged with crime, the indictment must show that the person who issued the warrant had jurisdiction, and the indictment must allege that the facts recited in the warrant are true. People v. Weston, 4 Parker, 226.

**34. Making false return.** An indictment against an officer for making a false return to process must state wherein the return was false, and the facts in relation to the transaction whereof the return was made. Tibbals v. State, 5 Wis. 596.

**35. Falsely personating officer.** In Massachusetts, an indictment for falsely personating a sheriff, in violation of the statute (R. S. ch. 128, § 19), must allege that the defendant falsely assumed or pretended to be a sheriff of the commonwealth, and took upon himself to act as such. Com. v. Wolcott, 10 Cush. 61.

**36. Resisting officer.** In charging a person with knowingly and willfully resisting an officer in the execution of a legal writ, it is not necessary to aver that the officer at the time informed the defendant that he acted under a warrant. The indictment need not set forth the acts of the officer, or show that in making the arrest he complied with the statute. The officer will be presumed to have discharged his duty; and the fact that he did not do so is proper matter of defense. State v. Freeman, 8 Iowa, 428.

**37.** Whether an indictment for resisting an officer ought to specify the process under which he acted, state the manner of executing it, and of the resistance, and allege that the defendant knew he was an officer—*query*. Faris v. State, 3 Ohio, N. S. 159. An indictment for resisting process which shows that the time of the commission of the offense was after the return day is bad on error. McGehee v. State, 26 Ala. 154.

**38.** In New Hampshire, an indictment under the statute (Gen. Stats. ch. 259, § 6), for willfully obstructing or assaulting an officer or other person in the service of criminal process, need not state that the officer was duly appointed or qualified to serve the process, or that it was "a lawful process," or that the complaint on which the process was issued was signed or addressed to any magistrate, or that the process was under the seal of the justice by whom it was issued. State v. Cassady, 52 New Hamp. 500.

**39.** An indictment under a statute punishing a person who should willfully obstruct or assault any officer or person duly authorized, in the discharge of any duty of his office, was held sufficient which charged that "the defendant, with force and arms, upon one H., then and there being a collector of taxes for said town of J., and in the due discharge of the duties of his said office, to wit, in the service of a certain warrant for the collection of taxes, theretofore issued and directed to said H. by the selectmen of said J., then and there made

an assault, and him, the said H., so being in the discharge of the duties of his said office, then and there did willfully obstruct, oppose, and hinder, and then and there did beat," &c., without alleging that H. was "duly authorized," and in the discharge of his duty. State v. Roberts, 52 New Hamp. 492; s. c. 1 Green's Crim. Reps. 157.

40. An information for hindering and obstructing G., an officer, in the execution of process, alleged that "G. was lawfully deputed according to the statute in such cases provided, as an indifferent person, by A. B., a justice of the peace, and as such indifferent person, had in his hands a writ of attachment issued by said justice, which was lawfully issued and perfected in all respects according to law, and which was directed to the said G., as an indifferent person, commanding him," &c., without alleging that G. was an officer, or that the plaintiff in the writ, or his agent, took the oath required by law, or that a bond for prosecution was given. *Held* that the information was sufficient after verdict. State v. Moore, 39 Conn. 244; s. c. 1 Green's Crim. Reps. 296.

41. Where an indictment charged the defendant with having willfully obstructed J. P., a deputy sheriff, in the service of a writ, which was set out and averred to be lawful process in a civil case, it was held sufficient without alleging that the writ was ever in the hands of the officer, or that it was returned. State v. Fifield, 18 New Hamp. 34.

42. It is essential to an indictment for obstructing an officer in the service of legal process, that it show that such process was legal; and it is not enough to allege that the officer was "in the due and lawful execution of his office." If the process was a writ of replevin, the indictment should allege that a bond was given. State v. Beasom, 40 New Hamp. 367.

43. An indictment for obstructing and resisting an officer in the service of an execution, which is set out, need not allege that a judgment was rendered upon which the execution issued. State v. Dickerson, 24 Mo. 365.

44. **For rescue.** An indictment for a rescue, must state the nature and cause of the imprisonment of the person alleged to have been rescued, and whether the party from whom the rescue was made was a public officer or private person. If the latter, the defendant would not be liable unless he knew that the prisoner was under arrest. State v. Hilton, 26 Mo. 199.

45. An indictment for attempting forcibly to rescue a prisoner held in the lawful custody of an officer, need not allege the process by which he was held or the circumstances of the holding. Com. v. Lee, 107 Mass. 207.

46. An indictment for rescue must aver that an order for bail was made previous to issuing the *capias ad respondendum* upon which the party rescued was arrested. State v. Dunn, 1 Dutch. 214.

47. **Removal.** Form of information and decree for the removal of a public officer. Com. v. Cooley, 1 Allen, 358.

5. Evidence.

48. **Proof of authority.** Where it is shown that a person has acted notoriously as a public officer, it is *prima facie* evidence of his official character, without proving his commission or appointment. State v. Roberts, 52 New Hamp. 492; s. c. 1 Green's Crim. Reps. 157.

49. Proof that a person is an acting officer, is evidence of his authority, notwithstanding in the given case, the power of appointing officers depends upon the adoption by the town, of the police law, which fact is not shown. State v. Butman, 42 New Hamp. 490.

50. The legal presumption that officers are authorized to act, and that papers bearing their official signature are genuine, applies to a warrant in the hands of an officer, and purporting to be signed by the tax-collector and treasurer of a town. Com. v. Gearing, 1 Allen, 595.

51. **Intent to defraud.** On the trial of an indictment against a register of deeds for "official misconduct" in making and signing a certificate that he had examined the title to a certain lot, and found no incumbrance thereon, whereas there was an in-

cumbrance on it, which was entered in the registry, the history of the certificate and of the uses made of it by the holder in obtaining a loan, are admissible to show an intent to defraud; also proof that a lien by attachment was perfected by levy; and likewise the record of the attachment notwithstanding there is a variance between that and the writ in the middle initial letter of the attaching creditor. State v. Leach, 60 Maine, 58.

**52. Original process.** In Connecticut, on the trial of an information for obstructing and hindering an officer in the execution of process, it was held that the original process was admissible in evidence although it had not been returned to court; the offense being complete upon the obstruction of the process, and it not being a question of the justification of the officer. State v. Moore, 39 Conn. 244; s. c. 1 Green's Crim. Reps. 296.

**53. Officer need not be witness.** When an officer is charged with misconduct which may be a ground for his removal or impeachment, though not an indictable offense, he is not bound to be a witness against himself. U. S. v. Collins, 1 Woods, 499.

*See* ARREST; EMBEZZLEMENT.

## Outlawry.

**1. Prosecution to.** In Virginia, where the defendant was indicted for a trespass, it was held that he might be prosecuted to outlawry. Com. v. Hale, 2 Va. Cas. 241.

**2. Process of.** In Pennsylvania, in process of outlawry, the township of which the defendant was inhabitant must be alleged. But if he is proved to have been there, it is sufficient, though not his place of residence. Resp. v. Steele, 2 Dall. 92.

## Pardon.

**1. Power of executive to grant.** Where the punishment is in the discretion of the presiding judge, the pardoning power should only be exercised in extreme cases. Whether the governor has power to pardon a portion of the supposed punishment (when it is discretionary) before it is determined by judgment—*query*. State v. McIntire, 1 Jones, 1.

**2.** In Massachusetts, under the State Constitution (ch. 2, art. 8, § 1), the governor has power, by and with the advice of the council to pardon a prisoner after verdict, and while exceptions allowed by the judge who presided at the trial are pending in the Supreme Court for argument; and the prisoner, upon waiving his exceptions, and pleading the pardon, is entitled to his discharge. Com. v. Lockwood, 109 Mass. 323; s. c. 1 Green's Crim. Reps. 168.

**3. Remission of part of fine.** The governor, under the power of pardoning, may remit part of a fine. State v. Twitty, 4 Hawks, 193. And see Rowe v. State, 2 Bay, 565. In South Carolina, it was held that the 4th section of the act of 1827, which provided that fines or forfeitures incurred or imposed in any Court of Sessions, should be paid to the commissioners of public buildings for public purposes, did not take from the governor the power to remit so much of any fine or forfeiture as was not by law given to the informer or other private persons for private purposes. State v. Simpson, 1 Bail. 378.

**4.** The power of pardon confided to the President after a judgment ordering a portion of a fine to be paid to a private citizen, is limited to a remission of the share of the government only, and is inoperative to divest an interest vested by such judgment in the citizen. U. S. v. Harris, 1 Abb. 110.

**5. May be conditional.** The power of the executive under the Constitution, to grant pardons, includes the power of granting a conditional pardon. Such condition may extend to banishment from the United States; and where there is a breach of the condition, the pardon becomes void, and the criminal may be remanded by the court in which he was convicted, or other court having criminal jurisdiction. People v. Potter, 1 Parker, 47.

**6.** A pardon may be upon the condition that the offender leave the State and never return; and upon a violation of the condi-

tion, the original sentence may be enforced. State v. Smith, 1 Bail. 123; State v. Fuller, 1 McCord, 178.

7. In Arkansas, where a person having been pardoned by the governor on condition that he should leave the State, complied with the condition, but afterward returned to the State, it was held that he was not liable to be retaken and imprisoned under the former conviction. *Ex parte* Hunt, 5 Eng. 284.

8. It is a reasonable condition that the defendant shall leave the county forthwith; by which the defendant would be required to depart and remain absent during at least the term of sentence. Com. v. Haggerty, 4 Brewster, Pa. 326; s. c. 1 Green's Crim. Reps. 180.

9. Where it appeared from the pardon that the governor supposing that the defendant had been fined as well as imprisoned, made his discharge conditional upon the payment of the fine, it was held that the pardon was void. State v. McIntire, 1 Jones, 1.

10. In Virginia, where a pardon was conditional, it was held that the governor having no power to pardon upon condition, the pardon was absolute. Com. v. Fowler, 4 Call, 35.

11. **By repeal of statute.** Where a penal statute is repealed, it operates as a pardon of all offenses committed before such repeal. Roberts v. State, 2 Overt. 423.

12. **Implied promise of.** Where an accomplice testifies in the United States Circuit Court in behalf of the prosecution, there is an implied promise by the government that he shall not be prosecuted if he makes a full and honest disclosure. U. S. v. Lee, 4 McLean, 103.

13. In New York, an accomplice testifying and making a full disclosure is entitled to a recommendation for pardon. People v. Whipple, 9 Cow. 707. It was held otherwise in Virginia. Byrd v. Com. 2 Va. Cas. 493; Dabney's Case, 1 Rob. 696.

14. An accomplice in murder who testifies on behalf of the State, is not before conviction entitled to avail himself of the rights and privileges of one claiming executive clemency. *Ex parte* Birch, 3 Gilman, 134.

15. **How proved.** A pardon may be proved by production of the charter of pardon under the great seal of the State. Roberts v. State, 2 Overt. 423; State v. Blaisdell, 33 New Hamp. 388.

16. **How taken advantage of.** A prisoner can only avail himself of a pardon by bringing it judicially before the court. U. S. v. Wilson, 7 Peters, 150.

17. **Averment.** Where an information alleges that the prisoner was discharged in consequence of a pardon, it is equivalent to an averment that he was discharged "in due course of law." Evans v. Com. 3 Metc. 453.

18. **General effect.** Pardons are to be construed favorably to the convict. They take effect from the delivery, and not only relieve from punishment, but remove the guilt of the offense. *Ex parte* Hunt, 5 Eng. 284. A pardon removes disabilities, whether granted before or after the term of punishment has expired. State v. Baptiste, 26 La. An. 134.

19. When a person sentenced to the State prison for life, is pardoned, he is restored to his rights and duties as a parent, and becomes entitled to the custody of his infant children, who had been placed under the care of a guardian, but it does not annul the second marriage of his wife, nor the sale of his property by persons appointed to administer on his estate, nor deprive his heirs of the interest acquired in his estate, by reason of his civil death. Matter of Deming, 10 Johns. 232.

20. A pardon restores all the rights of property of the grantee for acts done or permitted in aid of the late rebellion; and he may plead such pardon in proceedings for the confiscation of his property. Brown agst. U. S. McCahon's Kansas, 239.

21. **Does not restore capacity of magistrate.** Where a justice of the peace having been convicted of felony, thereby forfeited his office, it was held that a pardon did not do away with the forfeiture, or restore his capacity. Fugate's Case, 2 Leigh, 724.

22. **Does not affect offense not men-**

tioned. A pardon for a specified offense does not operate as a pardon for a previous felony not mentioned in such pardon. State v. McCarty, 1 Bay, 334.

23. It is not a defense to an indictment for horse stealing, that the crime was committed previous to the conviction of the defendant for negro stealing, for which he was pardoned. Hawkins v. State, 1 Porter, 475.

**24. Restoration of competency to testify.** The effect of a pardon, although granted after the convict has suffered the entire punishment awarded against him, is to remove the common-law disability of incompetency as a witness. State v. Blaisdell, 33 New Hamp. 388.

25. A clause in a pardon that nothing contained therein is intended to relieve the prisoner from the legal disabilities arising from his conviction and sentence, but solely from imprisonment, is repugnant, and may be treated as surplusage. People v. Pease, 3 Johns. Cas. 333.

26. A pardon restores the competency of a felon as a witness, notwithstanding it is not affirmatively shown that the pardon restored him to the rights of citizenship. Yarborough v. State, 41 Ala. 405.

27. The following was held not to be a pardon entitling the convict to testify as a witness, for the reason that it sought to restore the prisoner to all the rights of citizenship possessed by him before his conviction, while he yet remained a convicted felon: "Whereas Charles Davis, alias Charles Moore, has been convicted of criminal offenses against the laws of the State of California, and whereas it is desirable for the attainment of the ends of justice that he should be restored to citizenship; therefore I, H. H. Haight, governor of said State, do hereby restore said Davis to all the rights of citizenship possessed by him before his conviction for the offenses above referred to." People v. Bowen, 43 Cal. 433; s. c. 1 Green's Crim. Reps. 185.

28. Although a pardon restores the person's competency as a witness, yet a remission merely of his punishment does not have that effect. Perkins v. Stevens, 24 Pick. 277.

**29. Person convicted of perjury not competent witness.** In New York, a person who has been convicted of perjury cannot be a witness, until the judgment is reversed, though he has been pardoned by the governor, and the pardon purports to restore him to all his civil rights. Houghtaling v. Kelderhouse, 1 Parker, 241.

**30. Does not remit interest in penalty.** A pardon by the president of the United States as to all the interest of the government in the penalty incurred by a violation of the embargo laws, and directing further proceedings to be suspended, does not remit the interest of the custom house officers in a moiety. U. S. v. Lancaster, 4 Wash. C. C. 64.

**31. Effect on costs.** A general pardon discharging a convict from a fine and judgment of imprisonment does not operate as a remission of the judgment for costs against him. Estep v. Lacy, 35 Iowa, 419; s. c. 2 Green's Crim. Reps. 634.

32. In Illinois, where a person sentenced to imprisonment, and to pay a fine of one hundred dollars, was pardoned for the crime, and an execution issued against him for the amount of the fine and costs, it was held that the pardon discharged him from the fine, but not from the costs. Halliday v. People, 5 Gilman, 214. And in Pennsylvania, it has been held that the pardoning power does not include the costs to which the prisoner may have been sentenced upon conviction. *Ex parte* McDonald, 2 Whart. 440. It is the same in Indiana. State v. Farley, 8 Blackf. 229.

33. But in Pennsylvania, the pardon of a person convicted of bastardy, when pleaded before sentence, exempts the defendant from the costs of the proceedings, as well as from the obligation to support the bastard child. Com. v. Ahl, 43 Penn. St. 53.

## Peace, Breach of.

*See* Affray; Breach of the peace; Riot.

## Peddlers.

**1. Meaning of.** A hawker and peddler is

one who travels from town to town, or from house to house, carrying to sell, or exposing for sale, goods, wares, and merchandise. A single shipment of goods, regularly consigned to merchants, by the defendant, and sold for his benefit, is not hawking and peddling. State v. Belcher, 1 McMullan, 40.

2. It is a violation of the hawker and peddler act of Massachusetts (Stat. of 1846, ch. 244) for a person to sell merchandise from house to house by request of buyers, notwithstanding he was traveling in pursuit of a lawful occupation, and did not previously intend to sell such goods. But it is not a violation of such act for a carrier to deliver goods to persons who had previously ordered them, but who, when the goods were brought, desired to enlarge their order upon the same terms. Com. v. Ober, 12 Cush. 493.

**3. Constitutionality of statute.** A law prohibiting sales by hawkers and peddlers without license is valid, it being an exercise of the police power of the State. Morrill v. State, 38 Wis. 428.

**4. Indictment.** An indictment against a peddler must allege that the person charged with peddling had no license. May v. State, 9 Ala. 167.

5. An indictment for vending clocks without license need not allege to whom the clocks were sold, or the price that was given. Page v. State, 6 Mo. 205.

6. In Indiana, an indictment under the statute (R. S. of 1838, p. 216), for selling clocks without a license, must show that the defendant made vending clocks his business. Alcott v. State, 8 Blackf. 6.

7. In Maine, an indictment under the statute (R. S. ch. 27, § 20), making it unlawful for peddlers and dealers to carry for sale, or offer for sale, or offer to obtain, or to obtain, orders for the sale or delivery of any spirituous liquors, which charges a violation of all of the acts prohibited, is bad for duplicity. State v. Smith, 31 Maine, 386; s. c. 2 Green's Crim. Reps. 462.

**8. Burden of proof.** On the trial of an indictment for peddling goods not of the production or manufacture of this country, the burden of proof is on the prosecution to show that the goods are foreign. Com. v. Samuel, 2 Pick. 103.

# Perjury and Subornation of Perjury.

1. Perjury.
   - (*a*) *When and how committed.*
   - (*b*) *Indictment.*
   - (*c*) *Evidence.*
   - (*d*) *Verdict.*
2. Subornation of perjury.
   - (*a*) *Requisites.*
   - (*b*) *Indictment.*
   - (*c*) *Evidence.*

## 1. Perjury.

### (*a*) *When and how committed.*

**1. Meaning of.** Perjury is the willful taking of a false oath by a person who being required to testify in a judicial proceeding, swears absolutely in a matter material to the issue. If the testimony though false, be immaterial, it is not perjury; and it lies on the prosecution to show that it is material. Com. v. Pollard, 12 Metc. 225; State v. Simons, 30 Vt. 620. A person cannot be convicted of perjury because the jury believe that he had no reasonable ground for the opinion he expressed. Com. v. Brady, 5 Gray, 78.

2. In Tennessee, an early statute defined perjury as follows: "When a lawful oath or affirmation is administered in some judicial proceeding, to a person who swears or affirms willfully, absolutely, and falsely, in a matter material to the issue, or point in question." State v. Wall, 9 Yerg. 347.

3. Perjury consists in swearing falsely and corruptly contrary to the belief of the witness, and not in swearing rashly and inconsiderately according to his belief. U. S. v. Shelburne, 1 Bald. 350; Com. v. Pollard, *supra*.

**4. May be under general oath.** Where a person swears falsely under a general oath, when he might have taken a more restricted oath, he will be guilty of perjury. State v. Keene, 26 Maine, 33.

**5. Swearing to fact without any knowledge of it.** A person may commit perjury notwithstanding he believes what he swears, if he have no probable cause for his belief. State v. Knox, Phil. N. C. 312.

**6.** Perjury may be committed not only by swearing to material facts known not to be true, but in swearing to them without any knowledge on the subject. State v. Gates, 17 New Hamp. 373.

**7.** The following charge on a trial for perjury, was held correct: That if the fact sworn to by the prisoner was material, although it was true, yet if the jury believed from the evidence that the prisoner at the time of such testimony did not know it to be true, or have such knowledge or information concerning it as fairly justified him in believing it true, he could properly be convicted. People v. McKinney, 3 Parker, 510.

**8.** Where it appeared that the prisoner had testified that he was present at the making of a contract between certain parties, and it was proved that although the contract was made at such time and place, yet that the prisoner was not present and had no knowledge of it, it was held that such evidence was circumstantially material, and that the prisoner was guilty of perjury. Ib.

**9. Swearing contrary to belief.** Perjury may be committed by falsely swearing to an account that it is just to the witness's belief. Patrick v. Smoke, 3 Strobh. 147.

**10.** The cashier of a bank who swears that the return made by him "is, according to his best knowledge and belief, true," knowing at the time that it is false, is guilty of perjury. Com. v. Dunham, Thach. Crim. Cas. 519.

**11.** A witness who swears that a thing is so, or that he believes it to be so, when in truth he does not believe it to be so, takes a false oath, though the fact be really as stated. State v. Cruikshank, 6 Blackf. 62.

**12. What material.** Where several are jointly indicted for an assault, evidence as to the acts of either is material, and if fully and falsely given, it is perjury. State v. Norris, 9 New Hamp. 96.

**13.** Land was conveyed by A. to B., which had previously been mortgaged to C. Judgment of foreclosure having been recovered by C., a petition for review was filed by B., setting forth the discovery of new evidence, and claiming a technical payment of the debt secured by the mortgage. A. swore at the hearing of the petition, that he informed B. when the conveyance was made, of the existence of the mortgage. A. being indicted for perjury, a motion made before plea, to quash the indictment, on the ground of the immateriality of such evidence to the main issue at the hearing, was denied. Com. v. Farley, Thach. Crim. Cas. 654.

**14.** Where one summoned as a trustee discharged himself by disclosing that he had appropriated the funds of the principal defendant in his hands to the payment of money due him by such defendant, without disclosing that the debt was due him on a usurious contract, and being indicted for perjury in such statement, and the principal defendant being examined as a witness in support of the charge, he denied the existence of any contract between him and the trustee for the payment by him to the latter, of any more than lawful interest.—*Held* that if his testimony was false, he was liable for perjury. Com. v. Farley, *supra*.

**15.** A., who was summoned as a trustee of B., stated in his answer, that from the proceeds of property placed in his hands by B. as security for the indebtedness of C., he had received a sum of money, which pursuant to an agreement between him and C., he had appropriated in part discharge of the indebtedness of C., and that he had appropriated, paid over, and accounted to C. for the money so received. After A. was discharged as trustee, C. entered a complaint against him before the grand jury for perjury, and swore that there never was any agreement between him and A. for the payment by him to the latter of more than lawful interest on any of the transactions between them—*Held* that the evidence of C. was material, and if false, he was guilty of perjury. Com. v. Parker, 2 Cush. 212.

**16. False statement need not tend directly to prove the issue.** To constitute perjury, the fact sworn to need not be im-

mediately material to the issue, provided it has such a direct connection with a material fact as to give weight to the testimony on that point; and it has been held that a false answer to a question put to the witness for the purpose of impairing his credit as to points material to the issue, is perjury, especially if the witness be cautioned as to his answer. State v. Norris, 9 New Hamp. 96; State v. Hattaway, 2 Nott & McCord, 118: Wood v. People, 59 N. Y. 117; Com. v. Grant, 116 Mass. 17; State v. Strat, 1 Murphey, 124.

17. Perjury may be committed in swearing falsely to a collateral matter with intent to sustain the testimony on some other point; but such collateral matter must be material to the issue. Studdard v. Linville, 3 Hawks, 474; State v. Wall, 9 Yerg. 347; State v. Shupe, 16 Iowa, 36.

18. The swearing falsely by the prosecutor upon matters immaterial to the issue, who is examined on the trial of an indictment for assault and battery, with the view of mitigating the sentence, is perjury. State v. Keenan, 8 Rich. 456. So, if on a trial for assault and battery, a witness falsely swears to matters in aggravation, he is guilty of perjury. Stevens v. State, 1 Swan, 157.

19. **Where the false testimony is inadmissible.** Although testimony be incompetent and inadmissible in the action in which it is given, yet if it is false, perjury may be predicated upon it. Chamberlain v. People, 23 N. Y. 85.

20. **Where the witness is improperly sworn.** Perjury may be committed by a person who is erroneously sworn. State v. Molier, 1 Dev. 263; Montgomery v. State, 10 Ohio, 220; Van Steenburgh v. Kortz, 10 Johns. 167.

21. **Failure from defect of proof.** If a person swear falsely in respect to any fact relative to the issue being tried, he is guilty of perjury, although the case failed from defect of proof of another fact, and although such other fact had no existence. Wood v. People, 59 N. Y. 117.

22. **Immaterial statements.** A witness having sworn that he was present at a certain transaction, was asked where he lived at the time, and he answered, near the parties; and it was proved that he did not then live in the State, it was held that it was not swearing to such a material fact as constituted perjury. State v. Hattaway, 2 Nott & McCord, 118.

23. An applicant for naturalization is not guilty of perjury in swearing falsely to his residence in the State previous to his application; the oath of the applicant on this point being voluntary and immaterial under the act of Congress of 1802. State v. Helle, 2 Hill, S. C. 290.

24. If any other statements than those required by law be introduced in a petition for a *habeas corpus*, perjury cannot be predicated upon them. A false oath that the accused "is the father and proper custodian of Catharine, or Kate, a colored girl," on an application for a writ of *habeas corpus*, to bring up said Catharine, is not enough to sustain a conviction for perjury. Gibson v. State, 44 Ala. 17.

25. **Mode of statement not important.** It is not a valid objection to an indictment for perjury which alleges that the defendant knowingly and falsely made statements under oath which were material, that either before or after the oath was administered the statements made were reduced to writing by another person and signed by the defendant; the offense consisting in the false statement of material facts under oath, knowing them to be false, without reference to the mode of statement, whether oral or written. Com. v. Hatfield, 107 Mass. 227.

26. **Need not have caused injury.** It is the act of false swearing in respect to a matter material to the point of inquiry which constitutes perjury, and not the injury it may have done individuals, or the degree of credit which was given to the testimony. Where it was charged that the accused falsely testified as to his qualifications to go bail in the sum of $3,000, that he was worth $40,000 and owned 400 tons of hay, which was in a certain village and worth $8 per ton, it was held that the material point of inquiry was not whether the defendant was worth the definite sum of $40,000, but whether he was able to respond to the sum

of $3,000, nor if defendant owned the hay, whether it was situated in the village named, or was worth precisely $8 a ton. Pollard v. People, 69 Ill. 148.

27. Where on the trial of an indictment for perjury it appeared that the defendant having offered himself as bail, falsely swore to his ownership of property, it was held that, if he did not own all the items of property enumerated, it was false and material as a representation of his responsibility, even though a part of the property was sufficient to cover the amount of the recognizance. Com. v. Hatfield, 107 Mass. 227.

**28. False oath must have been taken willfully.** If the prisoner took the oath pursuant to the advice of his counsel, believing that he might lawfully do so, the element of corrupt intent would be wanting; but not if he sought such advice as a mere cover. Tuttle v. People, 36 N. Y. 431; Hood v. State, 44 Ala. 81.

29. A bankrupt who willfully and fraudulently exhibits a false schedule of his property is guilty of perjury; but not, if acting under the advice of counsel, he ignorantly omits items from his schedule. State v. Conner, 3 McLean, 573; Com. v. Calvert, 1 Va. Cas. 181.

30. Where a bankrupt intentionally leaves out of his schedule part of his property, and swears that his schedule contains a true account of all his effects, he is guilty of perjury under the act of Congress. U. S. v. Nichols, 4 McLean, 23; U. S. v. Dickey, 1 Morris, 412.

**31. Subject of offense.** Perjury may be committed in swearing falsely in an affidavit to hold to bail, or for a continuance. State v. Johnson, 7 Blackf. 49; or in swearing falsely in an affidavit administered by a justice of the peace as the foundation for obtaining a writ of *habeas corpus*. White v. State, 1 Smed. & Marsh. 149; but not by swearing falsely in such affidavit as to matters of inducement merely. Ib.; or in swearing falsely to an affidavit to obtain a certiorari. Pratt v. Price, 11 Wend. 127.

32. It is perjury to swear falsely before a justice of the peace in a matter submitted to arbitration by a rule of court without the consent of the parties. State v. Stephenson, 4 McCord, 165; but not in a parol submission not made a rule of court. Mahan v. Berry, 5 Mo. 21. To take a false oath under the insolvent debtor's act is perjury at common law. Com. v. Calbert, 1 Bald. 350. In Connecticut, where a person took the oath provided for poor imprisoned debtors falsely and corruptly before a magistrate, it was held perjury. Arden v. State, 11 Conn. 408. And it is perjury for the defendant in an action of debt on a bond to swear in an affidavit before the justice trying the cause, that he did not execute the bond. Com. v. Litton, 6 Gratt. 691.

33. It is perjury for a witness falsely to swear that he was present and saw the due execution and acknowledgment of a deed. Where a person corruptly erased the signature of the subscribing witness to a deed, and caused the instrument to be recorded by falsely swearing that he was himself the subscribing witness, it was held that he was guilty of perjury. Tuttle v. People, 36 N. Y. 431; 2 N. Y. Trans. of Appeals, 306.

34. Where a person sued before a justice of the peace on a promissory note, filed an affidavit as a plea, stating that he did not execute the note, and that it was wholly unjust and forged, it was held that perjury might be assigned on it. State v. Roberts, 11 Humph. 539.

35. A false affidavit to procure a search warrant, in order to be the subject of perjury, need not charge the offense on any particular person. Carpenter v. State, 4 How. (Miss.) 163.

36. Swearing falsely in affidavits by drafted men claiming exemption from military service is perjury. U. S. v. Sonachall, 4 Bis. 425.

**37. In naturalization proceeding.** In Pennsylvania, swearing falsely in a naturalization proceeding is perjury at common law. Rump v. Com. 30 Penn. St. 475. And see State v. Whittemore, 50 New Hamp. 245. But in New York, it has been held that perjury in a naturalization proceeding before a county court is an offense against the laws of the United States, of which the federal courts have exclusive jurisdiction. People v. Sweetman, 3 Parker, 358.

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**38. Before grand jury.** The rule that the proceedings before the grand jury shall be secret, will not protect witnesses who commit perjury in testifying before it from prosecution. People v. Young, 31 Cal. 563.

**39. By juror.** If a juror, when examined as to his competency and qualifications, willfully and corruptly swears to what is not true, he is guilty of perjury. State v. Wall, 9 Yerg. 347.

**40. In affidavit required by statute.** To constitute perjury in swearing falsely to an affidavit required by statute, it is not necessary that the affidavit should be in the words of the statute. It is sufficient that it substantially conforms to the requirements of the act. State v. Dayton, 3 Zabr. 49.

**41. Amendment or repeal of statute.** Where a statute prescribes certain oaths, and false swearing in taking them is declared perjury, and by a subsequent statute the original act is amended, and the form of the oaths altered, false swearing under the amendment is perjury, although it be not expressly declared to be so in the amended act. Campbell v. People, 8 Wend. 636.

**42.** The repeal of a statute will bar a prosecution for perjury committed under the statute while it was in existence. U. S. v. Passmore, 4 Dall. 372. Therefore, although a false oath taken before commissioners in bankruptcy is perjury, yet the moment the law is repealed it ceases to be a punishable offense. Anon. 1 Wash. C. C. 84.

**43. Tribunal administering oath must have had jurisdiction.** To constitute perjury, it is essential that the court have jurisdiction of the subject-matter, and power to administer oaths. Pankey v. People, 1 Scam. 80; Boling v. Luther, 2 Taylor, 202. But where the court has jurisdiction of the parties and the subject-matter, perjury may be committed although the proceedings are not strictly regular. State v. Lavalley, 9 Mo. 834; State v. Hall, 7 Blackf. 25; U. S. v. Babcock, 4 McLean, 113.

**44.** Perjury may be committed by taking a false oath before a magistrate authorized to administer oaths, in pursuance of a regulation of the U. S. treasury department, or in conformity with the practice and usage of the treasury department. U. S. v. Bailey, 9 Peters, 238.

**45.** Where an oath which was required to be taken before a collector of customs, was falsely made before a deputy of the collector, it was held ground for an indictment for perjury. U. S. v. Barton, Gilpin, 439.

**46.** Where an indictment alleged that perjury was committed on a trial before a justice and six jurors, and the trial seemed to have been with the consent of the parties, it was held that the consent was a waiver of the irregularity as to the jury. State v. Hall, 7 Blackf. 25.

**47. Oath administered by unauthorized person.** It is a good defense to an indictment for perjury, that the officer who administered the alleged false oath acted under a void appointment. Muir v. State, 8 Blackf. 154.

**48.** In South Carolina, where a magistrate had taken the oath of qualification before an associate judge, and was therefore not duly qualified, it was held that a person could not be convicted of perjury in swearing falsely before such magistrate. State v. Hayward, 1 Nott & McCord, 546.

**49. Extrajudicial oath.** Perjury cannot be predicated upon an extrajudicial oath. U. S. v. Babcock, 4 McLean, 113. It cannot be assigned upon an answer in chancery, unless the bill call for a sworn answer. Silver v. State, 17 Ohio, 365.

**50.** It is not perjury to swear falsely to a protest before a notary public as part of the preliminary proofs in case of a marine loss, the oath in such case being voluntary and extrajudicial. People v. Travis, 4 Parker, 213.

**51.** Where the clerk of the United States Circuit Court administered an oath as to the travel of a witness, which was not required by law or by a rule of court, it was held not perjury. U. S. v. Babcock, *supra.*

**52.** A petition for divorce having been filed in the Court of Common Pleas of Indiana by a non-resident, falsely alleging that he was a resident of the county, and that he had resided in the State one year, and that notice to the absent defendant had been duly

published, the deposition of a witness was taken before a notary public in Ohio, testifying to the fact of residence, and the causes of divorce specified in the petition. *Held* that the deposition of the witness was not extrajudicial, and that perjury might be assigned upon it. Stewart v. State, 22 Ohio, N. S. 477; s. c. 1 Green's Crim. Reps. 527.

(*b*) *Indictment.*

**53. General requisites.** In an indictment for perjury charged to have been committed on the trial of a cause before the court or an officer thereof, it is essential, 1st, That the name of the court should be stated, and that such court should have a legal existence. 2d, That the offense should be charged to have been committed in the county in which the indictment was found. 3d, That it should appear on the face, or be alleged in the body of the indictment, that the evidence on which the assignment of perjury is based, was material to the determination of the issue, or at least proper to be offered on the trial of such issue. Guston v. People, 61 Barb. 35; 4 Lans. 487.

**54. Must show that offense was committed in a judicial proceeding.** An indictment for perjury must show that the oath was had in a judicial proceeding. Such an indictment charged that B. exhibited his certain bill of complaint in writing against C. and others named, in the Court of Chancery within and for the county of O., then being in session, which said bill was directed to the chancellor of the 2d judicial circuit, "as in and by said bill of complaint of the said B., remaining filed of record in the said Court of Chancery, amongst other things, will more fully appear;" that C. made oath to his answer to said bill in due form before a justice of the peace, setting forth in what respects such answer was false. *Held* sufficient on the authority of the precedent in Chitty's Crim. Law (vol. 2, p. 386); and that it was not necessary to allege that C. was called upon to make answer under oath, or that the bill of complaint was served upon him. State v. Chamberlin, 30 Vt. 559.

**55.** An indictment for perjury alleged that C., on the 25th of June, 1860, brought her petition to the Supreme Court for divorce, "stating in her petition," &c., "whereupon it became necessary to take the testimony of witnesses in the premises," and that the accused "appeared before W., a notary public, and made his deposition as to facts in the premises," &c. *Held* that it sufficiently appeared that the alleged perjury was committed in a judicial proceeding. State v. Sleeper, 37 Vt. 122; State v. Magoon, Ib.

**56.** It is not sufficient to aver that "the perjury was committed in a course of justice." Where the perjury was alleged to have been committed in answers to certain interrogatories on a writ of *scire facias*, and there was no averment that the interrogatories were exhibited in any cause or proceeding pending or at issue, or on trial before the court, the indictment was held insufficient. State v. Hanson, 39 Maine, 337.

**57.** Where an indictment for perjury charged to have been committed in a public prosecution, did not state whether it was on the trial of an indictment or presentment, it was held fatally defective. Steinston v. State, 6 Yerg. 531.

**58. Must state before what tribunal the oath was administered.** The indictment should set out the style of the court before which the perjury is alleged to have been committed. State v. Street, 1 Murphey, 156.

**59.** An indictment for perjury which charges that the defendant went before A. B., a justice, and was sworn before A. B., being such justice, shows with sufficient certainty by whom the oath was administered. State v. Ellison, 8 Blackf. 225.

**60. Must show that court or officer had authority to administer the oath.** An indictment for perjury must show with certainty that at the time of the alleged offense, the tribunal which administered the oath, and before which the testimony was given, had jurisdiction of the matter on trial. State v. Plummer, 50 Maine, 217.

**61.** It is sufficient to aver that an issue was duly joined, that it came on to be tried in due form of law, and that the judge had competent authority to administer the oath in question, without expressly stating that

the court had jurisdiction. State v. Newton, 1 Iowa, 160; Com. v. Knight, 12 Mass. 274; Hallock v. State, 11 Ohio, 400; People v. Phelps, 5 Wend. 9.

62. Where an indictment for perjury alleged to have been committed in swearing to a deposition taken to be used in a libel for divorce under a rule of court requiring testimony in such case to be taken before a commissioner appointed by the court, charged that the oath was administered by the commissioner on a day mentioned, he "then being a justice of the peace, and duly authorized to administer said oath," and that the commissioner was appointed by the court at a term subsequent to the time at which the oath was administered; it was held that the latter averment might be rejected as surplusage. State v. Langley, 34 New Hamp. 529.

63. An indictment for perjury on an oath taken before a clerk of the Circuit Court, must show that the oath upon which it was founded was one which the clerk was competent to administer, a general averment that the clerk had the requisite power, will not be sufficient. McGregor v. State, 1 Carter, 232.

64. An indictment for perjury charged to have been committed before the grand jury, must show that the evidence related to an offense committed in the county. Com. v. Pickering, 8 Gratt. 628.

65. Where perjury is charged to have been committed on the trial of a former indictment, the finding of the former indictment in the proper county, must be alleged, and the former indictment be set forth, or so much of it as to show that it charged an offense committed in the county, and of which the court had jurisdiction; and the plea of the defendant to the former indictment must be set forth. State v. Gallimon, 2 Ired. 372.

66. An indictment for perjury alleged to have been committed on an examination before a commissioner of the United States, should state how, or by whom, or under what statute, or for what purpose, such commissioner was appointed, that he had authority to administer the oath; that the proceeding before him was one in which the oath was required, and what particular crime was charged. U. S. v. Wilcox, 4 Blatchf. 391.

67. An indictment for perjury in swearing falsely to an affidavit made for the purpose of obtaining an audit of an unliquidated claim against the city of Buffalo, by the common council of that city, did not aver that the affidavit was authorized by the city charter, or that it was made for the purpose required thereby, or that the claim to which it was appended was ever presented to the common council for audit. *Held* insufficient. Ortner v. People, 11 N. Y. Supm. N. S. 323.

68. An indictment for perjury in taking a false oath before a regimental court of inquiry, should state the number of officers composing the court, and their rank, so as to show that the court of inquiry was legally organized, and also state the subject of inquiry before the court. Connor v. Com. 2 Va. Cas. 30.

69. In an indictment for perjury at a general election, an allegation of jurisdiction to administer the oath is sufficient, without stating in detail the names or the number of the inspectors who constituted the board. And the indictment need not state that the inspectors were acting for the ward in which the alleged perjury was committed. The averment that a general election was held pursuant to the laws and Constitution of the State before a board of inspectors legally constituted and authorized according to law, is sufficient, without stating that the place had been legally appointed. Burns v. People, 59 Barb. 531; 5 Lans. 189.

70. Where the perjury is charged to have been committed on the trial of a cause at a special term of the court, the indictment need not set forth the order of the judge directing such special term, nor the designation by the governor, of the judge who held it. State v. Ledford, 6 Ired. 5.

71. In an indictment against an insolvent debtor for taking a false oath on presenting his petition and the inventory of his estate, it is sufficient to aver that the officer had lawful and competent authority to administer the oath, without setting forth the facts

which gave the officer jurisdiction. People v. Phelps, 5 Wend. 9.

72. An indictment for perjury which shows that the court had no authority to administer the oath is bad. State v. Furlong, 26 Maine, 69.

73. **Must show nature of proceedings.** At common law, where the oath upon which the perjury is assigned is taken in court, it is necessary to set forth the pleadings, the proceedings on the trial, the evidence, and the assignment of perjury upon it. In Tennessee it is sufficient to state the nature of the proceeding in which the false oath was taken, the court or person who administered the oath, and that it or he had authority to do so. State v. Stillman, 7 Cold. Tenn. 341.

74. In North Carolina, the indictment need not set forth the pleadings in the case in which the perjury is charged to have been committed, the statute (of 1842, ch. 49) having changed the common law in that respect. State v. Hoyle, 6 Ired. 1.

75. An information for perjury should set out the facts or show enough of the nature of the proceedings and of the purposes for which the oath was taken, to make it appear that the oath was either "required or authorized by law." When the perjury is charged to have been in swearing to an answer, the bill and answer should be set out. Com. v. Lodge, 2 Gratt. 579. Where an information charged that the offense was committed in swearing to a bill in equity, but did not show on its face that the bill was of a character to require to be verified by the oath of the complainant or of any other person, it was held fatally defective; the general allegation that the defendant was "lawfully required to declare and depose" not being sufficient. People v. Gaige, 26 Mich. 30; s. c. 1 Green's Crim. Reps. 524.

76. An indictment for perjury alleged to have been committed in testifying before a grand jury need not set out the facts constituting the offense which was under investigation by the grand jury, nor aver that the party charged with the offense was guilty. State v. Schill, 27 Iowa, 263.

77. An indictment charging that a juror swore falsely and corruptly upon his *voir dire* that he had not formed or expressed an opinion, must allege that an issue or question as to the competency of jurors was submitted to the determination of the court. State v. Wall, 9 Yerg. 347; State v. Moffatt, 7 Humph. 250.

78. An indictment for perjury charged to have been committed on a reference need not allege that there was a final determination of the controversy by the referees. State v. Keene, 26 Maine, 33.

79. An indictment for perjury in a justice's court, which charges that the offense was "committed on the trial of the cause or issue" is not bad for ambiguity. State v. Bishop, 1 Chip. 124.

80. Where an indictment for perjury alleged to have been committed at the hearing of a petition for review, stated that the parties were "at issue" at the hearing, no issue having in fact been there joined, it was held that the words were to be taken in their popular signification. Com. v. Farley, Thach. Crim. Cas. 654.

81. An indictment for perjury alleged to have been committed by a petitioner in bankruptcy need not set out the petition. State v. Deming, 4 McLean, 3.

82. An indictment for perjury need not set out the interrogatories in answer to which the perjury is charged to have been committed. State v. Bishop, 1 Chip. 124.

83. **Averment of time and place.** Where the indictment omits to state the day the trial was held at which the perjury is charged to have been committed, the judgment will be arrested. U. S. v. Bowman, 2 Wash. C. C. 328. And a variance between the day charged and that proved will be fatal. U. S. v. McNeal, 1 Gallison, 387; State v. Offutt, 4 Blackf. 355.

84. Where an indictment for perjury charges that the oath was taken on the trial of a cause fully identified, the particular day of the trial need not be averred so positively that a variance of a day would be fatal. Keator v. People, 32 Mich. 484.

85. An indictment for perjury is insufficient which avers in substance that the

defendant appeared before the court during a certain term named, and there made the false answers, without specifying any month or day of the month during the term when the answers were made. State v. Hanson, 39 Maine, 337.

86. An indictment for perjury in taking the poor prisoner's oath need not allege that the oath was administered to the defendant in the prison, or within the yard or liberty of the prison. Com. v. Alden, 14 Mass. 388.

87. Where an indictment for perjury alleged that the offense was committed in the village of S., and that the court at which it was committed was held in the town of K., it was held that the court would take judicial notice that the village of S. was situated in the town of K.; but that as the county was averred, it was all that was essential, the precise locality in the county being mere matter of description. Wood v. People, 3 N. Y. Supm. N. S. 506; s. c. 8 Ib. 381; 59 N. Y. 117.

88. **Averment of administration of oath.** An indictment for perjury must show that the defendant was sworn. The mere allegation that the defendant made and subscribed the following false oath, reciting it, is not sufficient. State v. Divoll, 44 New Hamp. 140.

89. The indictment need not state whether or not the witness was compelled to attend by subpœna, or whether he testified falsely in answer to a question or in the course of his own narration of the facts. Com. v. Knight, 12 Mass. 274.

90. An indictment for perjury is sufficient which charges that the defendant was duly sworn, without stating that the oath was administered by any one. State v. O'Hagan, 38 Iowa, 504.

91. An indictment for perjury in falsely swearing to an affidavit, must charge that the affidavit was made by the prisoner. It ought to allege either that he did corruptly say, depose, swear, and make affidavit in writing; or that he did produce and exhibit an affidavit in writing. Copeland v. State, 23 Miss. 257.

92. **Form of oath need not be averred.** The indictment need not specify the particular mode in which the prisoner was sworn. The averment that the defendant was duly sworn is sufficient. Patrick v. Smoke, 3 Strobh. 147; State v. Norris, 9 New Hamp. 96; Tuttle v. People, 36 N. Y. 431. It is, therefore, unnecessary to allege that the oath upon which the perjury is assigned, was taken upon the Gospels or Bible, or administered according to the ceremonies of any particular religion, or that the court had jurisdiction of the prosecutor's suit. State v. Farrow, 10 Rich. 165.

93. An indictment for perjury is good, although it charges that the oath was administered to the prisoner on "the Holy Scriptures," instead of the Gospels, the term used in the statute. Tuttle v. People, *supra*.

94. In New York, it has been held that an indictment for perjury at a general election, need not specify the particular mode in which the prisoner was sworn, or the particular oath which he took, or show that the oath required by the statute was administered to the defendant, or that he falsely swore to any part of the same; the averment that he was duly sworn and took his corporal oath before the board, being tantamount to the allegation that the proper oath was administered to him. Burns v. People, 59 Barb. 531; 5 Lans. 189.

95. But if the form of the oath, or manner of taking it, be alleged, it must be stated correctly; great strictness being required in this respect. State v. Porter, 2 Hill, S. C. 611. If it be charged that the prisoner swore upon the Holy Evangelists, and the evidence shows that he swore with the uplifted hand, the variance will be fatal. And the same, where it is charged that he deposed directly and positively to a fact, and the proof is that he deposed with a qualification or reservation, or upon his belief as informed by others. Williams v. State, 7 Humph. 47.

96. The words "corporal oath," and "solemn oath," are synonymous, and an oath taken with the uplifted hand, may be described by either term. Jackson v. State, 1 Carter, 189. An indictment for perjury

which charges that the witness took his corporal oath to speak the truth, the whole truth, and nothing but the truth, is sufficient without alleging the form in which such bodily assent was signified, as by raising the hand, or otherwise. State v. Norris, 9 New Hamp. 96.

**97. Averment of substance of oath sufficient.** When the oath is set forth to be in substance and to the effect following, there need not be an exact recital. People v. Warner, 5 Wend. 271. Where, therefore the defendant was charged with having sworn falsely in an affidavit "in substance and effect following, that is to say," &c., that there were 60,000 cigars on his premises, and the affidavit when produced showed that he had sworn to having 65,000, it was held that the variance was immaterial. Harris v. People, 6 N. Y. Supm. N. S. 206.

**98.** In New York, it was held that an indictment charging an insolvent with taking a false oath on presenting his petition for a discharge, need only set forth the substance of the oath; that it was sufficient to allege the oath to be "in substance, and to the effect following, to wit," &c.; and that where the indefinite article was substituted for the definite article, the variance was not material. People v. Warner, *supra*.

**99.** The indictment need not set out the entire oath, but only the portion of it which is false. State v. Neal, 42 Mo. 119. In New York, it was held that an averment in an indictment for swearing in a vote at an election, that the defendant was sworn by and before the board of inspectors, they being duly authorized to administer the oath, was sufficient, and that the whole oath need not be set out, but only that part of it in which the perjury was charged to have been committed. Campbell v. People, 8 Wend. 636.

**100. Averment of guilty knowledge and intent.** The indictment must allege that the defendant willfully and corruptly swore that a certain thing was true, knowing it to be false, or denied it, knowing it to be true. State v. Morse, 1 Iowa, 503; State v. Powell, 28 Texas, 626; U. S. v. Babcock, 4 McLean, 113; State v. Perry, 42 Texas, 238.

**101.** The averment in an indictment for perjury, that the defendant knew the falsity of the matter testified to by him, is only requisite where the assignment of perjury is upon the statement by the accused of his belief or denial of his belief of the alleged false matter. State v. Raymond, 20 Iowa, 582.

**102.** An indictment against an insolvent debtor for perjury, in swearing to a schedule which did not include certain debts owing, was held bad on demurrer for not alleging that he "well knew and remembered," the omitted debts. Cook's Case, 1 Rob. 729.

**103.** In California, an indictment for perjury which charged that the defendant "did willfully, corruptly, and falsely swear," &c., without using the word "feloniously," was held sufficient. People v. Parsons, 6 Cal. 487; People v. Olivera, 7 Ib. 403.

**104.** In Vermont, the allegation in an indictment for perjury, that the accused swore "falsely, willfully, and corruptly," was held sufficient, without the word "knowingly." State v. Sleeper, 37 Vt. 122.

**105.** In Iowa, an indictment which does not charge, in the language of the statute, that the defendant deposed, affirmed, or declared some matter to be fact, knowing the same to be false, or denied some matter to be fact, knowing the same to be true, is fatally defective; and the defect is not cured by a statute which provides that "no indictment shall be quashed if an indictable offense is clearly charged therein, or if the charge be so explicitly set forth that judgment can be rendered thereon." State v. Morse, 1 Iowa, 503.

**106. Averment of falsity of testimony.** An indictment for perjury must charge the falsity of the statement, and not leave it to be adduced by argument and intendment; and the omission of such averment will not be cured by the conclusion that the defendant did "falsely, wickedly, willfully and corruptly, in manner and form aforesaid, commit willful and corrupt perjury." Juaraqui v. State, 28 Texas, 625.

**107.** Assignments of perjury must be made by special averment negativing the oath. A general allegation that the defend-

ant swore falsely is not sufficient. Burns v. People, 59 Barb. 531; s. c. 5 Lans. 189.

**108.** In Maine, an indictment for perjury under the statute (R. S. ch. 122, § 4), which alleges that the accused "committed perjury by testifying as follows," giving the language, is a sufficient averment that the words sworn to were not true. State v. Corson, 59 Maine, 137.

**109. Specifying in what the offense consists.** The indictment should set out the substance and effect of the testimony which is alleged to be false. State v. Graves, Busbee, 402.

**110.** Where it was alleged that the accused had sworn that he had not voted at the election, and the assignment of perjury was that he had voted previously in the fourth ward of the city of New York, "in the house of T. L. W. in said ward," without stating that he voted before a board of officers duly constituted and authorized according to law, or that a lawful election had been appointed or maintained at the place named, it was held that the assignment was too general and uncertain, and that the defect was not cured by the statute of jeofails. Burns v. People, 59 Barb. 531; s. c. 5 Lans. 189.

**111.** An indictment for perjury in giving false testimony before a grand jury alleged that the defendant, being duly sworn, "did depose and give evidence to the grand jury in substance and to the effect following" (stating the testimony), "which said evidence was willfully false and corrupt, for in truth," &c. (denying the facts deposed to), "and so the defendant did, in manner and form aforesaid, commit willful and corrupt perjury. *Held* insufficient at common law. Thomas' Case, 2 Rob. 795.

**112.** An indictment against a bankrupt for perjury, must state in what the perjury consisted, and it is not sufficient to allege that the defendant swore falsely in respect to his schedule in taking the oath of bankruptcy. U. S. v. Morgan, 1 Morris, 341.

**113.** But in an indictment for perjury against an insolvent debtor for omitting to set forth property in his inventory, it is sufficient to allege that, with the papers presented to the officer, was one purporting to be a full and just inventory of all the estate of the insolvent, without setting out the inventory or stating the substance of it. People v. Phelps, 5 Wend. 9.

**114.** Where the defendant is charged with having taken a false oath to procure his release from custody under an execution, an assignment alleging that when he took the oath he had property enough to satisfy the debt for which he was arrested, is sufficient. De Bernie v. State, 19 Ala. 23.

**115.** On a charge of perjury, where the question is whether certain goods were sold in part payment of the one or the other of two debts, the averment that the defendant falsely swore that they were sold in part payment of the first, is sufficient. Com. v. Johns, 6 Gray, 274.

**116.** It was objected on motion in arrest of judgment, that the portion of the oath on which perjury was assigned, to wit, that the defendant "saw the said Peter Martin enter upon the premises of the said Jason Pangborn," was not negatived by the averment that he "did not see Peter Martin enter upon the premises of the said *Joseph* Pangborn," and that the oath he "heard and saw the said Peter Martin *getting* and carrying away," was not negatived by the averment that he did not see and hear the said Peter Martin *gather* and carry away. *Held* that the objections were not well taken. State v. Raymond, 20 Iowa, 582.

**117.** An indictment which charged a person with falsely swearing, in July, that he had witnessed a certain transaction in October of the same year, was held not bad for inconsistency. State v. McKennan, Harper, 302.

**118.** Where the perjury consists in swearing to a written instrument, the tenor of the instrument, or of the part of it alleged to be false, should be set out, and not merely the substance of it be given. Coppack v. State, 36 Ind. 513.

**119.** Where the perjury is assigned on a book account, it is not necessary to specify the particular items of the account to which the testimony related. State v. Keene, 26 Maine, 33.

**120.** An indictment against a bankrupt for perjury, in not giving a true and full account of his property, need not set out the items on the schedule. State v. Chapman, 3 McLean, 390.

**121.** Perjury cannot be charged on an affidavit made before the clerk of the court for an attachment, unless the affidavit contains the facts required by the statute, and such facts are alleged to be false. Hood v. State, 44 Ala. 81.

**122.** An indictment for perjury is good which charges the making of a false affidavit relative to an application for naturalization to be made subsequently, and that the affiant at the time of making the affidavit was sworn as a witness in support of the application, without alleging that the application was ever made or the affidavit used. State v. Whittemore, 50 New Hamp. 245.

**123.** A person was charged with swearing to an affidavit, that a certain boat was, as he believed, attempting to pass a certain place, whereas, he did not believe that the boat was attempting to pass said place. *Held* that the indictment was not bad in not stating that the boat was not attempting to pass the place. State v. Cruikshank, 6 Blackf. 62.

**124.** One assignment of perjury well made will sustain an indictment for that offense. Com. v. Johns, 6 Gray, 274.

**125. Must charge materiality of testimony.** An indictment for perjury must show that the false testimony was material. Com. v. Knight, 12 Mass. 274; Hembree v. State, 52 Ga. 242; State v. Keel, 54 Mo. 182. And where the perjury is charged to have been committed by a party to a suit, the indictment must show by proper averments that the defendant was sworn under circumstances which authorized his testifying as a witness in the cause. State v. Hamilton, 7 Mo. 300.

**126.** The materiality of the alleged false testimony must appear on the face of the indictment. Stating that "it became and was material to ascertain the truth of the matters hereinafter alleged to have been sworn to," setting out what the defendant testified, is sufficient. People v. Collier, 1 Manning, 137; Com. v. Pollard, 12 Metc. 225.

**127.** It is not sufficient in an indictment for perjury to charge generally that the false oath was material upon the trial of the issue. Its materiality must appear from the facts set forth. State v. Holden, 48 Mo. 93.

**128.** An indictment for perjury which does not show either by direct averment or facts set out, that the statement upon which the perjury is assigned was material to the matter before the court, is fatally defective. State v. Beard, 1 Dutch. 384.

**129.** An indictment alleged that the defendant, falsely, &c., swore to certain facts before the grand jury, but did not state how or in what way the facts thus sworn to had a bearing upon the offense charged in the indictment, nor that they were material. *Held* insufficient. State v. Dodd, 3 Murphy, 226.

**130.** Where an indictment for perjury alleged to have been committed before a justice of the peace, in the county of W., upon the trial of a complaint for an assault and battery committed upon him by A., B. and C., at G., in the county of W., charged that the defendant falsely and corruptly swore that A. and C. assaulted him at or near the house of C., without alleging that the testimony was material, or that the assault by A. and C. was the same assault as that charged, or that the house of C. was in G., or in the county of W., or within the State, it was held fatally defective. Com. v. Byron, 14 Gray, 31.

**131.** An information for perjury in falsely swearing to an affidavit, must show that the affidavit was made to be used, or was actually used in a judicial proceeding. People v. Fox, 25 Mich. 492.

**132.** When charged to have been committed in swearing falsely to an affidavit for a continuance, the indictment should contain an averment that a cause was pending in court; that an application for its continuance had been made, and that the affidavit was material; and then show what facts sworn to were false. Morrell v. People, 32 Ill. 429; Kerr v. People, 42 Ill. 307.

**133.** The prisoner was convicted of perjury, in swearing falsely in an affidavit made for the purpose of obtaining an audit of a claim against the city of Buffalo. The city

charter prohibited the common council from auditing any such claim, unless it was made out in detail with certain prescribed specifications, and unless accompanied by an affidavit that the claim, and the items and specifications, were in all respects just and correct. The indictment was held insufficient, because it did not aver that the affidavit was authorized by the charter, or that it was made for the purpose required by the charter, or that the claim to which it was appended was presented to the common council for audit. Ortner v. People, 6 N. Y. Supm. N. S. 548.

**134.** The indictment alleged that the prisoner caused his claim to be presented to D., the city engineer, and that he made his affidavit before P., who was a commissioner of deeds and a clerk in the office of D. But it was not averred that it was any part of D.'s duties to receive the bill, or that he in fact received it for any purpose connected with an audit. The oath was not in fact required, and it did not appear that P. was authorized to take the affidavit. *Held* that the prisoner must be discharged. Ib.

**135.** An information for perjury in swearing to a bill in equity, alleging that "it then and there became a material question in said bill of complaint, and in said judicial proceeding, whether the said T. had any claim or title to said stream or water-course," &c., is defective in failing to show the materiality of the matter sworn to; the bill not being one whose allegations could be treated as evidence. People v. Gaige, 26 Mich. 30; s. c. 1 Green's Crim. Reps. 524.

**136.** An indictment for perjury alleged that "it became and was material to show whether the said S. was at the house of C. on the morning of the 2d of November, 1859, and whether he then had a conversation with said C. in the presence of certain other persons," and then alleged that the accused falsely swore that at said time he stopped at said C.'s house and had a conversation with C. in the presence of one M. *Held* that it was sufficiently alleged that the evidence was material. State v. Sleeper, 37 Vt. 122; State v. Magoon, Ib.

**137.** An indictment for perjury committed in an *ex parte* proceeding sufficiently charges the materiality of the matter sworn to by alleging that "it then and there became material to him," the defendant, to take the oath, especially on a motion in arrest of judgment. Stofer v. State, 3 West Va. 689.

**138.** Where an indictment for perjury alleged that the evidence was material, and there was nothing in the record of the case in which the alleged false evidence was given contradicting it, it was held that the indictment could not be quashed for insufficiency. Com. v. Farley, Thach. Crim. Cas. 654.

**139.** A., in an action by a bank on a promissory note, in testifying in behalf of the indorser, swore that B., who at that time was president of the bank, took usury in discounting the note. *Held* that an indictment charging A. with perjury in so swearing need not allege that B. was acting in the transaction as an officer of the bank, or how he was connected with the transaction, but that it was sufficient to aver that it became a material question whether the said B. discounted the said note, and whether he took usury in discounting it, setting forth the testimony of the accused and the facts inconsistent with such testimony, with the usual allegations of falsity and corrupt intent. People v. Burroughs, 1 Parker, 211.

**140.** Where the materiality of the matter which is alleged to have been falsely sworn to appears from the statement of the matter, an express allegation of its materiality is unnecessary. State v. Johnson, 1 Blackf. 49; Com. v. Pollard, 12 Metc. 225; Campbell v. People, 8 Wend. 636; State v. Dayton, 3 Zabr. 49; Hock v. People, 3 Mich. 552; Hendricks v. State, 26 Ind. 493; Galloway v. State, 29 Ib. 442; State v. Marshall, 47 Mo. 378. It was so held where the false swearing was by the husband in his answer to a bill in chancery brought to foreclose a mortgage executed solely by the wife, which bill alleged that her husband, who was a party to the suit, gave his consent to the execution of the mortgage by his wife, and the borrowing by her of the money for which the mortgage was given. State v. Chamberlin, 30 Vt. 559.

141. Perjury may be assigned upon a false oath to a matter which, without additional proof, is insufficient to effect the purpose for which the oath was taken. State v. Dayton, 3 Zabr. 49.

142. **Conclusion.** Where after the alleged perjury was committed another statute was passed changing the punishment, it was held that an indictment concluding "against the form of the statute" was good. Strong v. State, 1 Blackf. 193.

143. **Form.** The usual form of an indictment for perjury when more than one question is relied on as material, is to aver that certain questions became and were material, to wit, whether, &c., and whether, &c., and also whether, &c. But this form is not essential. The indictment will be sufficient if it clearly avers that several matters were material on the trial in which the defendant testified, and that he committed perjury concerning them or any of them. Com. v. Johns, 6 Gray, 274. Form of an indictment for perjury in falsely swearing that usury was taken on a promissory note. People v. Burroughs, 1 Parker, 211.

(c) *Evidence.*

144. **Authority to administer oath.** To procure a conviction for perjury, it must be proved that the person before whom the oath was taken was authorized by law to administer it. Proof that the person habitually acted in the capacity of a particular officer, until rebutted, is sufficient without producing his commission. Morrell v. People, 32 Ill. 429.

145. On the trial of an indictment for perjury alleged to have been committed before a company court martial, the commission of the captain need not be produced. Parol proof of his acting as such is sufficient. State v. Gregory, 2 Murphy, 69.

146. On a trial for perjury, it is sufficient to prove that the oath was administered by an officer *de facto*. Keator v. People, 32 Mich. 484.

147. To justify a verdict of guilty on the trial of an indictment for perjury under section 13 of the act of Congress approved March 2d, 1825, the jury must be satisfied by the evidence that the defendant was sworn in a proceeding in which an oath was required by some law of the United States, and that he knowingly and willingly swore to that which was false; that the oath was administered to him by the person named in the indictment, and that such person had authority to administer the oath; and that the defendant swore with a corrupt intent to falsify. Any discrepancy between what the defendant swore to and what is set out in the indictment as having been sworn to by him will be fatal to a conviction. U. S. v. Coons, 1 Bond, 1.

148. **Proof that the defendant was sworn.** On the trial of an indictment for perjury, the certificate of the magistrate before whom the alleged false oath was taken is *prima facie* evidence that the prisoner took the oath. Com. v. Warden, 11 Metc. 406.

149. The following instruction on a trial for perjury was held erroneous: "It being the uniform rule and custom in the courts to administer oaths to witnesses before they testify, you will be justified in finding that the defendant was sworn on less evidence than would be necessary to establish a fact of a different character not occurring according to any fixed rule or custom." Hitesman v. State, 48 Ind. 473.

150. **Character of oath.** On a trial for perjury, evidence that the accused was sworn to tell "the whole truth, and nothing but the truth," supports the allegation that he "took his corporeal oath to tell the truth, the whole truth, and nothing but the truth." State v. Gates, 17 New Hamp. 375.

151. Where an indictment for perjury alleges that the defendant was sworn on the Holy Gospels, a failure to prove that he was so sworn will be a fatal variance. State v. Davis, 69 N. C. 383.

152. An indictment for perjury in swearing falsely as to ability to become bail alleged that the perjury was committed upon an examination had after the defendant had been previously sworn to make true answers to such questions as should be put to him, touching his qualifications and competency to be and become bail. It was proved that,

after the answers of the defendant to certain interrogatories had been taken down in writing, an oath was administered to him that the answers to the foregoing interrogatories, by him subscribed, are each and every of them true. *Held* that the variance was material, and that the proof did not support the indictment. Smith v. People, 1 Parker, 317.

153. **Time and place.** An indictment for perjury alleged that the defendant committed the offense at the hearing of a petition for review, "on the third day of April, before three of the justices of the Supreme Judicial Court." The record of the hearing set forth that it was "on the tenth day of April before the Supreme Judicial Court." *Held* that the record was admissible in evidence notwithstanding the variance. Com. v. Farley, Thach. Crim. Cas. 654.

154. On the trial of an indictment for perjury in falsely swearing to a petition before the court, the clerk of the court testified that the petition, which bore a certificate of the clerk that it was sworn to before him, was so sworn, but whether in his office or in court he could not remember; that there was no order of the court to administer the oath, but that was the practice. *Held* that the jury were justified in finding that the defendant was sworn in a proper manner before the court. Com. v. Kimball, 108 Mass. 473.

155. **Nature of proceedings.** An indictment charged that the perjury was committed on the offer of the accused to become bail for one Thompson, committed on the complaint of McDonald, in default of bail for $500. The evidence was that the perjury was committed on the examination of the defendant as bail for Thompson, committed on the complaint of Sayre and others, in default of $3,000 bail. *Held* that the variance was fatal. Smith v. People, 1 Parker, 317.

156. An indictment charging perjury committed on a trial for the larceny of property of A., or his son B., is not sustained by proof of a trial for the larceny of property of A.'s son B. Brown v. State, 47 Ala. 47; s. c. 1 Green's Crim. Reps. 531.

157. An indictment for perjury alleging that a warrant was tried, in which A. demanded of B. $20 for corn, is supported by proof of a warrant between the same parties for a debt due by account, without specifying the particulars of the account. State v. Alexander, 2 Dev. 470.

158. An indictment for perjury charged that the defendant had conveyed land to B. which had been previously mortgaged to C.; that C. had recovered a judgment under the mortgage for the possession of the land; that a petition for a review had been filed by B., on the ground of newly discovered evidence to show a technical payment of the debt secured by the mortgage; and that the defendant swore falsely at the hearing of the petition, that he told B. of the existence of the mortgage at the time of the conveyance. The indictment alleged that the judgment recovered by C. was "for possession of land, mill site, and mills of B.," and that the petition was "for a review of a certain action and judgment." The record of the proceedings at the hearing of the petition, offered in evidence at the trial of the indictment, set forth, that the petition was a review of a judgment for the possession of "the petitioner's mill site and mills," and that the petition was "a review of a certain action and supersedeas, and stay of execution." *Held* that, as the record was not recited in the indictment, the variance was not cause for the rejection of the testimony. Com. v. Farley, Thach. Crim. Cas. 654.

159. An indictment charging that the prisoner was sworn as a witness between a bank and A., is supported by proof that the prisoner was sworn in a suit brought by the bank on a promissory note against A. as indorser, and B. and the prisoner as joint makers, the evidence of the prisoner in such case being only available in behalf of the indorser. People v. Burroughs, 1 Parker, 211.

160. A variance between an indictment for perjury alleged to have been committed on a trial before a referee, and the evidence in regard to the person before whom the referee was sworn, is immaterial. People v. McGinnis, 1 Parker, 387.

**161. Matter sworn to.** On a trial for perjury charged to have been committed in testifying before an examining magistrate, the prosecution may prove what the defendant swore to by parol evidence. People v. Curtis, 50 Cal. 95.

**162.** An indictment for perjury, committed in swearing to a deposition, concluded thus: "As by his said answers to said interrogatories, written in said deposition remaining, will, among other things, appear." *Held* that upon the rejection of the deposition, parol evidence might be given to prove the testimony of the deponent. Com. v. Stone, Thach. Crim. Cas. 604.

**163.** An indictment for perjury which alleges that the defendant swore falsely in testifying that M. did not assault him on the tenth of September, is not sustained by proof that the defendant was assaulted by M. on the ninth of September. Com. v. Monahan, 9 Gray, 119.

**164.** An indictment alleged that the defendant swore that A. bought a gun of B. His testimony as proved, was, that B. in conversation with A. asked him, if he had returned his gun, to which A. replied that he had forgot it, but that he would keep the gun, and allow $15 for it on what B. owed him, and that B. responded "enough said." *Held* that the proof did not support the charge, B.'s answer not necessarily importing assent to A.'s proposition, but being susceptible of a different interpretation. State v. Graves, Busbee, 402.

**165.** An indictment for perjury alleged that the defendant falsely swore that he had land and two houses in East Cambridge, Massachusetts. On the trial, it was proved that he made oath to a written statement to the effect that he had land and two houses in East Cambridge, without any affirmation or assertion that they were in Massachusetts. *Held* that the variance was fatal. Com. v. Hughes, 5 Allen, 499.

**166.** An indictment for perjury alleged to have been committed in swearing to a replication to a plea of usury, that the sum of $20 above the legal interest was not received for the loan of $400. It was proved that the defendant gave to one S., who borrowed the money of him, the sum of $380, and received therefor of him a note for $400. *Held* that the variance was fatal. State v. Tappan, 1 Foster, 56.

**167. Testimony required to convict.** To authorize a conviction for perjury, the statements of the defendant must be disproved by two witnesses, or by one witness and corroborating circumstances. U. S. v. Coons, 1 Bond, 1; State v. Raymond, 20 Iowa, 582; Com. v. Farley, Thach. Crim. Cas. 654; State v. Hayward, 1 Nott & McCord, 546.

**168.** The law does not require two witnesses to establish the giving of the testimony upon which the perjury is assigned; but only to prove its falsity. State v. Wood, 17 Iowa, 18; Com. v. Pollard, 12 Metc. 225.

**169.** On a trial for perjury, the corroborative proof, in addition to the testimony of one witness, need not be equivalent to the testimony of another witness; but only such as gives a clear preponderance to the evidence in favor of the prosecution. Crusen v. State, 10 Ohio, N. S. 258; State v. Heed, 57 Mo. 252; *contra*, Galloway v. State, 29 Ind. 442. The testimony of a single witness, and the declarations of the prisoner, are sufficient to sustain a conviction. State v. Molier, 1 Dev. 263.

**170. Written evidence.** Where the owner of goods was charged in the indictment with taking a false oath at the custom house, it was held not necessary to a conviction that the prosecution should produce a living witness, if the jury believed the written testimony sufficient to establish the charge. U. S. v. Wood, 14 Peters, 430.

**171.** When a person, by a subsequent deposition, contradicts a former one made by him, and admits that the former one was intentionally false at the time it was made, or in such subsequent deposition alleges such facts and circumstances as to render the corrupt motive apparent, he may be convicted of perjury, upon an indictment charging the first deposition to be false, without any other proof than that of the two depositions. People v. Burden, 9 Barb. 467, Selden, J., *dissenting*.

**172.** On the trial of an indictment for

perjury, the falsity of the matter sworn to by the defendant may be proved by the books and papers kept by him and under his control. U. S. v. Mayer, Deady, 127.

173. On the trial of an indictment for perjury, charged to have been committed in testifying in a cause before a justice of the peace, in relation to a written contract, the record or papers of the suit, and the contract, must be produced, or their absence accounted for. The first is necessary to show the identity of the proceedings with those described in the indictment; and the second, to ascertain the legal effect of the contract, and what evidence was material. McMurry v. State, 6 Ala. 324.

174. The record of the court at which perjury is charged to have been committed, is not inadmissible in consequence of the day of holding the court being misrecited in the indictment. State v. Clark, 2 Tyler, 282.

175. **Party to suit may be a witness.** A party to a suit may be a witness to prove perjury therein, where the conviction of the prisoner would not entitle the witness to a new trial, or to damages as an injured party. State v. Bishop, 1 Chip. 124.

176. **Wife as witness.** Upon a trial of the husband for perjury, in swearing in an action for divorce (his wife having borne a child), that he had no sexual intercourse with her during marriage, she is a competent witness (a divorce having been obtained), to prove that she had no sexual intercourse with any other person. Chamberlain v. People, 23 N. Y. 85.

177. **Presumptive evidence.** Where, on the trial of an indictment for perjury, in falsely swearing that the defendant owned a house, the proof went to show that the house belonged to the defendant's wife, it was held that in the absence of any proof of title in the defendant, the fact that the records showed no conveyance from the wife, was presumptive evidence of title still in her. Com. v. Hatfield, 107 Mass. 227.

178. On the trial of A. for perjury, in swearing falsely to an *alibi* on the trial of B. for robbery, evidence of the conduct and appearance of B. just previous to and at the time of his arrest, not being a part of the *res gestæ*, is inadmissible; but otherwise, as to proof that B. was guilty, as it would tend to show that he was not at the place sworn to by A. Galloway v. State, 29 Ind. 442.

179. **Materiality of false testimony.** To convict of perjury, the materiality of the matter sworn to must be established by evidence, and cannot be left to presumption or inference. State v. Aikens, 32 Iowa, 403. In State v. Lewis, 10 Kansas, 157, it was held that the question whether the alleged false testimony was material, was one of law for the court.

180. **Guilty knowledge and intent.** An instruction which authorizes the jury, on a trial for perjury, to find the defendant guilty without proof that the false oath was taken willfully and corruptly, is erroneous. Green v. State, 41 Ala. 419.

181. On a trial for perjury it is competent to show that the motives which actuated the prisoner in committing the offense were corrupt; as that he swore to a complaint against the prosecutor, ostensibly to procure sureties of the peace, but in fact to coerce the settlement of a civil action. State v. Hascall, 6 New Hamp. 352.

182. On a trial for perjury, alleged to have been committed by the defendant in testifying before a fire marshal as to the origin of a fire, proof that the defendant falsely augmented the value of his property which was consumed by the fire, is material on the question of motive. Harris v. People, 6 N. Y. Supm. N. S. 206.

183. On a trial for perjury committed by the defendant in falsely swearing in a civil action that "he did not send his son to school last year, and did not know that his son went to school," the fact that he knew that his son went to school, if material to the issue in the civil suit, would be relevant evidence. Floyd v. State, 30 Ala. 511.

184. Although the jury cannot consider any other perjury than that assigned, for the purpose of determining the defendant's guilt upon such other perjury, yet if such other perjury was brought out in the development of the whole case, and related to the oath and subject-matter of the perjury charged

the jury may consider it in considering the question of corrupt intent in swearing to the false matter upon which the perjury was assigned. State v. Raymond, 20 Iowa, 582.

**185.** On a trial for perjury, charged to have been committed at the hearing of a complaint for maliciously setting fire to a ship, the prosecution, in order to show a corrupt motive, proved that a reward was offered for the detection of the incendiary, which was known to the defendant. *Held* that evidence was admissible in behalf of the defendant to show that he came from another State to testify in the case, reluctantly, and that no inducements were offered to him to do so. Com. v. Brady, 7 Gray, 320.

**186. Declarations of defendant.** It is not proper to instruct the jury on a trial for perjury, that the law presumes the declarations of a party against himself to be true, when the object of such an instruction is to make the declarations evidence of the falsity of the oath. The weight of such declarations is to be determined by the jury; but of themselves they are not sufficient to convict. State v. Williams, 30 Mo. 364.

**187.** On a trial for perjury in falsely swearing that F., one of the assailants in an affray, struck the defendant, the defendant, in order to disprove a corrupt motive, may show that immediately on his recovery from the unconsciousness occasioned by the blow, he had given the same account of the transaction he did in his testimony. State v. Curtis, 12 Ired. 270.

**188.** On the trial of an indictment for perjury in swearing falsely to a deposition, the deponent having afterwards testified on the stand that the facts stated therein were false, it was held that the prisoner was not estopped from showing in his defense the truth of his deposition. State v. J. B. 1 Tyler, 269.

**189.** Where an indictment for perjury alleged that the defendant was sworn as a witness in his own behalf, and while thus testifying committed the perjury charged, it was held that an affidavit made by the defendant was not admissible in evidence, except by consent of parties. Copeland v. State, 23 Miss. 257.

**190. The good character** of the defendant may be given in evidence; but it is entitled to but little weight on the trial of an indictment for perjury. Schaller v. State, 14 Mo. 502.

**191. Offer of prosecutor to settle.** On a trial for perjury, evidence that the prosecutor had offered to settle, and not prosecute the defendant, if the latter would pay him a certain sum, is not admissible. State v. Gates, 17 New Hamp. 373.

**192. Burden of explanation on defendant.** When, on a trial for perjury, the prosecution shows that the prisoner swore falsely, a *prima facie* case is made out, and the burden is cast on the prisoner to prove that his so swearing was caused by surprise, inadvertence, or mistake. State v. Chamberlin, 30 Vt. 559.

### (*d*) *Verdict.*

**193. Variance in.** An indictment for perjury alleged that the offense was committed before A., and the verdict was guilty of perjury before A. and F. *Held* that the variance was fatal. State v. Mayson, 3 Brev. 284.

**194.** Where the indictment charged that the defendant falsely swore that he did not execute a certain deed, and the jury found him guilty of perjury in denying his signature, it was held that the judgment must be arrested, as a deed may be executed without signing. State v. Avera, 2 Taylor, 237.

## 2. Subornation of perjury.

### (*a*) *Requisites.*

**195. Perjury must have been instigated.** To constitute subornation of perjury, the accused must have procured the commission of the perjury by inciting, instigating, or persuading the guilty party. Com. v. Douglass, 5 Mete. 241.

**196. Must have been knowledge that testimony would be willfully false.** Although a person charged with subornation of perjury knew that the testimony of a witness whom he called would be false, yet if he did not know that the witness would willfully testify to a fact knowing it to be

false, he cannot be convicted. Com. v. Douglass, *supra*.

**197. May be through party in other State.** In Massachusetts, a person may be guilty of subornation of perjury who causes the perjury to be committed there, through the instrumentality of a party in another State. Com. v. Smith, 11 Allen, 243.

(*b*) *Indictment.*

**198. Must aver that the witness testified.** In an indictment for suborning L. to commit perjury, it must be alleged that L. testified, and his testimony be set out in substance, and the omission of the verb signifying that L. was sworn, will be fatal on motion in arrest of judgment. State v. Leach, 27 Vt. 317.

**199.** An indictment for subornation of perjury charged that the defendant did feloniously, knowingly, and willingly procure A. and B. to swear falsely in the taking of an oath. But it did not allege that A. and B., and either of them, swore falsely. *Held* bad on demurrer. U. S. v. Wilcox, 4 Blatchf. 393.

**200. Description of proceedings.** In an indictment for perjury or subornation of perjury, it is necessary to allege that the false testimony was given in a judicial proceeding. Where, therefore, the statute required that a complaint in a prosecution for bastardy, should be in writing, and an indictment for suborning the female to commit perjury in making such a complaint did not allege that the complaint was in writing, the indictment was held insufficient. State v. Simons, 30 Vt. 620.

**201.** An indictment for subornation of perjury in a deposition to be used in a civil action in another State, is sufficient which alleges that on a day named a cause was depending, and that an issue was then and there joined in the cause between the parties, and that on the same day, "in the said cause then and there so depending as aforesaid a commission was duly issued." Com. v. Smith, 11 Allen, 243.

**202. Must charge guilty knowledge.** Guilty knowledge on the part of the suborner being a necessary element in the crime of subornation of perjury, it must be averred in the indictment and proved on the trial. An indictment for subornation of perjury charged in due form of law willful and corrupt perjury by A., and that A. knew that his testimony was false and fictitious, and concluded with the averment that A. had "in manner aforesaid" committed willful and corrupt perjury; and it then alleged that B. "procured, persuaded, and suborned the witness to commit said willful and corrupt perjury in manner and form aforesaid." *Held* that the guilty knowledge of B. was sufficiently averred. Stewart v. State, 22 Ohio, N. S. 477; s. c. 1 Green's Crim. Reps. 527.

**203. Against several.** An indictment may charge one person in one count with perjury, and another person in another count with subornation of perjury. State v. Lea, Cold. Tenn. 175.

**204. For attempt.** An indictment for attempting to commit subornation of perjury need not state in what the proposed perjury would have consisted. State v. Holding, 1 McCord, 31.

**205.** In Missouri, an indictment for attempting to bribe a witness (1 R. C. 601), need not allege that the testimony of the witness was material, or that he had been summoned, or that the justice of the peace before whom the suit was pending was an acting justice, or the intent to impede and obstruct the due course of justice, or the kind and amount of the money or property offered as a bribe, or the nature of the offense with which the defendant stood charged, or that the defendant was guilty of the charge. State v. Biebusch, 32 Mo. 276.

(*c*) *Evidence.*

**206. Witness.** A person may be convicted of subornation of perjury upon the testimony of a single witness. Com. v. Douglass, 5 Metc. 241. Where, however, on a trial for subornation of perjury, the person who committed the perjury is the sole witness on the part of the prosecution, it forms an exception to the rule that it is competent to convict upon the uncorroborated testimony of an accomplice. People v. Evans, 40 N. Y. 1.

## Pilot.

**Liability of.** To render a person liable as the pilot for a violation of the statute of New York (Laws of 1847, ch. 69), relative to pilots, for the safe pilotage of vessels through the channel commonly called Hell Gate, he must have been on board the vessel piloted. Francisco v. People, 4 Parker, 139.

## Piracy.

**1. At common law.** A pirate at common law is one who, to enrich himself, either by surprise or force sets upon merchants or other traders by sea, to despoil them of their goods. U. S. v. Tully, 1 Gallis. 247.

**2.** The felonious taking or carrying away of a ship, and the property on board of her, which if done on land would constitute felony, is piracy at common law, although there be no violence or putting in fear. U. S. v. Smith, 5 Wheat. 153; U. S. v. Pirates, Ib. 184; U. S. v. Klintock, Ib. 144; U. S. v. Jones, 3 Wash. C. C. 231.

**3.** A seizure made *animo furandi* under a commission purporting to be from a republic whose existence is unknown, or from a province of an acknowledged nation, is piracy. U. S. v. Klintock, *supra*.

**4. May be on ship at anchor.** Piracy may be committed on a ship which is at anchor, with no one in her, part of the crew being in the ship's boat and the balance on shore. U. S. v. Tully, *supra*.

**5. Under acts of Congress.** A robbery at common law, when committed on the high seas, is piracy by the act of Congress of 1790, ch. 36, § 8; and the Circuit Courts have jurisdiction of the offense. U. S. v. Palmer, 3 Wheat. 610.

**6.** To constitute piracy under the act of Congress of April 30th, 1790, ch. 9, the intent must have been *animus furandi;* but personal violence is not necessary. U. S. v. Tully, *supra*. The acts must have been such as are perpetrated by citizens or on vessels belonging to the United States. U. S. v. Howard, 3 Wash. C. C. 340.

**7.** Any intercourse with pirates calculated to further their views is within the act of Congress of April 30th, 1790, § 12. A confederacy by citizens on land, or on board of an American vessel, with pirates, or a yielding up of a vessel to such pirates, is within the 8th section of the same act. And an attempt by a mariner to corrupt the master of a vessel, and induce him to go over to pirates, is also within such act. U. S. v. Howard, *supra*.

**8.** The act of Congress of April 30, 1790, § 8, punishes in the courts of the United States a crew acting in defiance of all law, and acknowledging allegiance to no government. U. S. v. Klintock, *supra*.

**9.** The word "piratical," in the act of Congress of March 3d, 1819, ch. 75, is not restricted in its construction to such acts as by the law of nations are denominated piracy, but embraces such as pirates are in the habit of committing. A piratical aggression, search, restraint, or seizure is within the meaning of the act; and innocence or ignorance of the owner of the vessel of such acts will not save it from condemnation. U. S. v. Brig Malek Adhel, 2 How. U. S. 210.

**10.** To constitute a vessel piratical, it makes no difference whether she be armed for offense or defense, provided she commit the unlawful acts alleged. To bring a vessel within the terms of the act of Congress of March 3d, 1819, ch. 75, there need not be either actual plunder or an intent to plunder. It is sufficient that the act is committed from hatred, or an abuse of power, in a spirit of mischief. U. S. v. Brig Malek Adhel, *supra*.

**11. Privateers.** There is no exception in favor of commissioned privateers. U. S. v. Jones, 3 Wash. C. C. 209. And where an American citizen fits out a privateer to cruise against a power at peace with the United States, he is not protected by a commission from another belligerent power. U. S. v. Pirates, 5 Wheat. 184.

**12.** But in a state of war between two nations, a commission to a private armed vessel from either of the belligerents affords a defense in the courts of the enemy against

a charge of robbery or piracy on the high seas. U. S. v. Baker, 5 Blatchf. 6.

**13. Foreign cruisers.** The courts of the United States will not treat as pirates the cruisers of either of two nations who it is well known are at war with each other, although the independence of one of them has not been acknowledged by our government. The Josefa Segunda, 5 Wheat. 338; U. S. v. Palmer, 3 Wheat. 610.

**14. Robbery on foreign vessel.** Robbery committed by a person on the high seas, on board of a ship or vessel belonging to subjects of a foreign State, is not piracy. U. S. v. Palmer, *supra*.

**15. Seizure of piratical vessel.** Pirates may lawfully be captured on the ocean by the ships of any nation. The Marianna Flora, 11 Wheat. 1. The vessel upon becoming a pirate loses her national character. U. S. v. Pirates, 5 Wheat. 184.

**16.** Under the act of Congress of March 3d, 1819, ch. 75, punishing piracy, any armed vessel may be seized and brought in, or any vessel the crew of which are armed, and which shall have attempted or committed any piratical aggression, search, restraint, depredation, or seizure upon any vessel, and the offending vessel may be condemned and sold, the proceeds to be divided between the United States and the captors, in the discretion of the court. U. S. v. Brig Malek Adhel, 2 How. U. S. 210.

**17. Indictment.** Where the indictment charged that the piracy was committed on the high seas, within the admiralty and maritime jurisdiction of a particular State, it was held that the venue was well laid. U. S. v. Gibert, 2 Sumner, 19.

**18. Proof of character of vessel.** On the trial of an indictment for piracy, the national character of the vessel need not be proved by her register or by documentary evidence. U. S. v. Pirates, 5 Wheat. 184.

**19. Guilty knowledge and intent.** To convict persons of piracy, it must be proved that they participated in the unlawful capture of property with a felonious intent. U. S. v. Jones, 3 Wash. C. C. 231.

**20.** In order to make all the officers and crew of a piratical vessel guilty, the original voyage must have been undertaken with a piratical design, and they must have known and acted upon such design, otherwise those only can be convicted who actively co-operated in the unlawful enterprise. U. S. v. Gibert, 2 Sumner, 19.

**21.** Where a United States vessel was attacked by an armed ship without felonious intent, under the mistaken belief that she was a piratical cruiser, it was held not a piratical aggression within the acts of Congress, nor to subject the ship if captured to confiscation. The Marianna Flora, 11 Wheat. 1.

*See* SLAVE TRADE.

## Poisoning.

*See* HOMICIDE.

## Pound Breach.

**What essential to.** The driving or conveying away the impounded cattle, is a necessary part of the offense of pound breach. State v. Young, 18 New Hamp. 543.

## Presentment.

**1. What at common law.** A presentment at common law is the instruction given by the grand jury to the proper officer of the court for framing an indictment for an offense which they find to have been committed. When the indictment prepared by him and submitted to them has been found a true bill, the presentment is merged in it. Christian's Case, 7 Gratt. 631.

**2. How used in Virginia.** In Virginia, the presentment has been made the foundation for a summons to show cause at the next court why an information for the offense presented should not be filed against the accused. When an indictment has been previously found, an information will not be granted, although the indictment has been quashed for insufficiency. The pre-

sentment, and not the time of filing the information upon it, is deemed the date of the prosecution. Ibid.

**3. Finding and entering of record.** A presentment should be made in the presence of the jury, but need not be signed by all of them. It should be handed to the court by their foreman, and when entered of record there need be no further proof of its authenticity. State v. Cox, 6 Ired. 440. It is not necessary to its validity that it should appear on the record *in extenso*. Com. v. Tiernan, 4 Gratt. 545.

**4.** A presentment which was not found upon the knowledge of the grand jury, or any one of their number, but upon information of a person who was not sworn before the court, and sent to the grand jury previous to his being examined by them, will be bad on a plea of abatement. State v. Love, 4 Humph. 255.

## Profane Swearing.

**1. How regarded.** It is an indictable offense to utter in a public place, in the presence of others, profane and blasphemous language. State v. Steele, 3 Heisk. 135.

**2. What deemed.** Any words amounting to an imprecation of future divine vengeance will constitute the offense; and several distinct offenses may be committed by the same individual in relation to the same person on the same day. Holcomb v. Cornish, 8 Conn. 375.

**3. Arrest of defendant.** In Connecticut, a justice of the peace who has plain view and personal knowledge of the offense of profane swearing, may arrest and commit the offender without previous complaint or warrant. Holcomb v. Cornish, *supra*.

**4. Indictment.** An indictment for profane swearing must allege that it was uttered in the hearing of divers persons. An indictment therefore was held insufficient which charged that the defendant "in the public streets of the town of L., with force and arms, and to the great displeasure of Almighty God, and the common nuisance of all the good citizens of the State then and there being assembled, did for a long time, to wit, for the space of twelve seconds, profanely curse and swear, and take the name of Almighty God in vain, to the common nuisance," &c. State v. Pepper, 68 N. C. 259; s. c. 2 Green's Crim. Reps. 733, *note*.

**5.** An indictment alleged that the defendant did publicly, in the streets of the town of L., profanely curse and swear, and take the name of Almighty God in vain, to the common nuisance of the good people of the State then and there being and residing. *Held* that no crime was charged. State v. Powell, 70 N. C. 67; s. c. 2 Green's Crim. Reps. 731; approving State v. Pepper, *supra*.

**6.** An indictment which alleged that A., at, &c., with force and arms, on, &c., did publicly curse and swear, and take the name of Almighty God in vain, for a long time, to wit, for the space of two hours, to the common nuisance of all of the citizens of the State, and against the peace and dignity of the State, was held insufficient. State v. Jones, 9 Ired. 38.

**7.** The whole conversation need not be set out in the indictment; but only so much of it as clearly describes the language used. State v. Steele, *supra;* approving State v. Graham, 3 Sneed, 134.

*See* BLASPHEMY.

## Provisions.

*See* UNWHOLESOME PROVISIONS, SALE OF.

## Public Bridge.

*See* TOLL.

## Public Justice, Obstruction of.

**Indictment.** The dissuading, hindering and preventing a witness from appearing at court being an offense at common law, the words "contrary to the form of the statute"

may be rejected as surplusage. The indictment need not state where the witness was summoned, or when he was required to appear before the court, nor in whose behalf he was summoned, nor that his testimony was material. Where the indictment states facts showing the obstruction of "the due course of justice," it need not show that the trial was hindered or the result altered, nor conclude "to the obstruction and hindrance of public justice." Com. v. Reynolds, 14 Gray, 87.

## Railroad Train, Unlawfully Stopping.

**By pulling bell rope.** In Massachusetts, the defendant was indicted for obstructing a train of cars by pulling the signal rope fastened to a bell upon the engine, by which act the train was stopped, and the safety of the passengers endangered. It was proved at the trial, that the defendant was a passenger at the time of committing the offense, and that the bell rope was ordinarily pulled as a danger signal to notify the engineer to stop the train. A majority of the court held that the evidence was not sufficient to sustain a conviction for a criminal obstruction of the train, within the meaning of the statute (Gen. Stats. ch. 63, § 107) providing for the punishment of a person who "obstructs any engine or carriage passing upon a railroad, or endangers the safety of persons conveyed in or upon the same, or assists therein. Com. v. Killian, 109 Mass. 345; s. c. 1 Green's Crim. Reps. 192.

*For obstructing railroad track, see* NUISANCE.

## Rape.

1. WHAT CONSTITUTES.
2. WHO MAY COMMIT.
3. AGAINST WHOM OFFENSE MAY BE COMMITTED.
4. INDICTMENT.
5. EVIDENCE.
6. VERDICT.
7. ASSAULT WITH INTENT TO COMMIT RAPE.
   (*a*) *What deemed.*
   (*b*) *Who may commit.*
   (*c*) *Indictment.*
   (*d*) *Evidence.*
   (*e*) *Verdict.*
   (*f*) *Punishment.*

### 1. WHAT CONSTITUTES.

**1. Meaning of.** Rape is the carnal knowledge of a female, forcibly, and against her will. Charles v. State, 6 Eng. 389.

**2. Must be force.** Force, actual or constructive, is essential to constitute rape. Therefore an instruction that "if a man have carnal knowledge of a woman against her will, he may be convicted of rape," omitting the word "forcibly," is insufficient. Cato v. State, 9 Fla. 163.

3. The following charge on a trial for rape, was held erroneous: "As to the degree of force used in a case like this, where resistance is not made by reason of a representation leading the female to believe that sexual penetration of her body is necessary for the recovery from disease, the force used in ordinary sexual intercourse is sufficient to constitute a rape." Walter v. People, 50 Barb. 144.

**4. Must have been resistance.** The crime of rape can only be committed when there is on the part of the female, the utmost reluctance, and the utmost resistance. State v. Burgdorf, 53 Mo. 65; s. c. 2 Green's Crim. Reps. 593.

5. The following instruction, on a trial for rape, was held proper: "The jury must be satisfied that the connection was had by force, and against the will of the prosecutrix, and that there was the utmost reluctance and resistance on her part, or that her will was overcome by fear of the defendant; and if you entertain a reasonable doubt of such reluctance and resistance, it is your duty to acquit." Strang v. People, 24 Mich. 1.

6. In New York, to constitute the crime of rape of a female over ten years of age, if she is conscious of what is attempted, has possession of her mental and physical powers, is not overawed by the number of assailants, nor terrified by threats, nor in such

place that resistance is useless, she must resist until exhausted or overpowered. People v. Dohring, 59 N. Y. 374.

**7. Where female is insensible.** Rape may be committed by a man's having carnal intercourse with a woman while she is wholly insensible, with such force as is necessary to accomplish the purpose. Com. v. Burke, 105 Mass. 376.

**8.** In New York, forcible carnal connection with a female who is insensible from intoxication is not rape, but a crime under the twenty-third section of the act respecting offenses against the person. People v. Quinn, 50 Barb. 128. Where the evidence showed that the female and the defendants were drinking together voluntarily, and afterward went out together without any assignation or any consent on her part to have sexual intercourse with them, and she became insensible from the liquor, and while in such condition the defendants violated her person, it was held that they were not guilty of rape. Ib.

**9. Purpose accomplished by fraud.** Where sexual intercourse is had with a female through fraud, without force, it is not rape. People v. Bartow, 1 Wheeler's Crim. Cas. 378.

**10.** On a trial for rape, it was held that the following request of the prisoner's counsel of the court to charge was correct, and that the jury should have been so instructed: that "even if the defendant had accomplished his alleged purpose by fraud without intending to use force, such fraud did not constitute rape, unless the evidence showed that the defendant intended to use force if the fraud failed." Walter v. People, 50 Barb. 144.

**11. Where female consented.** Carnal knowledge of the person of a female of mature years, of good size and strength, with her consent, and without fraud, she being at the time laboring under *dementia*, not idiotic, but approaching toward it, does not constitute rape. Crosswell v. People, 13 Mich. 427.

**12.** In case of consent, the defendant cannot be convicted, although such consent was obtained by fraudulent representations. Don Moran v. People, 25 Mich. 356; Lewis v. State, 30 Ala. 54.

**13.** But although the female consented, yet if her consent was obtained by the use of force, and her will was overcome by fear of personal injury, it is rape, and not seduction. Croghan v. State, 22 Wis. 444.

**14.** On a trial for rape, the court charged the jury that if the prosecutrix consented through fear, or consented after the fact, or if, though she at first consented, she was afterward forced, the offense was committed. *Held* correct. Wright v. State, 4 Humph. 194.

**15.** On the trial of an indictment for rape alleged to have been committed on a girl twelve years of age, the court instructed the jury that if the girl in the first instance consented, and the defendant commenced the sexual intercourse with her consent, but she then withdrew her consent, and the defendant, notwithstanding, forcibly continued the intercourse, it was rape. *Held* that in consideration of the age and physical strength of the girl, and the relation she sustained to the defendant (stepdaughter), there was no error. State v. Niles, 47 Vt. 82.

**16.** The carnal knowledge of a female under ten years of age is rape, although the act be committed with her consent. Fizele v. State, 25 Wis. 364; Williams v. State, 47 Miss. 609.

**17. Penetration.** Under the existing law of North Carolina, the slightest penetration is sufficient to constitute rape. State v. Hargrave, 65 N. C. 466.

**18. Emission.** In Ohio, to constitute rape there must have been emission. Blackburn v. State, 22 Ohio, N. S. 102; referring to Williams v. State, 14 Ohio, 222. It is not so in Pennsylvania. Penn. v. Sullivan, Addis. 143.

**19.** In North Carolina, upon an indictment under the statute (Rev. Code, ch. 34, § 5), for carnally knowing and abusing a female child under the age of ten years, it is necessary to prove emission as well as penetration. State v. Gray, 8 Jones, 170. But under the act of 1860–61 carnal knowledge of a female is deemed complete upon proof of penetration alone. State v. Hodges, Phil.

N. C. 231; State v. Storkey, 63 N. C. 7. In Alabama, proof of penetration alone is sufficient. Waller v. State, 40 Ala. 325.

2. Who may commit.

**20. Boy under fourteen.** The presumption that an infant under the age of fourteen is incapable of committing, or attempting to commit the crime of rape may be rebutted by proof that he has arrived at the age of puberty. Williams v. State, *supra;* see *post*, *sub.* 123.

**21. Persons assisting.** In rape, all who are present and participating in the outrage are regarded as principals, and may be jointly indicted. Strang v. People, 24 Mich. 1.

**22.** But it is improper for the court, on a trial for rape, to refuse to charge the jury that if they are satisfied, from the evidence, that the defendant stood by at the time the offense was alleged to have been committed, but did no act to aid, assist, or abet the same, they should find the defendant not guilty. People v. Woodward, 45 Cal. 293; s. c. 2 Green's Crim. Reps. 421.

3. Against whom offense may be committed.

**23. With reference to age.** A female ceases to be "a child," and becomes "a woman," at the age of puberty, within the meaning of the statute of Ohio, defining the crime of rape. Blackburn v. State, 22 Ohio, N. S. 102; s. c. 1 Green's Crim. Reps. 660.

**24.** In Maine, by statute (R. S. ch. 154, § 17), rape consists in a man's ravishing and carnally knowing any female of the age of ten years, or more, by force and against her will. State v. Blake, 39 Maine, 322.

**25.** The carnal knowledge of a female under the age of ten years, is rape at common law. People v. McDonald, 9 Mich. 150. A child under ten years of age, cannot consent to sexual intercourse so as to rebut the presumption of force. Whether the same presumption does not exist in the case of a child over that age who is equally immature—*query*. Stephen v. State, 11 Ga. 225.

4. Indictment.

**26. Parties.** Two or more persons may be joined in an indictment for rape. Denis v. State, 5 Ark. 230.

**27. Necessary averments.** The words "forcibly" and "against the will," are essential in an indictment for rape. State v. Jim, 1 Dev. 142. It is otherwise, as to the word "unlawfully." Com. v. Bennett, 2 Va. Cas. 235; Weinzorflin v. State, 7 Blackf. 186. An indictment for rape which charges that the woman was gotten with child, is not for that reason bad. U. S. v. Dickinson, Hemp. 1.

**28.** Where an indictment for rape does not charge that the assault was with the intent "feloniously" to ravish, it is insufficient. State v. Scott, 72 N. C. 461.

**29.** In Massachusetts, in an indictment for rape, the omission of the words "felonious" or "feloniously" and "with force and arms" made the assault, is no longer a ground for a motion in arrest of judgment. R. S. ch. 137, § 14; Act of 1852, ch. 37, § 3; Com. v. Scannel, 11 Cush. 547.

**30.** The word "ravish," is essential, in an indictment for rape. Gougleman v. People, 3 Parker, 15. The words "carnal knowledge" of a woman, by a man in an indictment, mean sexual bodily connection. Com. v. Squires, 97 Mass. 59.

**31.** In an indictment for rape, it is a sufficient averment of force to allege that the accused violently and against the will of the woman "feloniously did ravish, and carnally know." Com. Fogerty, 8 Gray, 489.

**32.** An indictment for rape upon a child less than ten years of age need not allege that the offense was committed "with force," and "against the will" of the child, the averment that she was of tender years being equivalent. State v. Black, 63 Maine, 210.

**33. Name of person injured.** Where an indictment alleged that a rape was committed on Ellen Frances Davis, and it was proved that her true name was Helen Frances Davids, but that she went as much by one name as the other, it was held that the variance was immaterial. Taylor v. Com. 20 Gratt. 825.

**34. Averment of sex.** In an indictment for rape, the pronoun "her" sufficiently indicates the sex, without expressly averring that the person injured was a female; and the indictment need not state that the person injured was more than ten years of age. Hill v. State, 3 Heisk. 317.

**35.** Where an indictment for rape did not charge that the offense was committed on a female, but the person was spoken of as "Ellen Frances" and the personal pronoun "her" was twice used in the indictment, in relation to such person, it was held sufficient. Taylor v. Com. 20 Gratt. 825.

**36.** An indictment which alleged that the prisoner "with force and arms, in and upon one Mary Ann Taylor, in the peace of the State, violently and feloniously did make an assault, and her the said Mary Ann Taylor then and there, violently and against her will, feloniously did ravish and carnally know," charges with sufficient certainty that the person assaulted was a female. State v. Farmer, 4 Ired. 224.

**37.** In North Carolina, it was held that an indictment under the statute (1 R. S. ch. 34, § 5), for abusing and carnally knowing a female child under the age of ten years, need not describe the infant as "a female child," nor apply to her the name of "spinster." State v. Terry, 4 Dev. & Batt. 152.

**38.** In Virginia, where the indictment instead of charging in the language of the statute, that the offense was committed on a woman child, alleged that the rape was committed upon A. B., a female child, it was held good. Com. v. Bennett, 2 Va. Cas 235.

**39. Description of female.** An indictment against A. and B., charging them jointly with having carnal knowledge of C., forcibly and against the will of the said C., she "not being the daughter or sister of them the said A. and B.," is not a sufficient negative averment, for the reason that notwithstanding such averment, the said C. may be the daughter or sister of one of them. Howard v. State, 11 Ohio, N. S. 328.

**40. Averment of age.** An indictment for rape need not allege that the defendant is fourteen years of age, nor that the person upon whom the rape was committed, was not the wife of the defendant. Com. v. Scannel, 11 Cush. 547.

**41.** As rape may be committed upon a female of any age, the averment that the injured person is over the age of ten years, is unnecessary and need not be proved. But in a prosecution for the violation of a child under ten, the age is material and must be averred and proved. Mobley v. State, 46 Miss. 501; State v. Farmer, 4 Ired. 224; Bowles v. State, 7 Ohio, 243; People v. Ah Yek, 29 Cal. 575; State v. Storkey, 63 N. C. 7.

**42.** In Massachusetts, the allegation in an indictment of having by force and against her will, ravished and carnally known a female, is a sufficient description of the offense; and it is only necesssry to allege her age when it is not alleged that the act was against her will. Com. v. Sugland, 4 Gray, 7.

**43. Charging different offenses.** In Tennessee, an indictment was held bad which joined a count charging a negro with carnal knowledge of a white female child under ten years of age, with a count alleging the commission of a rape upon a white female, the offenses being different. State v. Cherry, 1 Swan, 160.

**44.** An indictment which charges a rape, and an assault with intent to commit a rape, is not bad as charging two offenses. People v. Tyler, 35 Cal. 553.

**45. When barred.** A conviction of an attempt to commit a rape will bar an indictment for rape; the former offense being necessarily included in the latter. State v. Shepard, 7 Conn. 54.

### 5. Evidence.

**46. Of prosecutrix through interpreter.** Where the female is of sufficient age, and of competent, though weak understanding, and can communicate and receive ideas only by signs, she may be sworn as a witness, and examined through the medium of a person who can understand her, who must be sworn to interpret between her and the court and jury. People v. McGee, 1 Denio, 19.

**47. Proof of force.** To convict of rape, it need not be proved that the force em-

ployed was such as to create a reasonable apprehension of death on the part of the woman. Waller v. State, 40 Ala. 325.

48. The following instruction on a trial for rape was held appropriate and correct: That the act of the defendant must have been without the woman's consent, and there must have been sufficient force used by him to accomplish his purpose; that the jury must be satisfied that there was no consent during any part of the act; and that the degree of resistance was frequently an essential matter for them to consider in determining whether the alleged want of consent was honest and real; but that there was no rule of law requiring a jury to be satisfied that the woman, according to their measure of her strength, used all the physical force in opposition, of which she was capable. Com. v. McDonald, 110 Mass. 405; s. c. 2 Green's Crim. Reps. 267.

49. If the female yield from terror, or the dread of greater violence, the intimidation is deemed equivalent to force. Where the accused threw the woman several times upon the floor, and then upon the bed, stripped her clothes over her head, smothered her with them, and attempted to gratify his passion upon her, it was held that the court properly refused to instruct the jury that in order to convict the prisoner they must be satisfied that when he had hold of her, he intended to accomplish his purpose at all events, and notwithstanding any resistance on her part. Pleasant v. State, 8 Eng. 360.

50. The following evidence on a trial for rape was held to have made out no offense against the prisoner: That the defendant, who was a physician, while attending the plaintiff in a professional capacity, told her that she had a disease of the womb, and that a physical examination was necessary; that she submitted with much reluctance; that he had carnal connection with her on two occasions while professing to be making such examination; that she was a single woman thirty years of age; that the foregoing occurred in the parlor of her brother's house in the day time while the wife of her brother was in an adjoining room; that she made no outcry; that she believed that while the plaintiff in error was doing these acts, he was making a medical examination in the usual way; and that she made no revelation of these occurrences until after she had been told that she was pregnant. Walter v. People, 50 Barb. 144.

51. The question whether or not a rape could have been committed without resort to other means than the exercise of the ordinary physical power of the prisoner, can be answered by the jury without the aid of an expert. Woodin v. People, 1 Parker, 464.

52. **Proof of resistance.** In New York, to convict of rape under the statute (2 R. S. 663, § 22), it must be proved that there was the utmost reluctance and resistance on the part of the prosecutrix. People v. Morrison, 1 Parker, 625.

53. On a trial for rape, evidence that the prosecutrix at the time of the outrage was in feeble health, is admissible on the question of her ability to make resistance, and also the muscular power of her assailant. State v. Knapp, 45 New Hamp. 148.

54. The force necessary to constitute rape, and the resistance required, must depend upon the mental and physical strength of the parties, and the circumstances surrounding them. When the prosecution has shown the idiocy of the prosecutrix, and force on the part of the prisoner, and there is nothing to show consent on her part, the offense will be deemed to have been committed against her will. State v. Tarr, 28 Iowa, 397, Cole, Ch. J., *dissenting*.

55. **Proof of penetration.** In Wisconsin, on the trial of an indictment under the statute (R. S. ch. 164, § 40), for unlawfully knowing and abusing a female child under ten years of age, penetration may be proved from circumstances. Brauer v. State, 25 Wis. 413.

56. **Guilty intent.** On a trial for rape, solicitations by the defendant more than six months previous to the act charged, are admissible in evidence, as showing a lustful intent. State v. Knapp, *supra*.

57. Notwithstanding force is used, yet if the assailant leave off upon resistance being made by the woman, and not because of an

interruption, it cannot be said that his intention was to commit rape. Pleasant v. State, 8 Eng. 360.

**58. Age of female.** Where on a trial for carnally knowing and abusing a female child, the exact age of the child was not known, it was held proper to take the opinion of medical experts as to her age. State v. Smith, Phil. N. C. 302.

**59. Place of transaction.** On the trial of an indictment for rape, a plan of the interior of the house, drawn by the district attorney from information derived from a person conversant with the house, and authenticated by the prosecutrix who lived in the house, is admissible to enable her to describe the localities. State v. Jerome, 33 Conn. 265.

**60.** The place where a rape was alleged to have been committed, having been changed by an agent of the prosecution, immediately before the place was viewed by the jury, it was held that the burden was upon the State to satisfy the court that the defendant was not prejudiced by the change. State v. Knapp, 45 New Hamp. 148.

**61. Complaint of female.** On a trial for rape, the request of the female to the witness, to go before a magistrate and report the offense, is competent evidence to prove complaint made. Smith v. State, 47 Ala. 540.

**62.** The fact that a female complaining that a rape was committed upon her, did not make known the outrage until a long time after its alleged occurrence, does not raise a presumption of law that the charge is false, but an inference of fact to be passed upon by the jury. State v. Peter, 8 Jones, 19. Mere lapse of time cannot therefore be made the test of the admissibility of evidence on this point. State v. Niles, 47 Vt. 82.

**63.** On a trial for rape, it was proved that the prosecutrix arrived in the city of New York an entire stranger, and that having lost her baggage, she was inveigled into a basement under the promise of recovering it, and there ravished; that when she regained the street she met a woman, who asked her what was the matter, and a policeman who took her to the station house, to neither of whom she disclosed what had occurred; but that shortly after arriving at the station house she stated the facts to the police captain, and the accused was arrested. *Held* not error in the court to refuse to charge that the disclosure was not sufficiently prompt. Higgins v. People, 58 N. Y. 377.

**64.** On the trial of an indictment for rape, the prosecutrix, who was the only witness, testified that the offense was committed about nine o'clock in the morning, near a road which was being continually traveled; that the wife and mother-in-law of the defendant were in sight; that the prosecutrix did not make an outcry; that she got up, finished getting wood, and went to washing near the defendant's house; that she told no one until four days afterward, when she informed her sister-in-law; and that her father was not told until after she discovered she was pregnant. *Held* that there was not sufficient evidence to sustain a conviction. Crockett v. State, 49 Ga. 185.

**65.** Whether proof of a complaint made more than three weeks after the alleged outrage, especially when forced from the prosecutrix by her mother, after the daughter had once declared that her injury was due to a fall, should have been received—*query*. Baccio v. People, 41 N. Y. 265.

**66. Particulars of complaint of female, not admissible.** The fact that the woman made complaint soon after the offense was committed, is admissible in evidence; but not the particulars of her complaint, and she can only be permitted to name the prisoner as the person who committed the injury, for the purpose of his arrest. Stephen v. State, 11 Ga. 225.

**67.** The rule is, that it is competent to prove that the person upon whom a rape is alleged to have been committed, made a complaint, without giving the particulars, and that an individual, without naming him, was charged with its commission. State v. Niles, 47 Vt. 82; Baccio v. People, *supra;* Lacy v. State, 45 Ala. 80; State v. Richards, 33 Iowa, 420; State v. Shettleworth, 18 Minn. 208.

**68.** It is usual to ask the prosecutrix on her direct examination, whether she made

complaint, and to receive in answer simply yes or no. Such statement is only corroborative of her testimony, and not evidence upon which the jury can predicate a verdict of guilty; and when she is not a witness it is inadmissible. Thompson v. State, 38 Ind. 39.

**69. Reasons for delay in making complaint.** On a trial for rape it is proper to show the reasons for delay on the part of the prosecutrix, in making complaint; whether caused by the threats of the prisoner, inability by reason of the violence, want of opportunity, or the fear of injury by the communication to the only persons at hand. State v. Knapp, 45 New Hamp. 148.

**70.** On the trial of an indictment for rape, evidence as to the appearance of the prosecutrix nearly two weeks after the alleged outrage, and that she seemed "to be down hearted and gloomy, as though there was something she wanted to tell, but dare not," may be admissible in connection with other facts to excuse her delay in making complaint; and where the bill of exceptions does not purport to state all the testimony, it will be presumed that there was testimony which rendered such evidence admissible. State v. Shettleworth, *supra*.

**71. Reason of complaint.** Where on a trial for rape, a witness testified that the prosecutrix made complaint soon after the offense was alleged to have been committed, it was held error to exclude on his cross-examination testimony tending to show that between the time the offense was alleged to have been committed and the time of the complaint, the prosecutrix had been told that the act of sexual intercourse, constituting the alleged crime, had been seen by other persons. McFarland v. State, 24 Ohio, N. S. 329.

**72. Admissions and declarations of prosecutrix.** On a trial for rape, mere admissions of the prosecutrix, which are not part of the *res gestæ*, are hearsay and not competent evidence to prove the fact of illicit intercourse by her with the defendant or others. State v. Shettleworth, 18 Minn. 208.

**73.** Upon the trial of an indictment for rape, the declarations of the prosecutrix immediately after the alleged outrage, are not admissible to prove the offense; and it is the same, though it appear that the female is incompetent to testify on account of immature age, idiocy, or other mental defect. People v. McGee, 1 Denio, 19.

**74.** The declarations of the prosecuting witness made immediately or soon after the commission of an alleged rape, are admissible in evidence, not as evidence of the guilt of the defendant, but to remove from the testimony of the prosecuting witness, suspicion that might otherwise rest upon it. Laughlin v. State, 18 Ohio, 99; Johnson v. State, 17 Ib. 593; McCombs v. State, 8 Ohio, N. S. 643; Burt v. State, 23 Ib. 394; s. c. 2 Green's Crim. Reps. 543.

**75.** Where on a trial for rape, the guilt of the accused rests on the oath of the prosecutrix, the testimony of a witness that she showed witness a garment with blood and mud on it, which she said was worn by her at the time of the rape (the witness not knowing whether or not the garment was worn as stated), is only admissible as a part of the complaint. Leoni v. State, 44 Ala. 110.

**76. Declarations of husband of prosecutrix.** Where on a trial for rape, it appeared that the husband of the woman was present at the outrage, and also the next morning when she related to a third person what had occurred, it was held competent to prove by the husband that he told such third person what had happened, without giving in evidence the details of the conversation. Conkey v. People, 5 Parker, 31; affi'd 1 N. Y. Ct. App. Decis. 418.

**77.** Where on a trial for rape, the female is examined as a witness, the acts and declarations of her husband are not admissible in evidence to discredit her. State v. Jefferson, 6 Ired. 305; McCombs v. State, 8 Ohio, N. S. 643.

**78. Presumptions.** The facts that the prosecutrix immediately made complaint, her appearance, and whether she bore upon her person marks of violence, are important; and any evidence showing that she feared

danger to life or limb if she resisted, is admissible, although it show a distinct outrage of a similar character previously committed. Strang v. People, 24 Mich. 1.

79. The fact that an alleged rape was not communicated to any one for a long time, affords a strong presumption that the charge is false. Higgins v. People, 8 N. Y. Supm. N. S. 307; 58 N. Y. 377.

80. On a trial for rape, the relationship between the prosecutrix and defendant is material, as bearing upon the reasonableness of the woman's story, and upon the probability of the resistance having been all that was to have been expected. Strang v. People, *supra.*

81. In Mississippi, on the trial of a guardian for rape upon his ward, it was held that the entire record of his proceedings as guardian, in the probate court, including his accounts and settlements and appropriations of the ward's property, was admissible; and that if any portion of the record was irrelevant, objection must be made to that part, and not to the whole. Sharkey, C. J., *dissenting*, held that such evidence was inadmissible as calculated to prejudice the jury against the prisoner, by showing that he had squandered the property of his ward. Tenney v. State, 8 Smed. & Marsh. 104.

82. On a trial for rape, the conduct of the prisoner immediately after the perpetration of the offense, is admissible in evidence to show that his connection with the woman was effected by violence and threats calculated to alarm and terrify her. Conkey v. People, 5 Parker, 31; affi'd 1 N. Y. Ct. of Appeals Decis. 418; Strang v. People, *supra.*

83. A female under the age of ten years is presumed incapable of consenting to an act of carnal knowledge, or an assault with intent to commit the act. The evidence to rebut this presumption need not show her ability beyond a reasonable doubt. A preponderance of evidence is sufficient. O'Meara v. State, 17 Ohio, N. S. 515; Moore v. State, Ib. 521. In Michigan, it has been held that in case of the carnal knowledge of a female under ten years of age, no evidence will be received to repel the presumption of force and want of consent. People v. McDonald, 9 Mich. 150.

84. On the trial of an indictment for rape alleged to have been committed by a negro on a white woman, it was held error in the court to refuse to charge that the jury should acquit the prisoner unless the prosecution proved to their satisfaction that the person upon whom the assault was committed was a white woman, and that the fact that the jury had seen her, or been acquainted with her, or heard her testify, would not dispense with such proof. But in the same case, it was held that the jury might infer that the prosecutrix was a white woman, from her appearance on the stand and from her reference during her examination as a witness, to her domestic relations. Charles v. State, 6 Eng. 389.

85. On the trial of a negro for rape, the prisoner's counsel asked the court to charge the jury that in order to convict, the prosecution must prove that the prisoner was a negro, and that though he was black, their seeing him was no proof that he was a negro. *Held* that as the instruction asked for assumed that the prisoner was black, the presumption that he was a negro would prevail, and that the instruction was properly refused. Ibid.

86. **Bad character of prosecutrix.** On a trial for rape, the character of the prosecutrix for chastity cannot be impeached by evidence of particular acts of unchastity, but only by general evidence in that respect. Nor can evidence be given as to previous sexual intercourse with persons other than the accused. McCombs v. State, 8 Ohio, N. S. 643; McDermott v. State, 13 Ib. 332; People v. Jackson, 3 Parker, 391, overruling People v. Abbott, 19 Wend. 192; State v. Knapp, 45 New Hamp. 148; Com. v. Regan, 105 Mass. 593.

87. But where on a trial for rape the prosecutrix testified that she became insensible and did not know whether the accused consummated the act or not, and the prosecution introduced a medical witness who swore that he examined her three weeks after the alleged outrage, and that

she then bore the marks of having had previous carnal intercourse with some man, it was held competent for the defense in rebuttal to prove either a previous voluntary connection with the accused or particular instances of unchastity with any other man. Shirwin v. People, 69 Ill. 55.

88. On a trial for rape, the accused may introduce evidence to show that the complainant was in the habit of receiving men at her house for the purpose of promiscuous intercourse with them. Whether evidence of particular acts of unchastity by her is competent—*query*. Woods v. People, 55 N. Y. 515; 1 N. Y. Supm. N. S. 610; s. c. 1 Green's Crim. Reps. 659. See People v. Abbott, *supra;* Campbell v. State, 3 Kelly, 417.

89. In Michigan, on a trial for rape, it is competent to prove criminal intercourse between the prosecutrix and a person other than the defendant for purposes of impeachment, but not particular facts from which such intercourse may be inferred. Strang v. People, 24 Mich. 1. In California, evidence of particular acts of lewdness on the part of the prosecutrix is admissible for the purpose of disproving the allegation of force. People v. Benson, 6 Cal. 221.

90. In Alabama, where the parts of a child upon whom it was charged the prisoner attempted to commit a rape were shown to be bruised and infected with the venereal disease, proof of sexual intercourse between her and other persons before and near the time of the commission of the alleged offense was held competent as tending to weaken the force of these circumstances. Nugent v. State, 18 Ala. 521.

91. In Vermont, it has been held that on a trial for rape or incest, the prosecutrix may be asked on her cross-examination whether she did not have sexual intercourse with other men both before and after the alleged offense. State v. Johnson, 28 Vt. 512, Bennett, J., *dissenting;* approved in State v. Reed, 39 Vt. 417.

92. In North Carolina, it was held on a trial for rape that the defendant might prove that the woman had been his concubine, or that he had been allowed to take indecent liberties with her, but not that she had had criminal intercourse with one or more particular individuals. State v. Jefferson, 6 Ired. 305.

93. In the same State, it was held proper on a trial for rape to ask the prosecutrix if she had not been delivered of a bastard child, and if she had not had sexual intercourse with other men, and the error of excluding such testimony is not cured by permitting the prisoner to show the same by other witnesses. State v. Murray, 63 N. C. 31. See Higgins v. People, 8 N. Y. Supm. N. S. 307; 58 N. Y. 377.

94. On a trial for rape, the defendant sought to lay the foundation for an inference of voluntary intercourse between him and the prosecutrix while she lived at the house of his father, by inquiring of the latter as to her habits of following the defendant around the house. The judge in ruling out the evidence said: "I do not think it competent, and even if she did follow him, it would not show that she wanted a rape committed upon her." *Held* that the evidence was competent and the remark of the judge improper. Shirwin v. People, 69 Ill. 55.

95. The magistrate before whom the complaint was made is not a competent witness to prove what the prosecutrix swore to before him as to her having had previous intercourse with other men, unless the inquiry is made for the purpose of impeaching her testimony. People v. Abbott, 19 Wend. 192.

96. Where on a trial for rape, a witness swore that he had heard three or four persons who lived in an adjoining town speak of the character of the prosecutrix for chastity, but did not know what the people in her neighborhood said, it was held that the evidence was properly rejected. Conkey v. People, 5 Parker, 31; affi'd 1 N. Y. Ct. of App. Decis. 418.

97. On a trial for rape, it was held competent for the defendant to prove, as tending to show the general immoral character of the prosecutrix, that she was a woman of drunken and dissipated habits, sleeping generally in the hallway of a tenement

house, and accustomed to go in there at two or three o'clock in the morning. Brennan v. People, 14 N. Y. Supm. N. S. 171; citing Woods v. People, 55 N. Y. 171.

98. On a trial for rape, the defendant, for the purpose of impeaching the character of the prosecutrix, asked her on cross-examination whether she did not go with him to a liquor shop and drink, and whether she did not go to a lumber yard with him and there solicit him to have carnal intercourse with her. The judge ruled that the cross-examination in this respect was upon matters immaterial to the issue, and that there could be no contradiction of the replies. *Held* error. Brennan v. People, *supra.*

99. It is not a ground of exception that the court, on a trial for rape, refused to permit the prosecutrix to be asked, on cross-examination, whether she had been at some previous time a common seller of intoxicating liquor in violation of law. Com. v. McDonald, 110 Mass. 405; s. c. 2 Green's Crim. Reps. 267.

100. **Good character of prosecutrix.** On a trial for rape, proof of the good character of the prosecutrix is admissible to sustain her credibility. Tenney v. State, 8 Smed. & Marsh. 104.

101. On a trial for rape, it is not competent for the prosecution to rebut proof of the general reputation of the prosecutrix, by showing that some of the reports prejudicial to her were false; for the reason that such testimony would raise collateral issues, and would not show that such reports were not in general circulation, or that they were not generally accredited. McDermott v. State, 13 Ohio, N. S. 332.

102. On the trial of an indictment for rape charged to have been committed on board a vessel, the defendant attempted to discredit the testimony of the complainant by showing that her story was improbable in itself, inconsistent with her conduct on board the vessel, and contradicted by statements made by her out of court. *Held* that this was not an attack upon the complainant's general character, and therefore that evidence of her good character was not admissible. People v. Hulse, 3 Hill, 309, Cowen, J., *dissenting.*

103. **Character of defendant.** Where, on a trial for rape, the defendant introduced witnesses as to his reputation for morality as well as chastity, it was held proper, on cross-examination, to inquire as to the defendant's reputation for selling liquor without license. State v. Knapp, 48 New Hamp. 145.

104. **Identity of defendant.** Where, on a trial for rape, the prosecution seeks to show the identity of the prisoner with the person who committed the offense, by evidence of a fresh pursuit from a description of the offender by the prosecutrix, and of inquiries made by the pursuer for him by describing his dress, the prisoner may show what inquiries were made, and that the dress described was different from the one worn by him. Com. v. Reardon, 4 Gray, 420.

105. **Consent of female.** On a trial for rape the defense may ask the prosecution, on cross-examination, whether the treatment complained of "was with her consent or against her will." Woodin v. People, 1 Parker, 464.

106. In Iowa, the offense of forcible defilement, under the Code (§ 2582), lies in doing the act against the will of the other person, with force, menace, or duress. The defendant is not obliged to prove consent; but the prosecution must show that there was dissent and repulsion. Pollard v. State, 2 Clarke, 567.

107. **Weight of evidence.** On the trial of an indictment for rape, the question of guilt or innocence is not to be measured by the character of the proof, whether positive or negative, but the jury should be left to consider the whole evidence. Innis v. State, 42 Ga. 473.

108. On a trial for rape, the prosecutrix testified that as soon as practicable after the outrage she told her husband, her mother, and others; and she was corroborated by the testimony of her husband as to the disclosures made by her to him. *Held* that the court properly charged the jury that it was not necessary for the prosecution to call the other persons referred to as witnesses, if the

jury were satisfied that the prosecutrix or her husband had testified truly in regard to the complaint made by her. Woodin v. People, 1 Parker, 464.

**109.** On the trial of an information for carnally knowing and abusing a female child nine years of age, the testimony of the child need not be corroborated by proof of an examination of her person at the time of the outrage, or by medical testimony. State v. Lattin, 29 Conn. 389.

6. Verdict.

**110. Where different grades of offense are charged.** The charges in an indictment were: 1st, rape against C. and H.; 2d, rape against C., and against H. for assisting C. in committing a rape; 3d, assault and battery against C. and H., with intent to commit a rape. The jury rendered the following verdict: "We find the prisoners at the bar guilty of the offense charged in the indictment." *Held* that it was competent for the court to pass judgment on the count charging the highest grade of offense. Conkey v. People, 5 Parker, 31; affi'd 1 N. Y. Ct. of App. Decis. 418.

**111. For lesser offense.** Under an indictment for rape, the prisoner may be convicted of an attempt to commit rape. Com. v. Cooper, 15 Mass. 187. It will not, therefore, vitiate the verdict to swear the jury to try the prisoner for the attempt, as well as for the rape. Stephen v. State, 11 Ga. 225.

**112.** In Massachusetts, where a *nolle prosequi* is entered on an indictment for rape, the defendant may, under the statute (Gen. Stats. ch. 172, § 16), be convicted of a simple assault, but not of an assault not connected with the rape originally charged. Com. v. Dean, 109 Mass. 349; s. c. 1 Green's Crim. Reps. 195. See Com. v. Drum, 19 Pick. 479.

**113.** Where, on a trial for rape, the jury find the prisoner guilty of an assault with *attempt* to commit a rape, it is tantamount to a verdict of guilty of an assault with *intent* to commit a rape. Prince v. State, 35 Ala. 367.

**114. For different offense.** In Massachusetts, under the statute (R. S. ch. 137, § 11), a person indicted for a rape upon his daughter may be convicted of incest. Com. v. Goodhue, 2 Metc. 193.

7. Assault with intent to commit rape.

(*a*) *What deemed.*

**115. Must have been rape if the purpose had been accomplished.** To sustain an indictment for an assault with intent to commit a rape, it must be shown that the offense would have been rape, if the defendant had carried his intention into effect. Sullivant v. State, 3 Eng. 400.

**116. Intention to employ force requisite.** A negro entered a room where a school-girl was sleeping, partly undressed himself, and tried to get on her; she awoke, screamed, and he ran away. Having been found guilty of an assault with intent to commit rape, a new trial was granted on the ground that it did not appear that the prisoner intended to accomplish his purpose by force. Charles v. State, 6 Eng. 389.

**117.** In Virginia, on the trial of an indictment against a free negro, it was proved that the prisoner, not intending to have carnal knowledge of the woman by force but while she was asleep, got into bed with her, and pulled up her night dress which waked her, but used no force. *Held* not an attempt to commit rape within the meaning of the statute. Field's Case, 4 Leigh, 648.

**118. Leaving off on account of resistance will not excuse.** Where a person intended forcibly to know a woman carnally, and against her will, and made an effort to accomplish his purpose, the mere desisting from further effort on account of resistance, inability to overcome resistance, or from fear, will not relieve him from the guilt of an assault with intent to commit rape. Taylor v. State, 50 Ga. 79.

**119.** A negro in the night, entered a room by raising a window where a girl thirteen or fourteen years of age was sleeping, and got into bed with her. Upon her making an outcry which was responded to from another room where her uncle slept, the negro fled through the window. *Held* that a conviction for an assault with intent to

commit a rape was proper. Sharpe v. State, 48 Ga. 16.

**120. Consent of female.** The subsequent yielding and consent of the woman to the sexual intercourse is not a legal excuse to the consummated offense of an assault with an intent to commit a rape. State v. Hartigan, 32 Vt. 607.

**121.** But where, on a trial for an assault with intent to commit a rape, it appears that the woman consented without being induced to do so by force or fear, the accused cannot be convicted. Hull v. State, 22 Wis. 580.

**122.** There is no such crime known to the law of Ohio, as an assault with intent to carnally know and abuse a child under ten years of age with her consent. O'Meara v. State, 17 Ohio, N. S. 515.

*(b) Who may commit.*

**123. Boy under fourteen.** An infant under the age of fourteen, may be convicted of an assault with intent to commit rape. Com. v. Green, 2 Pick. 380. See *ante, sub.* 20.

**124. Person standing by.** On the trial of an indictment for an attempt to commit rape, it is error to refuse to charge the jury, that if the defendant stood by when the offense was committed, but did no act to aid, assist, or abet the same, he could not be found guilty. People v. Woodward, 45 Cal. 293.

*(c) Indictment.*

**125. Description of female.** An indictment charging that "A. B., late of said county, in and upon C. D. (she the said C. D. then and there being a female child under the age of ten years), feloniously did make an assault, and her the said C. D. did then and there feloniously abuse, in the attempt carnally to know," is bad in not describing with sufficient certainty the person upon whom the attempt was made. Nugent v. State, 19 Ala. 540.

**126.** Where an indictment charged that "A. Hunt, in and upon P. Harvey, did make and assault, and her the said A. Hunt, then and there did beat, wound and ill treat, with an intent her the said P. Harvey to ravish," it was held that the words "her the said A. Hunt then and there," might be rejected as surplusage. Com. v. Hunt, 4 Pick. 252.

**127. Must charge that force was used.** An indictment for an assault with an intent to commit a rape which for the words "by force," substitutes the word "violently" is fatally defective. State v. Blake, 39 Maine, 322.

**128.** An indictment alleged that the defendant did unlawfully and feloniously assault one H. D., with intent to outrage her person, by throwing her on her back and attempting to have sexual intercourse with her. *Held* that it did not charge an assault with intent to commit rape, but only an assault. People v. O'Neil, 48 Cal. 257.

**129.** An indictment for an assault with intent to commit rape is good which alleges that "A. B., with force and arms, in and upon one J. D., a female twenty-one years of age, and not the wife of the said A. B., feloniously did make an assault with intent then and there to commit an act of sexual intercourse with the said J. D., by force and violence against her will;" without charging that the force and violence were against her resistance. People v. Brown, 47 Cal. 447; s. c. 2 Green's Crim. Reps. 456.

**130.** In Connecticut, under the statute (R. S. tit. 6, § 18), providing that "every person who shall, with actual violence, make an assault upon the body of any female with intent to commit a rape shall suffer imprisonment," &c., any language in the information, which expressly, or by necessary implication, imports and charges the exertion of physical force upon the female is sufficient. State v. Wells, 31 Conn. 210.

**131. Technical averments.** An indictment for an assault with intent to commit a rape, must contain the technical word "ravished," and state that it was attempted to be done forcibly and against the will of the female. Sullivant v. State, 3 Eng. 400.

**132.** But in Virginia, under the statute, an indictment for an attempt to commit a rape is sufficient which charges an attempt "feloniously carnally to know," omitting the word "ravish." Christian v. Com. 23

Gratt. 954, Anderson and Moncure, JJ., *contra*; s. c. 2 Green's Crim. Reps. 659.

**133.** An indictment for an assault with intent to commit a rape, which alleges that the defendant made the assault with intent feloniously to ravish, is bad. It ought to charge that the assault was made feloniously. Williams v. State, 8 Humph. 585.

**134.** An indictment for an assault on a child under ten years of age "with intent feloniously to ravish and carnally know," was held good; as the words "to ravish," might be regarded as surplusage. McComas v. State, 11 Mo. 116.

**135.** An indictment for an assault and battery with intent to commit a rape, which omits the word "unlawfully" or "feloniously," although bad as to the intent charged, may be sustained as to the assault and battery. McGuire v. State, 50 Ind. 284.

**136. Unnecessary averments.** In Tennessee, it has been held that an indictment for an assault with intent to commit a rape, need not allege that the assault was feloniously committed. Jones v. State, 3 Heisk. 445.

**137.** An indictment for abusing a female child, which alleges that she was under ten years of age, is sufficient without the words "she then and there being" after the first mention of the name. Com. v. Sullivan, 6 Gray, 477.

**138.** In an indictment for an assault with intent to commit a rape, there need not be an averment as to the age of the female, although she is under ten years of age. O'Meara v. State, 17 Ohio, N. S. 515.

(*d*) *Evidence.*

**139. Prosecutrix need not be a witness.** An assault and battery with intent to commit a rape, may be proved without the testimony of the injured party. People v. Bates, 2 Parker, 27.

**140. Proof of violence.** Where there is evidence of no act of violence, struggle, or outcry, and of no attempt to restrain or confine the person of the prosecutrix, the prisoner cannot be convicted of an assault with intent to commit a rape. Com. v. Merrill, 14 Gray, 415.

**141.** On the trial of an indictment for an assault with intent to commit a rape, it was held that evidence that the defendant, who was a colored man, ran after a white woman who was traversing a road through a lonely wood, and called out to her several times to stop, the distance between them being about seventy yards, was sufficient to sustain a conviction. State v. Neely, 74 N. C. 425.

**142. Proof of resistance.** Upon a trial for an assault with intent to commit a rape, on the question of resistance, it is proper for the jury to consider the age, strength, and capacity of the person upon whom the offense is alleged to have been committed. People v. Lynch, 29 Mich. 274.

**143.** Where the defendant was convicted of an assault with the intent to commit a rape on a child under ten years of age, upon the uncorroborated testimony of the child, who not only made no outcry, but immediately went about her daily duties, as though nothing unusual had occurred, and neglected for two years to disclose the facts even to her mother, and it appeared that no flow of blood followed the alleged outrage, and that the child did not suffer or complain of any pain, it was held that there must be a new trial. People v. Hamilton, 46 Cal. 540; s. c. 2 Green's Crim. Reps. 432.

**144.** Although where there was consent on the part of the prosecutrix, the prisoner cannot be convicted of an assault with intent to commit a rape, yet where it is clearly shown that the assault was made with the intent to commit the offense, the jury may convict, though not satisfied that there was such want of consent as to constitute the higher crime. The absence of outcries and complaints is not conclusive; and the mere submission of a girl fifteen years of age, in the power of a strong man, does not necessarily imply consent. State v. Cross, 12 Iowa, 66. See State v. Tomlinson, 11 Ib. 401.

**145. Complaint of female.** On the trial of an indictment for an attempt to commit a rape, a complaint made soon after the assault, by the woman assaulted, is admissible in evidence, but not the particulars

of the transaction, as detailed at that time, by the prosecutrix. State v. Ivins, 36 N. J. 233; s. c. 2 Green's Crim. Reps. 591.

**146. Declarations of female.** On the trial of an indictment for an assault with intent to commit a rape, the declarations of the prosecutrix are not admissible either for or against the defendant as independent evidence. To render them competent, the foundation must be laid by first calling her attention to them when she is examined as a witness, and if she denies making them, they can then be proved to contradict her. State v. Emeigh, 18 Iowa, 122.

**147.** On the trial of an indictment for an assault upon a girl six years of age, with intent to commit a rape, the child being interrogated as a witness, and not being able to give a connected history of the affair, the mother of the child was called and asked, "Did the child tell you how this occurred at the time?" which she answered in the affirmative. *Held* error. People v. Graham, 21 Cal. 261.

**148.** On the trial of an indictment for assault and battery, with intent to commit a rape, the injured party, who was about six years of age, not being allowed to testify for want of sufficient understanding, the court admitted in evidence her declarations made not in the presence of the defendant, elicited by questions put to her by her parents soon after the transaction. *Held* error. Weldon v. State, 32 Ind. 81.

**149. Appearance of female.** On a trial for an assault with intent to commit a rape, a witness may testify as to the appearance of the woman immediately after the outrage, but not as to what she said, except in confirmation of her testimony, after an attempt to impeach it. Pleasant v. State, 15 Ark. 624.

**150. Guilty intent.** On the trial of an indictment for an assault with intent to commit a rape, evidence of previous acts of the defendant is admissible on the question of guilty intent. Williams v. State, 8 Humph. 585.

**151.** Where, on a trial for an assault with intent to commit a rape, the jury were charged that if they believed from the evidence that the defendant *attempted* to commit a rape they ought to find a verdict of guilty, it was held error. Preisker v. People, 47 Ill. 382.

**152. Character of prosecutrix.** On a trial for an assault with intent to commit a rape, the prosecutrix cannot be compelled to answer as to her criminal connection with other men, nor can particular acts of unchastity be proved, though general evidence may be given of her reputation in that respect. Pleasant v. State, 15 Ark. 624.

**153. Corroboration of charge.** On the trial of an indictment for an attempt to commit a rape, before any effort had been made to discredit the testimony of the prosecutrix, otherwise than by her cross-examination, the district attorney introduced a witness to prove that she had previously told to the witness the same story which she had now sworn to in court. *Held* admissible to show constancy in the declarations of the prosecutrix, and thus to confirm her testimony. State v. De Wolf, 8 Conn. 93.

**154.** After it had been proved by the defense, on a trial for an attempt to commit a rape, that the prosecutrix, who was deaf and dumb, had given different accounts of the transaction, and after she had sworn that she concealed the transaction more than a year, giving as a reason for so doing the threats and influence of the prisoner, and fear of him, the prosecution proposed to show, by an instructor of the deaf and dumb, who had been the teacher of the prosecutrix, that the deaf and dumb generally have a sense of inferiority to other people, and as a class are easily intimidated; that they are credulous, sincere, and submissive, and that from his acquaintance with the witness, he believed such to be her character. *Held*, that such evidence was inadmissible. Id.

**155. Weight and sufficiency of proof.** Upon a trial for an assault with intent to commit a rape, the prisoner may be found guilty upon proof that a rape was actually committed. State v. Shepard, 7 Conn. 54; State v. Smith, 43 Vt. 324; State v. Archer, 54 New Hamp. 465.

**156.** On the trial of an indictment for an

assault with intent to ravish, it is improper to permit the prosecutrix to testify that the defendant "attempted to ravish her," or a witness to say that the prosecutrix, in making complaint to him, used that language. Scott v. State, 48 Ala. 420.

**157.** On the trial of an indictment for an attempt to commit a rape, the fact that the prisoner burglariously entered a room where a young lady was sleeping, and grasped her ankle, without any effort at explanation, is evidence for the consideration of the jury. State v. Boon, 13 Ired. 244.

**158.** Where there is evidence tending to prove that a person charged with an assault with intent to commit a rape was, at the time, in a greatly debilitated condition from a previous debauch, it is a circumstance for the consideration of the jury in determining whether he was physically capable of committing the offense. Nugent v. State, 18 Ala. 521.

**159.** On a trial for an assault with intent to commit a rape, in order to impeach a witness who had testified through an interpreter in respect to the time of seeing the defendant in a certain place, and who, on cross-examination, denied that he had said to any one that he saw him at an earlier and different time, the defendant offered one L. to prove that at an interview with the witness he stated to him, through an interpreter, that he met the defendant an hour earlier than he had testified. *Held* that the evidence of L. was inadmissible, and that the interpreter should be called, as he alone could know and understand what the witness had said. State v. Noyes, 36 Conn. 80.

(*e*) *Verdict.*

**160. Need not negative higher offense.** A verdict was as follows: "We, the jury, find the prisoner guilty of an attempt to commit a rape." *Held* sufficient, and that it was not necessary to negative the charge of rape, that being the legal effect of the finding. Stephen v. State, 11 Ga. 225.

(*f*) *Punishment.*

**161. Under former statutes in relation to slaves.** In Arkansas, the statute (Dig. ch. 51, pt. 4, art. 4, § 9), punishing with death an attempt by a negro to commit a rape on a white woman, included the case of such an attempt upon a white female under the age of puberty. Charles v. State, 6 Eng. 389.

**162.** In Mississippi, the statute (Hutch. Dig. 918, § 21), providing that no person shall be convicted of an attempt to commit an offense where it appeared that the offense was actually committed, did not apply to the case of rape by a slave upon a white woman. There was no law punishing a slave for rape committed on a white woman; but the attempt to commit rape was made a capital offense. Wash v. State, 14 Smed. & Marsh. 120.

**163.** The statute of Tennessee of 1839, ch. 19, § 10, punishing a slave with death for an assault with intent to commit rape on a free white woman, did not include the case of a female under ten years of age. Sidney v. State, 3 Humph. 478. But in Virginia, a white girl under twelve, and not having attained to the age of puberty, was deemed a white woman within the meaning of the statute making it a capital offense for a slave, free negro, or mulatto to attempt to ravish a white woman. Watts' Case, 4 Leigh, 672.

## Receiving Stolen Property.

1. Offense when committed.
2. Indictment.
3. Place of trial.
4. Evidence.
5. Charge of judge.
6. Verdict and judgment.

1. Offense when committed.

**1. What constitutes charge of concealment.** Swearing in an affidavit that certain goods of a specified value, have been stolen by some person or persons unknown, and that from probable cause, the owner suspects that said goods are concealed in a trunk belonging to A. and B., does not constitute a charge of larceny, but of knowingly concealing stolen goods. Field v. Ireland, 21 Ala. 240.

**2. Construction of statute.** A statute which prohibits the "buying, receiving, concealing, or aiding in the concealment of stolen goods," specifies four distinct offenses, and the disjunctive or applies to each of the preceding verbs. State v. Murphy, 6 Ala. 845.

3. As bank notes are not "goods or chattels," the receiver of stolen bank notes cannot be indicted under the statute of New Jersey, making it a misdemeanor to receive stolen "goods or chattels." State v. Calvin, 2 Zabr. 207.

**4. What constitutes a receiving.** Where a person allowed a trunk of stolen goods to be placed on board a vessel destined for North Carolina, as a part of his luggage, it was held that he might be convicted of receiving stolen goods. State v. Scovel, 1 Mills, 274.

5. In California, where on a trial for grand larceny it was proved that the defendant was not in the county where the offense was committed at the time of its commission, and did not participate in the theft, but afterward, knowing that the property was stolen, received it in the county where he resided, and aided in selling, it was held that he could not be convicted of larceny in the first mentioned count, and that he was not an accessory after the fact, but liable as a receiver of stolen goods. People v. Stakem, 40 Cal. 599.

6. The defendant agreed with a small boy that the latter should take his grandfather's money and hide it at the stable, and that the defendant should go at night and tap on the door, and the boy would run out and shoot at him for a blind. This arrangement was carried out, but the boy could not find the money. Several days afterward, the boy took the money to a place two and a half miles distant, and gave it to the defendant. *Held*, that a conviction of the defendant as principal was error. Able v. Com. 5 Bush, Ky. 698, Robertson, J., *dissenting*.

7. A conviction for knowingly receiving stolen goods was sustained upon proof that the defendant received them from the servant of a carrier, and concealed them, and that the servant furtively acquired them. State v. Teideman, 4 Strobh. 300.

8. In South Carolina, to make the receiver of stolen goods liable under the statute of 1769, the goods must have been taken by burglary, or house breaking. State v. Sanford, 1 Nott & McCord, 512.

**9. Possession not necessary.** On the trial of an indictment for receiving and aiding in concealing stolen property, it is not necessary to prove that the defendant had actual possession of it, and concealed it with his own hands. If he was present, knew that it was stolen, saw it hid, kept silent, and refused to give information to the officers searching for it, such conduct unexplained will warrant his conviction. State v. St. Clair, 17 Iowa, 149. See State v. Turner, 19 Ib. 144.

**10. May be owner of property.** Where goods have been stolen from the bailee of the owner, the owner may make himself criminally liable by fraudulently receiving them from the thief. People v. Wiley, 3 Hill, 194.

**11. By agent.** Where a person directs another to receive property lost or stolen, the latter who receives the property from the thief, knowing it to be stolen, is liable to indictment. Caskells v. State, 4 Yerg. 149; Wright v. State, 5 Ib. 154.

12. The statute of Michigan in relation to the offense of receiving stolen property, knowing the same to have been stolen, has enlarged the common-law offense, by making those who aid the principal felon equally guilty with him. People v. Reynolds, 2 Mich. 422.

**13. Where there is a pretense of agency.** Funds having been stolen from a bank in Maryland, A., a police justice, invited the agents of the bank to an interview, and undertook to procure a restoration of the property upon condition that the bank would pay therefor at the rate of ten per cent. on the amount, saying that his employer would not take less. After several days spent in negotiating, during which A. professed to be acting in accordance with the views and wishes of the thief, it was finally agreed that the property should be restored for less than was first demanded, and a place was designated for carrying out

the agreement. A. brought the property to the appointed place and delivered it to the agents of the bank, who thereupon paid him what they agreed. *Held* that A. might be convicted as a receiver of stolen goods. People v. Wiley, *supra*. If A. had only demanded such a sum as was insisted on by the thief before surrendering the goods, together with a fair compensation for his own trouble, the case might have been different. Ibid.

**14. Receiver not an accessory.** The receiving of stolen goods knowing them to be stolen does not constitute the receiver an accessory, because he renders no aid to the principal felon, but is in itself a distinct offense. Loyd v. State, 42 Ga. 221.

**15.** The offense of receiving stolen goods is not merged in that of being an accessory before the fact to the larceny, the less being merged in the greater offense only when both result from the same act or continuing transaction. State v. Coppenburg, 2 Strobh. 273.

**16.** In Connecticut, under the statute of 1830, the receiver of stolen goods knowing them to have been stolen may be prosecuted as a principal. State v. Weston, 9 Conn. 527.

**17. Accomplice.** The thief is not an accomplice of the person who receives the stolen goods knowing them to have been stolen, but guilty of a different offense. People v. Cook, 5 Parker, 351.

**18. Must have been fraudulent intent.** To constitute the offense of receiving stolen goods knowing them to have been stolen, the stolen goods must have been received feloniously, or with intent to secrete them from the owner, or in some other way to defraud him of them. People v. Johnson, 1 Parker, 564.

**19.** It is erroneous to charge the jury that if the defendant received the goods knowing them to have been stolen he is guilty of crime, without also stating that he must have fraudulently intended to deprive the owner of them. Rice v. State, 3 Heisk. 215; s. c. 1 Green's Crim. Reps. 366.

**20. To obtain a reward.** A person may be convicted of receiving stolen goods, under the statute of New York, who with guilty knowledge receives a receipt designed as a means of depriving the owner of the whole or part of the goods, although the purpose be not to deprive him of the specific goods, but to defraud him into the payment of a reward for the restoration of them. People v. Wiley, 3 Hill, 194.

**21. Need not have been expectation of benefit.** It is no defense to a prosecution under a statute for receiving or aiding in the concealment of stolen goods, knowing the same to have been stolen, that the defendant received the goods as a friendly act to the thief, without any benefit or expectation of benefit. Com. v. Bean, 117 Mass. 141.

**22.** A person received stolen goods knowing them to have been stolen, not intending to make them his own, or to derive any profit from them, but simply to aid the thief as a friendly act. *Held* that he was rightly convicted of receiving stolen goods knowing them to have been stolen. State v. Bushing, 69 N. C. 29; s. c. 1 Green's Crim. Reps. 372.

2. Indictment.

**23. When it will lie.** In general, a person cannot be convicted of receiving stolen goods until after the conviction of the thief. But in Massachusetts, under the statute of 1784, ch. 56, § 9, the receiver may be indicted for a misdemeanor, although the principal is not prosecuted or known. Com. v. Andrews, 3 Mass. 126.

**24. Description of property.** An indictment for receiving stolen goods must describe the goods with certainty, and a variance in respect to them will be fatal. People v. Wiley, 3 Hill, 194.

**25.** An indictment alleged that the defendant received "sundry pieces of silver coin, made current by law, usage and custom within the State of Alabama, amounting together to the sum of five hundred and thirty dollars and fifteen cents." *Held* insufficient in not specifying the number and denomination of the coin. State v. Murphy, 6 Ala. 845.

**26.** An indictment for receiving stolen goods which describes the stolen property

as so many yards of cloth of a certain value, is sufficiently definite, and will be sustained by proof that they were pieces of any kind of cloth. Com. v. Campbell, 103 Mass. 436.

**27. Need not state value.** In Rhode Island, the common-law distinction between grand and petit larceny having been abolished, an indictment for receiving stolen goods need not allege their value. State v. Watson, 3 R. I. 114.

**28. Name of owner.** In Maine, it has been held that an indictment against a receiver of stolen goods which does not allege the ownership of the property stolen, or that the principal has been duly convicted, is fatally defective. State v. McAloon, 40 Maine, 133.

**29.** Bank bills complete in form, but not issued, are the property of the bank, and may be so described in an indictment for receiving them knowing them to have been stolen. People v. Wiley, 3 Hill, 194.

**30.** Where goods which are the joint property of three persons are stolen from one of them, who has them in his custody for sale, an indictment for receiving the goods knowing them to be stolen, may allege that they are his property. Com. v. Maguire, 108 Mass. 469.

**31.** An indictment for receiving stolen goods may describe them as the property of the person from whom they were taken, although as against the true owner his possession was tortious. Com. v. Finn, 108 Mass. 466.

**32.** Where the offense charged is feloniously receiving goods which have been stolen from an incorporated company, it is necessary to allege in the indictment, and also to prove at the trial, that the injury was done to an existing corporation. Cohen v. People, 5 Parker, 330.

**33. Name of thief.** In general, an indictment for receiving stolen goods knowing them to be stolen, need not state the name of the person who stole them; and the allegation that his name is unknown to the grand jury is equally immaterial. People v. Avila, 43 Cal. 196; State v. Coppenburg, 2 Strobh. 273; Swaggerty v. State, 9 Yerg. 338; State v. Hazard, 2 R. I. 474; State v. Murphy, 6 Ala. 845; Com. v. State, 11 Gray, 60; State v. Smith, 37 Mo. 58; Shriedley v. State, 23 Ohio, N. S. 130; s. c. 2 Green's Crim. Reps. 530. Nor need the indictment allege any consideration passing between the thief and the receiver. Hopkins v. People, 12 Wend. 76.

**34.** But in North Carolina, an indictment for receiving stolen goods must name the person for whom the goods were received, so as to show that the defendant received them from the principal felon, the statute not applying if he received them from any one else. State v. Ives, 13 Ired. 333; State v. Beatty, Phil. N. C. 52.

**35.** A receiver of stolen goods, charged with receiving the property of persons to the jury unknown, stolen by a person to the jury unknown, will not be entitled to acquittal because the same grand jury have found a bill imputing the same larceny to a person named. Com. v. Hill, 11 Cush. 137.

**36. Unnecessary averment.** An indictment for receiving stolen goods, knowing the same to have been stolen, need not add the words "taken and carried away." Com. v. Lakeman, 5 Gray, 82.

**37. Charging offense disjunctively.** In Alabama, the offense of concealing, or aiding to conceal, a stolen horse or mare, knowing the same to have been stolen, and buying or receiving a stolen horse or mare, knowing the same to have been stolen, cannot be charged disjunctively in the same count. Barber v. State, 34 Ala. 213.

**38. Averment of intent.** The indictment should allege that the stolen goods were received with intent to deprive the owner of them. Hurell v. State, 5 Humph. 68.

**39.** An indictment for receiving stolen goods which does not charge that the prisoner received them for the purpose of defrauding the owner, will be bad, and the defect may be taken advantage of by demurrer, writ of error, or motion in arrest of judgment. Pelts v. State, 3 Blackf. 28; People v. Johnson, 1 Parker, 564.

**40.** An allegation in an indictment that the defendants feloniously bought, or received two horses, of the value of one

hundred dollars each, the personal property of S. W., which said horses had before then been feloniously taken and carried away, they, the said defendants, well knowing that the said horses had been feloniously taken and carried away, is a sufficient averment of guilty knowledge on the part of the defendants. Huggins v. State, 41 Ala. 393.

**41. Compelling prosecution to elect.** Where the indictment contains two counts, the first charging the defendant with the larceny of certain goods, and the second with receiving the same goods, knowing them to have been stolen, the court may proceed to trial upon both counts, or compel the prosecution to elect upon which count it will proceed. State v. Hazard, 2 R. I. 474.

3. Place of trial.

**42. With reference to the county.** In New York, a person may be tried and convicted of receiving and having stolen property in any county where the prisoner either received the property at first, or at any time afterward had it. Wills v. People, 3 Parker, 473.

**43.** A. stole cotton in W. county, which he delivered to B. in M. county, the latter knowing at the time that it had been stolen. Subsequently B. sent some of the cotton through W. county. *Held* that the offense of receiving stolen goods was complete in M. county, and that its subsequent removal to W. county did not constitute a second offense of receiving stolen goods. Roach v. State, 5 Cold. Tenn. 39.

**44. Where the goods were stolen in another State.** In Maine, an instruction of the jury that if they believed from the evidence that the defendant bought, received, or aided in concealing property as set forth in the indictment, he at that time knowing the same to have been stolen, it would be their duty to convict, notwithstanding the original larceny was committed in Massachusetts, was held correct under the statute (R. S. ch. 156, § 10). State v. Stimpson, 45 Maine. 608.

4. Evidence.

**45. Must support charge.** Although an indictment for receiving stolen goods need not name the person by whom the larceny was committed, yet if alleged it must be proved. Where, therefore, the indictment charged larceny at common law by one M., and that the defendant received and aided in the concealment of the property, knowing the same to have been stolen, and the larceny by M. as charged was not proved, it was held that the conviction could not be sustained. Com. v. King, 9 Cush. 284.

**46.** The record of the conviction of a thief on his plea of guilty to an indictment against him for stealing certain property, is not admissible in evidence to prove the theft on the trial of the receiver of that property upon an indictment against him alone, which does not aver that the thief has been convicted. Com. v. Elisha, 3 Gray, 460.

**47.** Where an indictment charges the defendant with receiving stolen goods jointly with two other persons, he may be convicted, although the evidence shows only a separate act of receiving by him. State v. Smith, 37 Mo. 58.

**48.** An indictment under the statute of Michigan (R. S. 1846, ch. 154, § 20), for aiding in the concealment of any articles, money, goods, or property, knowing the same to be stolen, is sustained by proof that the defendant assisted the thief in converting the property to his use, or aided him in preventing its recovery by the owner, without showing that the property was secreted. People v. Reynolds, 2 Mich. 422.

**49.** On a trial for receiving stolen goods, knowing that they were stolen, it is not competent for the prosecution to prove that the defendant's house was the resort of thieves, who went there to dispose of their booty. People v. Pierpont, 1 Wheeler's Crim. Cas. 139.

**50. Admissions and declarations of defendant.** On the trial of an indictment for receiving stolen goods, evidence is admissible of a conversation between the defendant and the principal in the larceny. Com. v. Jenkins, 10 Gray, 485.

**51.** On a trial for receiving goods knowing them to have been stolen, it was proved

that the goods were stolen by the clerk of the complainant, and sold or pawned to the prisoner, and that previous to the particular act charged there had been a series of similar transactions between the clerk and the prisoner, in which the latter had received from the clerk goods belonging to the complainant similar to those described in the indictment. *Held* that conversations had between the accused and the clerk at the time of such transactions were admissible as tending to prove guilty knowledge. Copperman v. People, 15 N. Y. Supm. N. S. 199; 8 Ib. 15; affi'd 56 N. Y. 591.

**52.** Where husband and wife are jointly indicted for receiving stolen goods, the declarations of the wife, though criminating both, are admissible in evidence against her. Com. v. Briggs, 5 Pick. 429.

**53.** On a trial for receiving stolen goods knowing them to have been stolen, the defendant offered to prove that during the week previous to receiving the goods he stated publicly his expectation that he would get the goods. *Held* not admissible. People v. Wiley, 3 Hill, 194.

**54. Declarations of confederate.** Where a person receives stolen goods, knowing that they were stolen, and sells them, it will be presumed that the transaction was on joint account; and it is competent to prove the declarations of either party made before the sale relative to the common enterprise. People v. Pitcher, 15 Mich. 397.

**55. Admissions and declarations of thief.** On the trial of a woman for receiving stolen goods, it was proved that the goods had been stolen by a brother of the defendant, and that they were found with a large amount of other stolen property in the defendant's house, no person being at the time in the house but the defendant and one K. K. being introduced by the defendant, she proposed to ask him what was said by the brother at an interview between them, after the goods were stolen, relative to sending his trunks to her house. *Held* that the question was proper as a part of the *res gestæ*. Durant v. People, 13 Mich. 351.

**56. Presumption from possession.** The mere possession of stolen goods is not evidence that the party in whose possession they are found received them knowing they had been stolen. Durant v. People, *supra*.

**57.** Where an indictment alleged the receiving or aiding in the concealment of a sheep and of honey in the comb, which had been stolen, it was held that the fact that strained honey, and the cloth through which it was strained, and mutton tallow and scraps, were found on the defendant's premises, was admissible in connection with evidence tending to show that a sheep was killed and honey in the comb taken there. Com. v. Slate, 11 Gray, 60.

**58.** On the trial of an indictment for receiving goods, knowing them to have been stolen, evidence is admissible that other stolen goods were found in the possession of the defendant, to show guilty knowledge. Devoto v. Com. 3 Metc. Ky. 417.

**59. Proof of other similar acts.** On the trial of an indictment for receiving goods knowing them to be stolen, the prosecution may give in evidence a series of other acts of the like character, to show the knowledge or *scienter* of the accused, or to rebut any presumption of innocent mistake. But the prisoner cannot prove the declarations of the persons from whom he received the stolen goods. People v. Rando, 3 Parker, 335; Wills v. People, Ib. 473.

**60.** On a trial for receiving property knowing it to be stolen, it is competent upon the question of guilty knowledge to prove that the accused had frequently received from the thief the same kind of property knowing that he had stolen it from the same person or place; and conversations between the thief and the accused upon previous occasions when property was received are admissible as part of the *res gestæ* and to show knowledge. Copperman v. People, 56 N. Y. 591; Shriedley v. State, 23 Ohio, N. S. 130; s. c. 2 Green's Crim. Reps. 530.

**61.** Upon a trial for receiving property knowing it to have been stolen, the prosecution, for the purpose of showing guilty knowledge, cannot prove that the accused has received other property from other per-

sons knowing the same to have been stolen. Coleman v. People, 55 N. Y. 81.

62. **Proof that goods were bought for less than they were worth.** Where, on a trial for receiving goods knowing them to have been stolen, it is proved that the price paid by the accused for the goods was much less than their value, it is not error for the court to charge the jury that it is material for them to determine whether the transaction was a sale or a pawn to secure a loan. Copperman v. People, 3 N. Y. Supm. N. S. 199; 8 Ib. 15; 56 N. Y. 591.

63. On the trial of an indictment for receiving brass couplings, knowing them to have been stolen, the stolen couplings were not produced, but a similar coupling exhibited. If the couplings received by the defendant were adapted to present use, a presumption of guilt arose from the fact that the price he paid for them was far less than their value. Witnesses were called to prove that they were machinists and brass finishers, and that without close inspection, it could not be told whether couplings similar to the one shown in the case were of any use except as old brass, to melt over. *Held* that the testimony was admissible as having a tendency to destroy the presumption arising from inadequacy of price. Jupitz v. People, 34 Ill. 516.

64. On the trial of an indictment for receiving stolen goods knowing them to have been stolen, to prove the *scienter* evidence is admissible of a stealing by the same thief from the same owner of goods of a similar description but a short time before the transaction under investigation, and the purchase of those goods by the accused for an inadequate price, with knowledge that they were stolen. Coleman v. People, 58 N. Y. 555; affi'g s. c. 4 N. Y. Supm. N. S. 61.

65. On the trial of an indictment for receiving and having stolen property, a witness testified that he called on the defendants and found that they had the stolen property; that he bought it of them for a great deal less than it was worth; and that he had a memorandum of the property in question with him at the time. *Held* proper to show that the witness had previously received the memorandum and the money with which he bought the stolen property, from the owner. Wills v. People, 3 Parker, 473.

66. **Opportunity to commit offense.** On the trial of an indictment for receiving stolen goods, evidence of the kind of shop which the defendant kept, and the business which he there carried on, is admissible to show his opportunity to commit the offense charged. Com. v. Campbell, 103 Mass. 436.

67. **Presumption from conduct of accused.** Where most of the stolen property was found stored in Williamsburg, but a portion of it used as samples was exhibited to the witness, and offered for sale to him in the city of New York within fifteen minutes after one of the defendants left the witness to get it, it was held that there was sufficient proof that the defendents had received or had the property in question, within the city and county of New York. Wills v. People, 3 Parker, 473.

68. On the trial of an indictment for receiving and aiding in the concealment of stolen goods, proof that B. and D., who were alleged to have stolen the goods, about the period of the larceny were often seen in company going out in the evening and returning home together is admissible; and the prosecution need not prove the precise days named by the witnesses as those on which they saw B. and D. together. Com. v. Hills, 10 Cush. 530.

69. On a trial for receiving stolen goods knowing them to have been stolen, evidence was admitted tending to show that some time after the sale of the stolen property by the defendant, and before either he or the thief had been prosecuted, the defendant was anxious that the thief should run away. *Held* competent. People v. Pitcher, 15 Mich. 397.

70. **Time of receiving goods.** Where under an indictment charging in a single count, A., B. and C. with receiving stolen goods knowing that they were stolen, it is proved that A. received some of the goods at a particular time, it is not competent for the prosecution to show that B. and C. received

the rest of the goods at another time. People v. Green, 1 Wheeler's Crim. Cas. 152.

**71. Testimony of accomplice.** On the trial of an indictment for feloniously receiving stolen goods, the defendant may be convicted upon the testimony of an accomplice which is corroborated by proof of the possession of the goods by the defendant, although such possession was not proved by the accomplice. Com. v. Savory, 10 Cush. 535.

**72. Impeachment of witness for prosecution.** On the trial of an indictment for receiving stolen goods knowing that they were stolen, a witness for the prosecution denied, on cross-examination, that he had any knowledge of a letter shown to him purporting to have been written by him to the defendant, stating that he knew nothing whatever relative to the accusation against the defendant. *Held* that the letter was admissible in evidence to impeach the witness, *prima facie* proof having first been given that the letter was written and sent by the witness to the defendant. Shriedley v. State, 23 Ohio, N. S. 130; s. c. 2 Green's Crim. Reps. 530.

### 5. Charge of judge.

**73. Assuming that proof of certain facts would show guilty knowledge.** The court should, as a general rule, instruct the jury hypothetically, and not assume a conclusive effect to circumstances, or assume that they are proved. Where, on the trial of an indictment for receiving stolen goods, the court charged the jury that a guilty knowledge on the part of the defendant might be shown by proving that he bought the goods very much under their value, or denied their being in his possession, or the like, it was held error, such facts not constituting a legal conclusion of guilt. People v. Levison, 16 Cal. 98.

**74.** But a charge to the jury that if the prisoner received stolen goods under such circumstances that any reasonable man of ordinary observation would have known that they were stolen, and concealed them, they would be justified in finding that he knew they had been stolen, is unobjectionable. Collins v. State, 33 Ala. 434.

### 6. Verdict and judgment.

**75. Where the indictment has a separate count for larceny.** Where the indictment contains two separate counts, one for larceny, and the other for receiving stolen goods, a verdict of "guilty as charged in the second count, to wit, of receiving stolen goods, knowing them to be stolen," will support a conviction under the second count. Oxford v. State, 33 Ala. 416.

**76. Need not name thief.** Under an indictment which charges the receiving of stolen goods from the thief, naming him, a conviction will be sustained which does not find by whom the goods were stolen. People v. Caswell, 21 Wend. 86.

**77. Where the proof differs from charge.** In Alabama, although under an indictment for buying or receiving stolen property, the defendant cannot be convicted of concealing or aiding in the concealment of the property, yet the court may properly refuse to instruct the jury that on such proof, "they cannot find him guilty as charged in the indictment," since such proof does not negative the buying or receiving. Huggins v. State, 41 Ala. 393.

**78. Where there is a plea of guilty of part of charge.** An indictment alleged that the defendant received various articles of stolen property, knowing them to have been stolen, and described and stated the value of each article. The defendant pleaded that he was "guilty of receiving fifty dollars' worth of said property in manner and form as set forth in the indictment." *Held* that judgment could not be rendered against him on the plea. O'Connell v. Com. 7 Metc. 460.

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## Recognizance.

*See* Bail and recognizance.

# Religious Meeting, Disturbance of.

1. Character of offense.
2. Indictment.
3. Evidence.

1. Character of offense.

**1. How regarded.** The willful disturbance of a religious meeting is an indictable offense at common law. People v. Degey, 2 Wheeler's Crim. Cas. 135; State v. Smith, 5 Harring. 490.

**2.** In Tennessee, it is an indictable offense to disturb a congregation assembled for worship, at any time before they have actually dispersed. Williams v. State, 3 Sneed, 313; and the disturbance of a religious congregation met to transact business connected with their interests as a church, is indictable. Hollingsworth v. State, 5 Ib. 518.

**3.** In Connecticut, a singing school for instruction in sacred and church music, is within the statute of 1857, p. 29, making it a crime to disturb any district school, public, private, or select school, while the same is in session. State v. Gager, 26 Conn. 607. But a complaint for such offense, which does not allege that the school was in session, is fatally defective; and it must appear that the school had a teacher. s.c. 28 Conn. 232.

**4.** The violent and rude disturbance of citizens lawfully assembled in town meeting is an indictable offense at common law. Com. v. Hoxey, 16 Mass. 385.

**5.** The malicious disturbing of a meeting of school directors, lawfully assembled, is indictable at common law. Campbell v. Com. 59 Penn. St. 266.

**6. What deemed a disturbance.** In Alabama, to constitute the offense of disturbing religious worship, within the meaning of the statute (Code, § 3257), there must be an actual interruption or disturbance of an assemblage of people met for religious worship, by noise, profane discourse, rude or indecent behavior, or by some other act or acts of like character, at or near the place of worship. It is not enough, however, that the act was reckless or careless. It must be willful or intentional. Harrison v. State, 37 Ala. 154; Brown v. State, 46 Ib. 175. It is not necessary that the interruption or disturbance was during the progress of the religious services. It is sufficient that it occurred after the close of the services, and while a portion of the people were still in the house, and before a reasonable time had elapsed for their dispersion. Kinney v. State, 38 Ala. 224.

**7. What not deemed an offense.** The defendant was indicted for disturbing a congregation while engaged in divine worship, which disturbance consisted in his singing in so peculiar a manner as to excite mirth in one portion of the congregation and indignation in the other. It appeared from the evidence that at the end of each verse his voice was heard after all the other singers had got through, and that the disturbance was decided and serious; that the church members had remonstrated with him, to which he replied that he would worship his God, and that as a part of his worship, it was his duty to sing. It was further proved that the defendant was a strict member of the church, and a man of exemplary deportment, and that he had no intention or purpose to disturb the congregation, but was conscientiously taking part in the religious services. *Held*, that the prosecution could not be sustained. State v. Linkaw, 69 N. C. 214; s. c. 1 Green's Crim. Reps. 288.

**8.** A church regulation, that no one shall leave the church during the services, is illegal. People v. Browne, 1 Wheeler's Crim. Cas. 124.

2. Indictment.

**9. Averment of place.** An indictment for disturbing public worship must charge that the acts causing the disturbance were committed at or near the place where the assembly met for worship. State v. Doty, 5 Cold. Tenn. 33.

**10. Description of meeting.** In North Carolina, an indictment for disturbing "a religious assembly, commonly called a quarterly meeting conference," was held bad in

not charging that the assembly had met "for divine worship," "divine service," "religious worship," or "service," or something of the same import. State v. Mitchell, 3 Ired. 111.

**11.** An indictment for disturbing a religious meeting need not allege that the congregation was at the time engaged in worship. State v. Yarborough, 19 Texas, 161.

**12. Description of disturbance.** In Arkansas, an indictment, under the statute making the disturbing of a congregation or private family assembled for religious worship a misdemeanor, must describe the disturbance. State v. Minyard, 7 Eng. 156.

**13.** An indictment charged that J. H. did contemptuously disturb a congregation of people assembled for religious worship, by profanely swearing, and by laughing and talking aloud. *Held* not bad for duplicity. State v. Horn, 19 Ark. 578.

**14.** In Virginia, it was held that an indictment for disturbing a religious congregation need not allege the means by which the disturbance was effected. Com. v. Daniels, 2 Va. Cas. 402.

3. Evidence.

**15. Place.** Under an indictment for disturbing a religious congregation assembled for worship in a church, or other place, the place of assembly being descriptive of the offense, must be proved as charged. Stratton v. State, 8 Eng. 688.

**16.** An indictment for disturbing a religious congregation assembled in a certain church is not supported by proof that the defendant disturbed a congregation assembled in the open air. Id.

**17. Specific acts.** An indictment alleging that the defendant disturbed a congregation by using indecent gestures and threatening language in the presence and hearing of such congregation is not supported by proof that while the minister was preaching, the defendant, who was a clergyman of another denomination, interrupted his discourse by declaring "the doctrines you advance are untrue and false! I hold the Word of God in my hand, and am prepared to defend it at all times," the defendant being excited, and producing confusion in the congregation, but using no gestures or threatening language. Stratton v. State, *supra*.

**18. Proof of disturbance by others.** Evidence that other persons had been guilty of a similar disturbance in the same church, without objection or notice on the part of the members of the congregation, is irrelevant. Harrison v. State, 37 Ala. 154.

**19. Proof of character.** Under an indictment for disturbing religious worship, the defendant may prove his good character, but until he has done so the prosecution cannot show his bad character as a disturber of public worship. Id.

## Resisting Process.

*See* Officer, tit. Indictment, *sub.* 37.

## Revenue Law, Violation of.

**1. Indictment.** The offense of effecting an entry, and of aiding in effecting an entry of goods, may be charged conjunctively in one count, against the same person, and the proof of either will sustain the charge. U. S. v. Bettilini, 1 Woods. 654.

**2. Burden of proof.** Where an indictment charges the defendant with violating the revenue law, in doing business without a license and without paying a special tax, and in failing to keep books, the burden of proof is on the defendant to show that he had a license, paid the tax, and kept the books. U. S. v. Devlin, 6 Blatchf. 71.

## Revolt.

**1. Restraint of master.** To constitute a revolt, the confining the master of the vessel may be by means of moral restraint, by threats of violence, or by physical restraint of his person. U. S. v. Thompson, 1 Sumner, 168.

**2. Attempt to commit.** A combination by the crew of a vessel to resist the lawful

commands of the master to make sail and go to sea, is an attempt to commit a revolt. But they may lawfully refuse to go to sea in the vessel if they have reasonable cause to believe, and do believe, that the vessel is unseaworthy; and the burden of proof is on them to show this. U. S. v. Nye, 2 Curtis C. C. 225.

**3. Proof of ownership of vessel.** On the trial of an indictment for an attempt to commit a revolt on board of an American vessel in a foreign port, the ownership of the vessel by an American citizen may be proved orally. U. S. v. Seagrist, 4 Blatchf. 420.

## Riot.

1. What constitutes.
2. Indictment.
3. Trial.
4. Evidence.
5. Verdict.

### 1. What constitutes.

**1. How defined.** A riot is a tumultuous disturbance of the peace by three or more persons assembled of their own authority, with intent mutually to assist each other against any person who shall oppose them, and afterward putting the design into execution in a terrific and violent manner, whether the object be lawful or unlawful. State v. Brazil, 1 Rice, 257; State v. Connolly, 3 Rich. 337; Com. v. Runnels, 10 Mass. 518; State v. Cole, 2 McCord, 117; Pennsylvania v. Craig, Addis. 190; State v. Brooks, 1 Hill, S. C. 361; State v. Russell, 45 New Hamp. 83.

**2.** In Georgia, the statute defines a riot to be where "any two or more persons, either with or without a common cause of quarrel, do an unlawful act of violence, or any other act, in a violent and tumultuous manner." Prince v. State, 30 Ga. 27.

**3. What assemblage requisite.** In Maine, if persons upon being lawfully assembled conspire to cause a breach of the peace, they are guilty of riot. State v. Snow, 18 Me. 346. In Illinois and South Carolina, a riot may be committed in doing a lawful act in a violent and tumultuous manner. Dougherty v. People, 4 Scam. 180; State v. Brooks, 1 Hill, S.C. 361; State v. Connolly, 3 Rich. 337; State v. Blair, 13 Ib. 93. In Missouri, the common-law offense of riot does not exist. To constitute riot under the statute of that State, the act done or attempted must be unlawful. Smith v. State, 14 Mo. 147. In North Carolina, where the assembly is lawful, the subsequent illegal conduct of the persons so assembled, will not make them rioters. State v. Stalcup, 1 Ired. 30. To constitute a riot it is not necessary that the facts charged should amount to a distinct and substantive indictable offense. An attempt to commit an act of violence which, if completed, would be an indictable offense, is sufficient. State v. York, 70 N. C. 66.

**4. Acts amounting to.** Where persons go through the street of a city, crying fire, blowing horns, and shooting guns, it is a riot. And a riot may be committed by kicking a foot ball in a noisy and tumultuous manner, calculated to excite terror among the inhabitants of a town. If a number of persons go to a theater with the intention of rendering the performance inaudible, they may be guilty of a riot, though they commit no acts of violence. State v. Brazil, 1 Rice, 257.

**5.** In Massachusetts, it was held that an unlawful and tumultuous assembly, disturbing the selectmen of a town in the exercise of their duty on a public day in a public place, and obstructing the inhabitants of a town in the exercise of their constitutional right to vote, was an aggravated riot. Com. v. Runnels, 10 Mass. 518.

**6.** In Pennsylvania, where a liberty pole was raised contrary to law in a riotous manner, and United States commissioners insulted, it was held that such acts were indictable. Pennsylvania v. Morrison, Addis. 274.

**7. By trespassers.** The disturbance of another in the enjoyment of a right which would ordinarily constitute a trespass, when done by numbers unlawfully combined is a riot. Com. v. Runnels, 10 Mass. 520.

8. Four persons went by agreement at midnight for a frolic to the stable of another and shaved his horse's tail, at the same time making a noise which aroused the owner of the horse and alarmed his family. *Held* that they were guilty of riot. State v. Alexander, 7 Rich. 5.

9. Three persons went in company where one Brown was at work. One of them procured a club in the presence of the other two, used threatening language to Brown, and commanded his associates to cut up Brown's house logs, which they did. *Held* that these acts constituted a riot. State v. Montgomery, 1 Spear, 13.

**10. Destruction of one's own property.** A man may lawfully pull down his own house in a tumultuous manner, and with a great concourse of people, and if it be accompanied with no circumstances calculated to excite terror or alarm in others, it will not constitute a riot. State v. Brazil, 1 Rice, 257.

**11. Aiding and encouraging others in the commission of unlawful acts.** To make a person a rioter, he need not be actively engaged in the riot, but only present giving countenance, support or acquiescence. Williams v. State, 9 Mo. 268; State v. Straw, 33 Maine, 554.

12. The following charge was held correct: "If a crowd of three or more persons engaged in the attack on H. with the preconcerted intent to commit an assault and battery upon him, and accomplished the unlawful act, and the defendants, or any of them, participated in the unlawful proceeding, they were guilty of riot." People v. White, 55 Barb. 606.

13. A riot may be committed where only two persons are actively engaged, while a third is present aiding and abetting them. State v. Straw, 33 Maine, 554.

14. But where an individual is engaged in acts of violence, and others stand by inciting him to commit them, it is not a riot. Scott v. U. S. 1 Morris, 142.

15. A person who commences a riot, but abandons it before it is finished, is liable for the whole. State v. Blair, 13 Rich. 93.

**16. Neglecting to suppress.** In Pennsylvania, a justice of the peace was held liable to indictment for not trying to suppress a riot. Resp. v. Montgomery, 1 Yeates, 419.

2. Indictment.

**17. Must state facts.** An indictment for riot must set out fully and clearly all the facts constituting the offense. Whitesides v. People, Breese, 4.

**18. Must charge unlawful assemblage.** An indictment for a riot cannot be sustained where it contains no proper allegations of the assembling of three or more persons. Com. v. Gibney, 2 Allen, 150.

19. The indictment must allege an unlawful assembly or set forth circumstances showing that such was its character. State v. Stalcup, 1 Ired. 30; McWaters v. State, 10 Mo. 167. It need not be alleged that the acts were to the terror of the people when there is a charge of unlawful acts riotously committed. Com. v. Runnels, 10 Mass. 518. It is sufficient to charge that the defendants assembled "with force and arms," and being so assembled committed acts of violence, without repeating the words force and arms. Ib.

20. An indictment for riot need not allege that a proclamation under the riot act was made, or that the defendants assembled to aid each other in the execution of an act of a private nature, or that the act for which they assembled was consummated, or that they assembled to do the act which it is averred they did do. An indictment is not bad for duplicity which charges a riotous assembly and an act of violence. State v. Russell, 45 New Hamp. 83.

**21. Names of the defendants.** The riot need not be charged to have been committed by three persons named. It is sufficient to name those who are known, and to allege that the others are unknown. State v. Brazil, 1 Rice, 257; State v. Calder, 2 McCord, 462.

**22. Description of property.** An indictment for a riot in pulling down a dwelling-house, and for breaking and entering the house, must state whose house it is. If a person occupy a dwelling-house as the wife,

guest, servant or part of the family of another, it is in law the occupation of such other person, and must be so charged in the indictment. State v. Martin, 3 Murphy, 533.

23. **Averment of violence.** An indictment for a riot with with "an intent to make an assault," must allege that it was "with force and violence." It is not sufficient to charge it to have been "with force and arms." Martin v. State, 9 Mo. 283.

24. **Averment of terror.** Where the indictment charges the going about armed without committing any acts of violence, the words "to the terror of the people" are necessary, the offense in such case consisting in terrifying the people. State v. Brazil, 1 Rice, 257.

25. **Averment of purpose.** An indictment for riot is sufficient which does not charge any other unlawful purpose than that of disturbing the peace. State v. Renton, 15 New Hamp. 169.

26. **Indorsement of name of prosecutor.** In Missouri, when the name of the prosecutor is not indorsed on an indictment for a riot, the objection may be first raised in the Supreme Court on appeal. McWaters v. State, 10 Mo. 167.

### 3. Trial.

27. **Defendants not entitled to be tried separately.** In South Carolina, where several were jointly indicted for riot and assault, the court refused to permit them to be tried separately. State v. Berry, 1 Bay, 316. It was otherwise in Tennessee. State v. Allison, 3 Yerg. 428.

28. In New York, where an indictment against several charges a riot and riotous assault and battery, the accused are not entitled to demand separate trials, but it is in the discretion of the court to try them jointly or separately. Such acts do not amount to felony at common law, but to a misdemeanor, and are not within the statute (3 R. S. 5th ed. 970, § 24), which applies to persons who shall assault, &c., "with knife, dirk, dagger or other sharp dangerous weapon. People v. White, 55 Barb. 606.

### 4. Evidence.

29. **Order of proof.** In proving the guilt of the defendants on an indictment for riot, the regular way is first, to show the combination, and then what was done in pursuance of the unlawful design. But it is discretionary with the judge to prescribe the order of proofs in each particular case, and if he deems it expedient to permit the prosecution first to prove the riotous acts, it will only be after the whole case on the part of the State has been openly stated, and the prosecution has undertaken to connect the defendants with the acts done. It will, however, be sufficient to fix the guilt of any defendant, if it be proved that he joined himself to the others after the riot began, or encouraged them by words, signs, or gestures, or otherwise took part in their proceedings. People v. White, 55 Barb. 606.

30. **Burden of proof.** The following instruction is erroneous: That in riotous and tumultuous assemblies, all who are present and not actually assisting in the suppression in the first instance, are in presumption of law participants, and bound to prove their non-interference. State v. McBride, 19 Mo. 239.

31. **Proof of possession.** Under an indictment for a riot and forcible trespass in entering a man's dwelling-house, he being in the actual possession thereof, and taking therefrom his personal property, it need not be proved that the prosecutor had a right to the property; and evidence tending to show his possession is admissible. State v. Bennett, 4 Dev. & Batt. 43.

32. An indictment for a riot and forcible trespass on the land of a person, will not be supported by proof that he is the owner of the land, but that it was then in the possession of his tenant. The indictment should charge that the offense was committed on land in the possession of the tenant. State v. Wilson, 1 Ired. 32.

33. An indictment for riot charged "the pulling down, breaking, removing and destroying the dwelling-house of one L. S., the said L. S. being in the peaceful possession thereof." It was proved on the trial that L. S. was a married woman, but that her husband did not live with her. The defendants having been found guilty, a new

trial was granted. State v. Martin, 3 Murphey, 533.

**34.** On the trial of an indictment for a riot, the possession of the prosecutor may be proved by parol. State v. Wilson, 1 Ired. 32.

**35. Sufficiency of proof.** On the trial of an indictment for riot, a verdict of guilty will be sustained, although the evidence only showed an unlawful assembly. State v. Brazil, 1 Rice, 257.

**36.** On a trial for a riot, whether the other rioters were named in the indictment or not, proof of a riot in which any two other persons joined with the defendant, is sufficient. Com. v. Berry, 5 Gray, 93.

5. Verdict.

**37. Where the charge is for riot and assault.** A verdict of guilty of riot, under an indictment for a riot and assault, is only a partial finding, and therefore bad. State v. Creighton, 1 Nott & McCord, 256.

**38.** On the trial of an indictment for riot and riotous assault and battery by four persons, one of them may be found guilty of assault and battery and the others acquitted. Shouse v. Com. 5 Barr, 83.

## Robbery.

1. What constitutes.
2. Indictment.
3. Evidence.
4. Verdict.

1. What constitutes.

**1. At common law.** Feloniously taking the property of another in his presence and against his will, by putting him in fear of immediate personal injury, is robbery at common law. Com. v. Holland, 1 Duvall, Ky. 182.

**2. Need not have been a putting in fear.** Robbery may be committed by the felonious and forcible taking of property from the person of another without putting him in fear. State v. Gorham, 55 New Hamp. 152.

**3. Must have been force or intimidation.** To constitute robbery, the property must be taken by violence to the person beyond a simple assault and battery. The violence must be sufficient to force the person to part with his property, not only against his will, but in spite of his resistance. Where the proof showed that the prisoner took money from the prosecutor while they were walking together in a friendly manner, no more force being used than sufficient to pull the money out of the prosecutor's pocket; that the men had been drinking; and the prosecutor at the time of the act evidently considered and treated the prisoner's conduct as a joke, it was held not to be robbery but larceny. McCloskey v. People, 5 Parker, 299.

**4.** On a trial for robbery, the following charge to the jury was held not to be erroneous: "If you believe C.'s statement to be true, that the prisoner put his arm around his neck, and violently and forcibly jerked him back, and forcibly and feloniously took from his person his pocket-book and money, it was a robbery with a felonious intent and accompanied by violence." Mahoney v. People, 5 N. Y. Supm. N. S. 329; affi'd 59 N. Y. 659.

**5.** Merely snatching a watch from another is not robbery. People v. Hall, 6 Parker, 642. But where the prisoner, while walking at night with a stranger in a city, suddenly snatched the stranger's watch from his vest pocket, breaking the guard chain about his neck, exclaiming, "Damn you, I will have your watch," and then ran away with the watch, followed by the stranger, it was held that the threat, accompanied by the force, made the offense robbery, although surprise aided the force to enable the prisoner to accomplish his purpose. State v. McCune, 5 R. I. 60.

**6.** The forcible capture of a citizen's horses by military order, on neutral ground, occupied and controlled by rebel military authority, was held a belligerent act, and not robbery. Com. v. Holland, 1 Duvall, Ky. 182.

**7.** In Georgia, by the penal code, robbery may be committed either by force or intimidation. By force is meant actual personal violence, a struggle, and personal outrage.

When the offense is committed by putting in fear, it is robbery, though the property be taken under color of a gift; but the taking must be against the will of the owner. The property need not have been delivered cotemporaneously with the assault. It is sufficient that it was delivered afterward during the continuance of the fear or apprehension. Long v. State, 12 Ga. 293.

8. **Construction of Act of Congress.** The word "rob," in the act of Congress of 1825, § 22, is used as at common law. "Jeopardy" means a well grounded apprehension of danger to life in case of refusal or resistance. U. S. v. Wood, 3 Wash. C. C. 440. Under an indictment for robbing the mail and putting the life of the mail carrier in jeopardy, a sword or pistol in the hand of the robber, by the fear of which the robbery was effected, is a "dangerous weapon," although the sword is not drawn, or the pistol presented. Ib. Pistols are "dangerous weapons," within the contemplation of the act, without proof that they were loaded. U. S. v. Wilson, 1 Baldw. 78.

9. **Threatening to accuse of crime.** A robbery may be committed by obtaining personal property from the person, or in the presence of the owner, by threats of a groundless criminal accusation. People v. McDaniels, 1 Parker, 198. But it has been held that mere threats of a criminal prosecution, without force actual or constructive, will not constitute robbery, unless the threat be to prosecute for an unnatural crime. Long v. State, *supra*.

10. In New York, where A. threatened to arrest B. on a charge of having committed the crime against nature (the charge being without any foundation, and known to be so by A.), and B., through fear of such threatened arrest, was induced to give A. twenty dollars, and a receipt for thirteen dollars which A. owed B., and to promise to pay A. twenty dollars more, it was held that A. was guilty of robbery in the second degree. People v. McDaniels, 1 Parker, 198.

11. To constitute robbery through intimidation, by charging another with the crime against nature, the charge need not have been direct, or made in unequivocal language. It is sufficient that the language employed was designed to communicate such a charge, and was so understood at the time by the person threatened. Ib.

12. **Removal of property.** In Massachusetts, to constitute robbery under the statute (R. S. ch. 125, § 15), the property taken must have been carried away by the assailant. Com. v. Clifford, 8 Cush. 215.

13. **Property need not be taken from owner.** To constitute robbery, the property need not be taken from the person of the real owner. It is sufficient if the party robbed has a general or special property in or right to the possession of the goods taken. State v. Ah Loi, 5 Nev. 99; Com. v. Clifford, *supra*.

14. To constitute robbery in the first degree, under the statute of New York, the person from whom the property is taken, need not be the owner of it. Brooks v. People, 49 N. Y. 436.

15. **Must be felonious intent.** The taking must have been *animo furandi*. But force or intimidation having been proved, the *animus furandi* will be inferred. Long v. State, 12 Ga. 293.

16. Where several persons make an assault upon another, intending to rob him of his property, and in the course of a scuffle between the parties, one of the assailants snatches a pistol from him, their only object in getting possession of the pistol being to prevent its being used against them, their subsequent carrying it away and converting it, would not constitute robbery; but otherwise, if their intention at the time was to deprive the prosecutor wholly of the pistol, although on snatching it, they also intended to prevent its being used against them. Jordan v. Com. 25 Gratt. 943.

17. In Massachusetts, under the statute of 1818, ch. 24, punishing a person who shall rob, being armed with a dangerous weapon with intent to kill or maim, or who being armed, shall actually strike the person robbed, it is sufficient that the robber had the intent to kill and main as a means of effecting the robbery, if it should become neces-

sary, although not an intent to kill or main at all events; but an intent merely to terrify would not be enough to constitute the chief offense of the statute. Com. v. Martin, 17 Mass. 359.

**18. All concerned are equally guilty.** Where several persons combine to commit a robbery, and one only perpetrates the act, all are constructively present, and equally guilty. State v. Heyward, 2 Nott & McCord, 312.

2. Indictment.

**19. Averment of force.** An indictment for robbery which alleges the stealing, &c., by force and violence, is sufficient at common law, without the averment that the party robbed was put in fear. Com. v. Humphries, 7 Mass. 242.

**20.** An indictment for robbery is good which alleges that the property of A. was forcibly taken from the person of B. against his will, without averring that it was taken without the consent or against the will of A. or stating the nature of B.'s possession. People v. Shuler, 28 Cal. 490.

**21.** In an indictment for highway robbery, it is sufficient to allege that the property was taken from the person and against the will of the owner, feloniously and violently. State v. Cowan, 7 Ired. 239.

**22.** The averment, in an indictment for robbery, of an intent to steal or rob is not sufficiently made by the words feloniously did seize, take, and carry away. Mathews v. State, 4 Ohio, N. S. 539.

**23.** An indictment for robbery, being armed with a dangerous weapon, need not aver that the striking and wounding therein charged were inflicted with the dangerous weapon with which it was charged the defendant was armed at the time of the robbery. Com. v. Mowry, 11 Allen, 20.

**24. Must charge a taking from the person.** An indictment for robbery must allege that the money was taken from the person of another. Stegar v. State, 39 Ga. 583.

**25.** The following indictment was held fatally defective: That the defendant "did feloniously, forcibly, violently, unlawfully, and with force of arms, and by force, threats, and intimidation, take from another, to wit, from one J. H., a leather bag and purse," &c. People v. Beck, 21 Cal. 385.

**26.** An indictment for robbery which alleges that the defendant made an assault upon A. and put him in fear of his life, and did take, steal, and carry away feloniously the money of said A., is insufficient in not charging that the money was taken from the person of A., and against his will. Kit v. State, 11 Humph. 167.

**27. Averment of place.** An indictment for highway robbery may allege either that the robbery was committed in the highway, or that it was committed near it. State v. Anthony, 7 Ired. 234.

**28. Description of property taken.** An indictment for robbery need not allege the kind and value of the property taken. State v. Burke, 73 N. C. 83. But describing the property taken as "ten dollars in money of the United States currency," was held too indefinite. Crocker v. State, 47 Ala. 53.

**29. Averment of ownership of property.** An indictment for robbery must state correctly the ownership of the property taken, as well as the name of the person from whom it was taken. Smedly v. State, 30 Texas, 214.

**30.** An indictment for robbery which contains no allegation as to the ownership of the property taken, nor states that it does not belong to the defendant, is fatally defective. People v. Vice, 21 Cal. 344.

3. Evidence.

**31. Proof of violence.** It is not necessary to prove both violence and putting in fear, proof of either being sufficient. State v. Burke, 73 N. C. 83.

**32. Proof of putting in fear.** The person robbed is a competent witness to prove that at the time of the robbery he was terrified. It is not necessary to prove actual fear. It is sufficient to show that the taking was under such circumstances as would be likely to create an apprehension of danger in the mind of a man of ordinary experience, and induce him to part with his property for the safety of his person. Long v. State, 12 Ga. 293.

**33. Proof of concert of action.** Where several are tried for robbery, it is not necessary that it should be proved that they actually met and agreed to commit the offense. Concert of action may be shown from circumstances; and if, from all the evidence, the jury are satisfied that the defendants acted together, it is sufficient. Miller v. People, 39 Ill. 457.

**34. Place.** Under an indictment charging that a robbery was committed in the highway, the prosecution cannot prove that it was near the highway. State v. Cowan, 7 Ired. 239.

**35. Property taken.** An indictment for robbery charged the taking of certain money and bank bills, "to wit, six dollars and eighty-five cents in bank bills, usually called United States legal tender notes, as follows: One bill of the denomination of five dollars, one bill of the value of one dollar, and eighty-five cents in currency, usually known and called postal currency." The proof was that the bills were national bank bills, and not United States notes, nor legal tender notes; and that the currency alleged to have been stolen was what is called fractional currency, issued under the act of Congress passed March 3d, 1863 (12 U. S. Stats. at Large, 711, § 4). *Held* that the variance was fatal. People v. Jones, 5 Lans. 340.

**36. Declarations of party injured.** On the trial of an indictment for robbery, a statement by the prosecutor that he had been robbed, made a few minutes after the crime was committed, is admissible in evidence as part of the *res gestæ*. State v. Ah Loi, 5 Nev. 99. Where, therefore, the prosecutor swore to being knocked down and robbed, and other witnesses who came up immediately were allowed to testify that he then told them he had been robbed, it was held proper. Lambert v. People, 29 Mich. 71.

**37.** Where, on a trial for robbery, the person robbed testified that while walking with the prisoner, he felt the prisoner's hand in his pocket, and charged the prisoner with robbing him, and that the witness had been drinking, but was not so drunk as not to know what occurred, it was held that the witness's declaration to a third person, immediately after the transaction in the prisoner's absence, that the latter had taken his watch, was admissible in evidence to show that he was not so much under the influence of liquor as not to be conscious of all that took place. State v. Bryan, 74 N. C. 351.

**38. Suspicious conduct of accused.** It is the province of the jury to determine from the acts of the defendant, and the surrounding circumstances, what the defendant's purpose was, in stopping persons on the public highway at eleven o'clock at night, with a cocked and loaded revolver presented at short range. Such an assault, if unexplained, would be sufficient to warrant a conviction for an attempt to rob. People v. Woody, 47 Cal. 80.

**39.** The avowal of the prisoner before the robbery was committed, of an intention to rob D.; the fact that the prisoner used violence toward him on the night of the robbery; and the further fact that a part of the stolen property was found in the prisoner's possession, are sufficient evidence of guilt to sustain a conviction. Bloomer v. People, 1 N. Y. Ct. of App. Decis. 146; s. c. 3 Keyes, 9.

**40. Attempt of prisoner to escape.** On the trial of four persons for robbery alleged to have been committed in taking money from the person of another, it appeared that on the arrest of the defendants no portion of the money was found in their possession. *Held* competent for the prosecution to prove that one of them attempted to escape, and was pursued by the officer some distance, as tending to show that he might have disposed of the money. People v. Collins, 48 Cal. 277.

**41. Situation of party injured.** Proof that the complainant on the night of an alleged robbery, had on his person money and other valuables; that he became insensible from intoxication; that he was badly injured in his person; and that when he was restored to consciousness his property was gone, and one of his pockets turned inside out, is evidence that his property had

been taken from his person against his will. Bloomer v. People, *supra*.

**42. Testimony required to prove corpus delicti.** Where on a trial for highway robbery, the court declined to instruct the jury in regard to any separation between the circumstances which tended to prove the *corpus delicti* and those which went to identify the guilty party, or to tell them that when the *corpus delicti* is attempted to be shown by circumstantial evidence, it must be so established that the combined circumstances produce the same degree of certainty as positive proof, it was held a ground for setting aside the verdict. State v. Davidson, 30 Vt. 377.

**43. Determination of felonious intent.** On a trial for robbery, the question whether or not a felonious intent has been proved, is to be determined by the jury. People v. Hall, 6 Parker, 642.

4. VERDICT.

**44. Cannot find defendant guilty as accessory after the fact.** In California, a person charged in an indictment with the commission of robbery, cannot be convicted as accessory after the fact to the robbery. People v. Gassaway, 28 Cal. 404.

**45. May be for assault and battery.** In Virginia, under an indictment for robbery in the common form, the jury found the defendants "not guilty of the felony charged; but guilty of an assault and battery." *Held* that the verdict was good under the statute (Code, ch. 208, § 27). Hardy v. Com. 17 Gratt. 592. And the same was held where the charge was an assault with intent to kill. Canada v. Com. 22 Ib. 899.

*See* LARCENY.

## Sabbath.

*See* SUNDAY.

## Search Warrant.

**1. Can only be issued upon oath or affirmation.** The provision in the Constitution of the United States that "no warrant shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized," is in terms re-enacted in the New York bill of rights. Comfort v. Fulton, 39 Barb. 56.

2. In Maine, where it does not appear upon the face of the proceedings, that before the warrant was issued to search the defendant's dwelling-house for intoxicating liquors, the magistrate caused the testimony of the witnesses to be signed and verified by oath or affirmation, the warrant is fatally defective. State v. Carter, 39 Maine, 262.

**3. Must be in strict conformity with the statute.** A search for, and seizure of property not made in the cases and according to the exact mode prescribed by statute, is unlawful. As the direction of a warrant is a material part of it, where the statute contemplates that a search warrant shall only be executed by the sheriff of the county, or a constable or marshal of the town or city, and it is directed to "any constable of the county," it is void. People v. Holcomb, 3 Parker, 656.

4. In New York, it has been held questionable whether a search warrant can be executed, or will afford protection to an officer, where it shows upon its face, that the party who has the property alleged to be stolen is charged with the larceny of it, and no warrant for his arrest accompanies or is incorporated in the search warrant. Ib.

**5. Description of place to be searched.** The search warrant must contain as specific a description of the place to be searched as would be required in a deed of land. The complaint and warrant must be construed together; and if the descriptive words are sufficient to designate the place to be searched independent of the repugnant words, the latter will be rejected. State v. Bartlett, 47 Maine, 388.

6. Where a search warrant stated that the complainant "suspects that the stolen property is concealed in the stable of C., on the east side of the canal in the village of W., in said county, known as the red barn," and

directed the officer "to search the place where the said property is suspected to be concealed," it was held void in not designating particularly the place to be searched. People v. Holcomb, *supra*.

7. The complaint prayed for process to search "the store occupied by R., situated on the northerly side of F. street, being numbered 197 on said street. The warrant directed the officer to search the store, giving the same description, except that the number was stated to be 179. It was proved that R. occupied only one store, and that his store was on the northerly side of F. street, number 197. *Held* that the description in the warrant was sufficient to justify the search. State v. Robinson, 49 Maine, 285.

**8. Right of officer to enter apartment of third person.** A., who occupied a house, in which he kept liquors for sale in violation of law, had a barrel of ale in a room of the same house, which was occupied by B., but with a faucet passing through a partition into the apartments of A. A search warrant having been issued to an officer, requiring him to enter A.'s house and search for and seize liquors, the officer entered B.'s room and removed the barrel of ale. *Held* that he was justified in so doing, and that B., in resisting him, was guilty of assault and battery. Com. v. Leddy, 105 Mass. 381.

**9. Force and effect of officer's return.** Where the return upon a warrant shows that the officer seized liquors and arrested the defendant by virtue of it, the latter cannot claim that his premises were searched without a warrant, or that the proceedings should be solely against the liquors. State v. McCafferty, 63 Maine, 223.

10. The officer's return upon search and seizure process is admissible in evidence as a part of the record of judgment; and the record of conviction is proof that the defendant had all the liquors described in the officer's return, with the intention of selling the same in violation of law. State v. Lang, 63 Maine, 215.

*See* OFFICER.

# Seduction.

1. OFFENSE, WHEN COMMITTED.
2. INDICTMENT.
3. EVIDENCE.

1. OFFENSE, WHEN COMMITTED.

**1. Meaning of.** The word "seduction," used in reference to a man's conduct toward a female, *ex vi termini*, implies sexual intercourse between them; and where a statute provides that "every person who shall seduce a female," &c., without mentioning the word fornication, the latter will be implied. State v. Bierce, 27 Conn. 319.

**2. Must be promise, or deception.** A person cannot be convicted of seduction in the absence of proof of any artifice, promise, flattery or deception employed by him. State v. Crawford, 34 Iowa, 40.

**3. Promise may be conditional.** On the trial of an indictment for seduction under promise of marriage, it is not error in the court to refuse to charge that if the promise to marry was not an existing one, but dependent upon the result of the illicit intercourse as furnishing evidence that the female had been previously virtuous, the accused could not be convicted. Boyce v. People, 55 N. Y. 644, Church, Ch. J., and Rapallo, J., *dissenting*.

**4. Need not be pregnancy.** A conviction of seduction under promise of marriage, may be had under the New York statute, notwithstanding pregnancy did not result from the intercourse. Cook v. People, 2 N. Y. Supm. N. S. 404.

**5. Chastity of female.** The words "previous chaste character," in the statute of New York to punish seduction, mean actual personal virtue. People v. Kenyon, 5 Parker, 254; 26 N. Y. 203; Crozier v. People, 1 Parker, 453. A female is not a virtuous woman within the meaning of the statute of Georgia punishing seduction, whose mind is corrupted and defiled by lustful desires and unchaste wishes, although previous to her seduction she never had carnal intercourse with a man. Wood v. State, 48 Ga. 192, Warren, Ch. J., *dissenting*.

6. In Iowa, although the female may have

had previous sexual intercourse with the defendant, yet if she had reformed, and was chaste in fact at the time of the seduction, such latter offense is within the statute. State v. Carron, 18 Iowa, 372. And in Minnesota, on a trial for seduction, the following instruction was held proper: "If the jury find that the defendant had carnal intercourse with the prosecutrix at the time and place charged in the indictment, under a promise to marry, they may convict, although she may have had carnal connection with the defendant previously, provided she had reformed and was chaste at the time of the commission of the offense." State v. Timmens, 4 Minn. 325.

**7. Intention of defendant.** It is no defense to an information for seduction, that the only inducement used by the defendant to prevail on the female to surrender to him her chastity, was a promise of marriage on his part sincerely made, and intended by him to be performed; nor that the female, subsequent to the illicit connection between her and the defendant, misconducted herself. State v. Bierce, 27 Conn. 319.

**8.** In Iowa, on the trial of an indictment for taking and enticing away an unmarried female under the age of fifteen years, from and without the consent of the person having the legal charge of her, for the purpose of prostitution, it was held the duty of the court to charge that "if the defendant only intended to obtain the body of the female for his own personal carnal enjoyment, and no more, the act did not amount to her prostitution in the eye of the law." State v. Ruhl, 8 Iowa, 447.

**9. Who may commit the offense.** An individual who is old enough to be, and is the father of a child begotten upon the body of the prosecutrix under a promise of marriage, is "a man" within the statute of New York punishing seduction. People v. Kenyon, 5 Parker, 254; 26 N. Y. 203.

**10. By married man.** It is a good defense to an indictment for the seduction of an unmarried female under the statute of New York of 1848, that at the time of committing the acts charged, the defendant was, and for five years previous thereto had been, a married man, having a wife and family, with whom he was then living, all of which, at time of the alleged promise and seduction was well known to the prosecutrix. People v. Alger, 1 Parker, 333.

**11. Custody of female.** Under an indictment for enticing an unmarried female under the age of fifteen years away from the person having legal charge of her, for the purpose of prostitution, if her parents are dead and no guardian has been appointed, those with whom she resides as a member of the family, and who have her under their care and protection, will be deemed to have "the legal charge of her person." State v. Ruhl, 8 Iowa, 447.

**12. Statute of limitations.** The defendant was tried on an information charging him with having on the 3d of March, 1862, seduced and debauched one M. T., an unmarried woman; the statute providing that no prosecution shall be commenced after one year from the time of committing the offense. It was proved that the first sexual intercourse between the parties took place July 8th, 1860; that the complainant yielded in consequence of the defendant's promise to marry her; that the promise of marriage was renewed at every act of intercourse; that the improper intercourse was afterward repeated at short intervals, but was twice suspended during several months, and finally renewed and continued until April, 1862; and that she became pregnant from an intercourse which occurred on or about the day charged in the information. *Held* that the prosecution was not barred by the statute of limitations, and that the defendant was properly convicted. People v. Millspaugh, 11 Mich. 278, Martin, Ch. J., *dissenting*.

**13.** But in New York, where the illicit intercourse began four or five years before the finding of the indictment, and continued until within two years, it was held not to be a seduction within two years before the finding of the indictment within the statute of 1848. Safford v. People, 1 Parker, 474.

### 2. Indictment.

**14. Must aver that female was seduced.** In Georgia, an indictment under the statute

punishing seduction, is not good, which simply charges that the defendant had, by persuasion and promise of marriage, procured a virtuous unmarried woman to have illegal sexual intercourse with him. It must be alleged that the woman has been "seduced and induced to submit to the lustful embraces of the seducer, and to allow him to have carnal connection with her." Wood v. State, 48 Ga. 192.

**15. Need not allege a valid promise.** An indictment for seduction, under the statute of New York of 1848, is sufficient, which avers that the female was seduced under promise of marriage, without alleging a mutual or valid promise; and the defendant may be convicted, although the promise was in fact a false pretense, and one which the seducer knew it was not in his power to perform. Crozier v. People, 1 Parker, 454.

3. Evidence.

**16. Promise of marriage.** The seduced female is competent to prove that the promise of marriage was the inducement to the illicit intercourse. Where nothing appears to the contrary, the defendant will be deemed to have been of full age so far as may affect his promise. Kenyon v. People, 26 N. Y. 203.

**17.** On the trial of an indictment for seducing a female under promise of marriage, the following charge to the jury is unobjectionable: That if they were fully satisfied from the evidence, that the defendant promised to marry the prosecutrix if she would have carnal connection with him, and she believing and confiding in such promise, and intending on her part to accept such offer of marriage, did have such carnal connection, it is a sufficient promise of marriage under the statute. Kenyon v. People, *supra;* s. p. Boyce v. People, 55 N. Y. 644. A mutual promise on the part of the female seduced, is implied, if she yields to the solicitations of the seducer, made under his promise to marry. Ib.

**18. Corroboration of prosecutrix.** In New York, on the trial of an indictment for seduction under promise of marriage, it is only necessary that the female should be corroborated as to the facts constituting the crime, and not as to her having been unmarried and of previous chaste character. Kenyon v. People, 26 N. Y. 203; s. c. 5 Parker, 254. There need not be direct and positive corroborative evidence as to any of the material facts; but it is sufficient, if the female seduced is corroborated by circumstances. Boyce v. People, 55 N. Y. 644. Where the defendant was a frequent visitor at the house of the mother of the prosecutrix, waited on her to balls and parties, frequently took her to ride, and when the mother spoke to him about keeping company with her daughter, said his motives were good, it was held that there was evidence tending to show that he had made her a promise of marriage. And it having also been proved that she was delivered of a child, and that there was opportunity for the defendant to have become the father of it if there were such promises as she had sworn to, it was held that the fact of the illicit connection was sufficiently established. People v. Kenyon, *supra.*

**19.** But in Minnesota, a conviction cannot be had under the statute against seduction, upon the testimony of the woman seduced, unless she is corroborated upon every material point, to wit: the promise to marry, the seduction under such promise, and the previous chaste character of the female. State v. Timmins, 4 Minn. 325.

**20. Repetition of offense.** On the trial of an indictment for seduction under promise of marriage, after the prosecutrix had testified to the commission of the offense on the 2d of July, as charged in the first count of the indictment, the prosecution was permitted, against the objection of the defendant, to prove the offense charged in the second count of the indictment to have been committed on the 19th of August. *Held* error, it being impossible that the offense should have been twice committed against the same female. Cook v. People, 2 N. Y. Supm. N. S. 404.

**21. Moral character of prosecutrix.** On a trial for seduction, it is not error in the court to refuse to allow the defendant to prove that the reputation of the prosecutrix

for morality and virtue in the neighborhood where she resides, is bad; for the reason that her reputation in that regard, would be injuriously affected by the seduction itself. People v. Brewer, 27 Mich. 134; s. c. 2 Green's Crim. Reps. 562.

22. On the trial of an indictment for seduction under promise of marriage, the defendant cannot show that the character of the prosecutrix for chastity was bad, by general reputation. He must prove specific acts. And the same as to the house of the mother of the prosecutrix; its character cannot be proved by general reputation, but only by specific acts. People v. Kenyon, 5 Parker, 254; 26 N. Y. 203. See Safford v. People, 1 Parker, 474.

23. In Iowa, under the statute punishing seduction (Code, § 2586), it is not necessary in order to establish the unchaste character of the female, to prove that she had been previously guilty of sexual intercourse, but only to show that she was lewd in her behavior. Andre v. State, 5 Iowa, 389. But in the absence of proof to the contrary, the chastity of the female will be presumed. Ib. See Boak v. State, Ib. 430; State v. Higdon, 32 Ib. 262.

24. On the trial of an indictment for seduction under promise of marriage, evidence is inadmissible to show that after the alleged seduction she had been guilty of fornication with another person. Boyce v. People, 55 N. Y. 644.

25. **Interrogation of prosecutrix as to previous acts.** On the trial of an indictment for seduction, the prosecutrix may be interrogated on her cross-examination as to her prior unchaste acts and connection before the date of the alleged offense with men other than the defendant. State v. Sutherland, 30 Iowa, 570.

26. **Testimony to impeach prosecutrix.** On the trial of an indictment for seduction under promise of marriage, the prosecutrix testified that she had never had any sexual intercourse with any other person than the defendant. *Held* that the defendant had a right to contradict her, either directly by proof of such intercourse with others, or by facts from which the jury might infer the same, and that for the latter purpose it was proper to show wanton or lewd acts. People v. McArdle, 5 Parker, 180.

27. It is error to refuse to charge the jury on a trial for seduction, that one reason for disbelieving the prosecutrix is the fact that in her testimony on the trial she disclosed acts done, and habits of life pursued by her, which exhibited moral turpitude. Wood v. State, 48 Ga. 192.

28. Although on a trial for seduction the admission of the prosecutrix that she had had sexual intercourse with another person than the defendant, may be used as impeaching testimony after the proper foundation has been laid for its introduction, yet such evidence is not admissible when not offered in connection with other proofs to show a habit of lewd talk and conversation, but for the inferences which might be drawn from the single fact of the admission that she was not at the time in the path of virtue. People v. Brewer, 27 Mich. 134; s. c. 2 Green's Crim. Reps. 562.

29. **Proof of good character of prosecutrix.** On the trial of an indictment for seduction, three or four witnesses for the defendant testified to acts of lewdness on the part of the prosecutrix; and one witness stated that on two occasions he had sexual connection with her. *Held* competent for the prosecution to prove that the prosecutrix had a good character for chastity, was correct and modest in her deportment, and that until the occurrence with the defendant she was considered virtuous. State v. Shean, 32 Iowa, 88, Dey, J., *dissenting.*

*See* Abduction; Incest; Lasciviousness.

## Self-Defense.

*See* Assault and battery; Homicide.

## Sentence.

1. **Duty of court to pronounce.** Where a general verdict of guilty is rendered, the court must either pronounce sentence on the verdict, or grant a new trial. It cannot set

aside the verdict and direct a judgment of acquittal to be entered for the defendant. State v. Curtis, 6 Ired. 247.

2. **Competency of court.** Sentence of death being about to be passed on the prisoner by a judge holding the United States Circuit Court alone, in the absence of his associate, it was objected by the prisoner's counsel that this could not be done, for the reason that the trial had been conducted before both judges. *Held* that it was competent for the court to pass the sentence when held by a single judge. U. S. v. Gordon, 5 Blatchf. 18.

3. In California, at the close of the testimony on a trial for murder, the district judge of the 14th district, who had thus far presided at the trial, was obliged to go home on account of dangerous illness in his family. It was thereupon agreed by the parties that the judge of the 6th judicial district might sit during the remainder of that trial. The latter accordingly held the court, heard the argument, charged the jury, and received the verdict. Before the day appointed for passing sentence, the judge of the 6th judicial district resumed his seat on the bench and pronounced the judgment of the court. *Held* not improper. People v. Henderson, 28 Cal. 465.

4. **Delaying sentence.** If, after verdict and before sentence, the prisoner becomes insane, it is good cause for staying sentence. State v. Brinyea, 5 Ala. 241.

5. In New York it has been held that the Court of Oyer and Terminer ought not to delay the sentence in order to have the decision reviewed by certiorari, except in cases of great doubt and difficulty, but should leave the prisoner to his writ of error. Colt v. People, 1 Parker, 611.

6. In New York it can seldom become necessary to delay the sentence, for the reason that the governor is authorized, upon conviction of the prisoner for a capital offense, to take the opinion of the attorney-general, and of the high judicial officers of the State, before he permits the execution of the sentence, and to suspend it if there are doubts as to its legality, until the case can be taken to the Supreme Court on a writ of error. Colt v. People, *supra*.

7. In Massachusetts, where a juror did not agree to find the prisoner guilty of murder, but only of manslaughter, and through mistake assented to a verdict for murder, it was held no cause for delaying sentence. Com. v. Drew, 4 Mass. 391.

8. In Alabama, the statute of 1836 provided that in capital cases, whenever points were reserved as novel and difficult for the decision of the court, the execution of the judgment should be postponed to a time not less than twenty-five, nor more than forty days after the commencement of the next succeeding term of the Supreme Court. *Held* that a prisoner who was sentenced under such circumstances was entitled to the delay given by the statute, and that a sentence fixing an earlier day for his execution was erroneous. John v. State, 2 Ala. 290.

9. **Postponement of sentence after plea of guilty.** A prisoner pleaded guilty to an indictment, and the prosecuting attorney did not move for sentence, but the indictment was filed and the defendant permitted to go at large on a recognizance to appear when sent for. After several intervening terms of the court the prosecuting attorney moved for sentence, which it was held might then be passed. Com. v. Chase, Thach. Crim. Cas. 267.

10. **Original indictment not necessary.** Possession of the original indictment is not essential to the sentencing of the prisoner. Where the indictment has been stolen from the files, its place may be supplied by a copy. Mount v. State, 14 Ohio, 295.

11. **When accused must be present.** To sustain a conviction for felony, the record must affirmatively show that the prisoner was personally present in court when he was tried, and when sentence was pronounced against him. Graham v. State, 40 Ala. 659.

12. Judgment for corporal punishment cannot be rendered against the prisoner in his absence, and the record must affirmatively show that he was present in court. Young v. State, 39 Ala. 357; Peters v. State, Ib. 681; Gibson v. State, Ib. 693. But it is not necessary that the fact that he was

present should be stated in express terms in the record. It is sufficient if it can be collected therefrom by fair intendment. West v. State, 2 Ala. 212; Cole v. State, 5 Eng. 318; People v. Winchell, 7 Cow. 524. The following recitals in the judgment entry are not enough: "This day came the solicitor and the defendant, and it is therefore considered by the court that the prisoner be taken hence to the jail of the county," &c. Eliza v. State, 39 Ala. 693.

13. In California, if the prisoner objects that he was absent at the time of trial or rendition of verdict, or passing of sentence, he must prove it. People v. Stuart, 4 Cal. 218.

**14. When presence of defendant not necessary.** It is not error for the court to name the day for passing sentence when the defendant is not in court. People v. Galvin, 9 Cal. 115.

15. The prisoner need not be present in court when judgment is pronounced, unless corporal punishment is to be inflicted. Son v. People, 12 Wend. 344.

16. Where it is in the discretion of the court to sentence the prisoner to corporal punishment, it does not follow that he must be present, though the rule is that such a sentence shall not be imposed in his absence. But where the sentence is a fine merely, the defendant's presence is not necessary. People v. Taylor, 3 Denio, 91.

17. In Iowa, under the statute (Code, sec. 3059), where the offense charged is a misdemeanor, judgment may be rendered in defendant's absence. Hughes v. State, 4 Iowa, 554; State v. Shepard, 10 Ib. 126.

**18. Asking prisoner if he has anything to say.** On every trial for felony, before the prisoner is sentenced, the court should demand from him what he has to say why judgment should not be pronounced against him, and the fact that he was present and that such demand was made of him ought to appear upon the record. Safford v. People, 1 Parker, 474.

19. In cases of felony, it is error to omit to ask the prisoner, before passing sentence, if he has anything to say why sentence should not be awarded against him. Mullen v. State, 45 Ala. 43.

20. In New York and Mississippi, in capital cases, it is indispensable that the record show that the prisoner was asked why sentence should not be pronounced upon him. Messner v. People, 45 N. Y. 1, Peckham, J., *dissenting;* James v. State, 45 Miss. 572.

21. In Alabama, under an indictment for felony, the record need not affirmatively show that the prisoner was asked by the court before sentence if he had anything to say in arrest of judgment. But it will be presumed that the question was asked unless the record affirmatively shows the contrary. Aaron v. State, 39 Ala. 684; Robin v. State, 40 Ib. 72; Taylor v. State, 42 Ib. 531.

**22. When prisoner need not be interrogated.** It is only in capital cases that the court is required to demand of the prisoner whether he has anything to say why sentence should not be passed upon him. West v. State, 2 Ala. 212; Grades v. State, 2 Ga. 253.

23. In Massachusetts, it is only in capital trials that there need be a recital on the record that the defendant was asked what he had to say why judgment should not proceed against him. Jeffries v. Com. 12 Allen, 145.

24. In Georgia, it has been held that in the minor felonies the neglecting to ask the prisoner if he has anything to say why sentence should not be pronounced against him is not a sufficient ground for reversing the judgment, provided it appears that he and his counsel were both in court when the sentence was pronounced, and urged nothing in arrest of judgment or in mitigation of the prisoner's guilt. Grady v. State, 11 Ga. 253.

25. In New York, the objection that it does not appear that the prisoner after conviction of burglary was asked why sentence should not be passed upon him, is not ground for reversal, though it would be in a capital case. In the absence of any statement, objection or exception upon the record, it will be implied that the usual formalities were observed. People v. McGeery, 6 Parker, 653.

26. In Iowa, where the defendant is con-

victed of a misdemeanor, the record need not show that he was asked if he had any reason to state why judgment should not be pronounced against him. State v. Stiefle, 13 Iowa, 603.

27. **Upon overruling demurrer.** Judgment having been rendered in favor of the defendant on demurrer to an indictment for a misdemeanor, and the judgment reversed on error, it was held that the appellate court must give a final judgment for the prosecution on the demurrer and pass sentence on the defendant, and that he could not withdraw the demurrer and plead. People v. Taylor, 3 Denio, 91.

28. **Under pleas of former conviction and acquittal.** In Iowa, after the issues under the pleas of former conviction and acquittal were determined against the defendants by the verdict of the jury, the court proceeded to judgment without trying the defendants again on the question of their guilt. *Held* proper under the statute (Revision, § 4833.) State v. Green, 16 Iowa, 239.

29. **In case of escape.** Where after conviction the prisoner escapes, and cannot be produced on the day fixed for his sentence, he may be sentenced at a subsequent term of the court. State v. Pierce, 8 Nev. 291.

30. In Massachusetts, under the statute (R. S. ch. 143, § 49), where a person sentenced to the house of correction for successive terms of imprisonment on several convictions, breaks prison and escapes before the expiration of the sentence on his first conviction, he may, upon being found guilty of such escape, be sentenced to the State prison for the unexpired term to which he was sentenced on all the previous convictions. Stevens v. Com. 4 Metc. 360.

31. **Where defendant violates condition of pardon.** Where a prisoner having been pardoned on condition that he shall leave the State and not return, violates the condition, he is remitted to his original sentence, and when brought before the court to have it repronounced, and another day assigned for its execution, he may show cause why it should not be passed. State Chancellor, 1 Strobh. 347.

32. **In case of repeal of statute.** Where a penal statute is repealed without a saving clause as to prosecutions previously commenced, a prisoner found guilty of an offense created by such statute, cannot be sentenced. Com. v. Kimball, 21 Pick. 373; Heald v. State, 36 Maine, 62. Where the prisoner who had been sentenced to be hung was not executed on the day named in the sentence, and was brought before the court at a subsequent term to be resentenced, it was held that the repeal of the law under which he was convicted and sentenced, subsequent to the original sentence, made it necessary to discharge him. Aaron v. State, 40 Ala. 306, Walker, Ch. J., *dissenting.*

33. As the statute of New York prescribing the punishment of death was only declatory of the common law, where a prisoner after the repeal of the statute was sentenced to suffer the punishment of death, it was held that he was sentenced to be executed in the mode required by the common law. Done v. People, 5 Parker, 364.

34. **Under joint indictment.** Where several are convicted under a joint indictment, they must be separately sentenced. State v. Gay, 10 Mo. 440; Waltzer v. State, 3 Wis. 783.

35. Where two persons jointly indicted are convicted, and their common surety confesses judgment on the conviction, a separate judgment should be rendered against each, with his surety, for the amount of the fines and costs. McLeod v. State, 35 Ala. 395.

36. **Under indictment containing several counts.** Where an indictment containing several counts, charges an offense embraced in one transaction, it is error in the court to sentence on each count separately. Woodford v. State, 1 Ohio, N. S. 427.

37. But in Pennsylvania, where an indictment contains two counts, the first, for willfully and maliciously breaking and entering a storehouse or shop, with intent feloniously to steal, take and carry away goods and chattels, and the second for simple larceny, enumerating the goods, and the defendant having been found guilty was sentenced to separate and distinct terms of imprisonment

on each count, it was held proper. Com. v. Birdsall, 69 Penn. St. 482.

38. On a general verdict of guilty, under an indictment containing counts for burglary, larceny, and receiving stolen goods knowing them to have been stolen, the prisoner may be sentenced for the highest offense charged. People v. McGeery, 6 Parker, 653; People v. Bruno, Ib. 657.

39. Where one count of an indictment is good, and another defective, and there is a general verdict of guilty, it is not error to render judgment on the good count, unless there is some matter of aggravation alleged in the defective count which may be supposed to have influenced the judgment and sentence. Arlen v. State, 18 New Hamp. 563.

40. Where the clerk of the court undertook to number the counts of the indictment on the margin, but by mistake, commenced the numbering with the second count, and the mistake was continued through the whole of the counts, and the jury returned a verdict of guilty on the seventh and eighth counts as numbered, it was held error for the court to sentence the prisoner on the seventh and eighth counts of the indictment, they being numbered six and seven. Woodford v. State, 1 Ohio, N.S. 427.

**41. Under indictment charging distinct offenses.** Where there is a general verdict of guilty on an indictment charging several distinct offenses, a single sentence is legal, if it do not exceed the sum of the several sentences which may be awarded. Carleton v. Com. 5 Metc. 532.

42. In Massachusetts, where the defendant is charged with breaking and entering a dwelling-house with an intent to steal, and stealing therefrom, and there is a general verdict of guilty, he is to be sentenced for house-breaking and not for larceny. Com. v. Hope, 22 Pick. 1. But if a breaking and entering with intent to steal be proved, and a larceny committed at another time be also proved, the prisoner may be sentenced for both offenses. Kite v. Com. 11 Metc. 581. See Murray v. Com. 13 Metc. 514.

43. In the same State, under the statute (R. S. of Mass. ch. 126, § 19), where a person is convicted of three distinct larcenies at the same term of the court, there must be a consolidated judgment against him as a common and notorious thief. Haggett v. Com. 3 Metc. 457.

**44. Under two indictments.** Where the prisoner is found guilty on two separate indictments at the same term of the court, he may be sentenced on both, the second to commence upon the expiration of the first. State v. Smith, 5 Day, 175.

**45. Where there are distinct punishments.** Where the prisoner is liable to two distinct and independent punishments, he cannot allege for error, that only one of the punishments is adjudged against him. Kane v. People, 8 Wend. 203.

**46. Under verdict finding less than amount charged.** Where the value laid in an indictment for larceny is over one hundred dollars, the jury may in their verdict find the value less than the amount charged, and then the prisoner is sentenced in the same manner as if the indictment had laid the value under one hundred dollars. Com. v. Griffin, 21 Pick. 523.

**47. Under statute punishing common-law offense.** Where an offense is a misdemeanor at common law, punishable by fine and imprisonment in the discretion of the court, and a statute is passed punishing by a fine of five hundred dollars, the court, in passing sentence, cannot exceed the punishment imposed by the statute. State v. Thompson, 2 Strobh. 12.

**48. Before expiration of previous sentence.** Where a prisoner, under an unexpired sentence, commits an offense, he may lawfully be convicted thereof, and the succeeding period of imprisonment will commence on the termination of the period next preceding. State v. Connell, 49 Mo. 282.

**49. For successive terms of imprisonment.** Where a person is found guilty and sentenced to imprisonment for one offense, and during the same term is found guilty of others, he may be sentenced on the latter, each term of imprisonment to commence at the expiration of the other. State v. Smith, 5 Day, 175; Com. v. Leaths, 1 Va. Cas. 151; Russell v. Com. 7 Serg. & Rawle, 489; Kite v. Com. 11 Metc. 581.

50. **To additional punishment.** A sentence to additional punishment on an information charging three previous convictions and sentences, will be sustained, if two of those sentences were valid, although one of them has been reversed for error. Newton v. Com. 8 Mete. 535. See Wilde v. Com. 2 Mete. 408.

51. In New York, under the statute (Sess. 42, ch. 246, § 4), providing that a person a second time convicted of petit larceny shall be imprisoned in the State prison, to justify a sentence for the increased penalty, the second offense must have been committed after a conviction for the first. It is not sufficient that the prisoner committed two successive petit larcenies which were severally and successively prosecuted to conviction, though the second indictment charged the first conviction as a part of the offense. People v. Butler, 3 Cow. 347.

52. **Designating time of imprisonment.** A sentence is defective which does not state the date at which the imprisonment shall commence. Kelly v. State, 3 Smed. & Marsh. 518.

53. Where the statute provides that the term of imprisonment shall begin upon and include the day of conviction, a sentence that the defendant be imprisoned in the State prison for one year, and that until taken there he be confined in the county jail, sufficiently defines the term of imprisonment in the State prison. State v. Gaskins, 65 N. C. 320.

54. In Connecticut, where a justice of the peace sentenced the defendant to the workhouse until released by order of law, it was held error, such a sentence being for an indefinite time. Wash v. Belk, 3 Conn. 302.

55. In New York, at a Court of Special Sessions, the defendant was convicted of petit larceny, and sentenced to pay a fine and to imprisonment for thirty days, and in case the fine was not paid, to imprisonment for the term of four months. *Held* that as the Special Sessions under the statute (Sess. 36, ch. 104, § 4), could imprison not to exceed thirty days for the non-payment of a fine, the sentence was good for the thirty days, but void for the four months. Matter of Sweatman, 1 Cow. 144.

56. The requirements of a statute that a sentence shall be so made that the imprisonment shall expire between March and November, is merely directory, and a failure to comply with such requirement does not render the sentence void. Miller v. Finkle, 1 Parker, 374.

57. **Directing mode and place of imprisonment.** In New York, the sentence of a prisoner to confinement in the State prison is necessarily a sentence of imprisonment at hard labor. Done v. People, 5 Parker, 364; and the omission to designate in the sentence the prison in which the convict is to be confined is not error. Weed v. People, 31 N. Y. 465.

58. In Massachusetts, under the statute (R. S. ch. 139, § 8), providing that a sentence to imprisonment in the State prison shall be partly to solitary confinement and partly to confinement at hard labor, a sentence which directs no solitary confinement will be erroneous. Stevens v. Com. 4 Mete. 360.

59. Where a statute provided that an offense might be punished by imprisonment in the penitentiary or county jail, it was held that a sentence to imprisonment in the county jail at "hard labor," was void, notwithstanding "hard labor" made a part of a sentence to the penitentiary under the statute. Daniels v. Com. 7 Barr, 371.

60. **Designating execution of prisoner at a time not fixed by law.** A sentence which directs the execution of a person convicted of murder at a time beyond the period prescribed by the statute, is not void; but such designation may be rejected as surplusage. State v. Summers, 9 Nev. 269.

61. Where the court below improperly sentenced the prisoner to be executed on a certain day, and he procured a stay of proceedings until the day of execution had passed, it was held that as the error had, by his own act, become immaterial, he was not entitled to a reversal of the judgment. Lowenberg v. People, 27 N. Y. 336, Balcom, Wright, and Emott, JJ., *dissenting*.

62. **Cannot be upon agreed case.** The

defendant cannot be sentenced upon facts agreed upon by the parties. State v. Cross, 34 Maine, 595.

63. **Must not be conditional.** The sentence must be absolute, and not have annexed to it a condition for its subsequent remission. State v. Bennett, 4 Dev. & Batt. 43.

64. **Amendment of sentence.** Where the court in passing sentence has overlooked a requirement of the statute, it may correct the judgment at the same term, before the sheriff has executed it, by vacating the first sentence and passing a new one. Miller v. Finkle, 1 Parker, 374; Drew v. Com. 1 Whart. 279.

65. In Alabama, under the statute (Code, §§ 3663–64), where the judgment of conviction in a capital case does not name the day of execution, the appellate court on affirming the judgment will specify the day. Russell v. State, 33 Ala. 366.

66. In California, where the court after conviction of murder, sentenced the prisoner to be executed, but afterward caused him to be again brought into court, and amended the sentence by shortening the time, it was held proper. People v. Thompson, 4 Cal. 238.

67. In Virginia, where the defendant was sentenced in the court below to the penitentiary for a shorter time than was authorized by law, it was held that the Circuit Court might, upon proper proceedings had before that court, correct the error, and sentence the defendant for the shortest period fixed by the statute for the offense of which he was convicted. Logan's Case, 5 Gratt. 692.

68. Where a statute provides that an offense shall be punished by fine *or* imprisonment, and the court having sentenced the offender to pay a fine, and also to imprisonment; the fine has been paid, it cannot amend the judgment by imposing imprisonment instead of the former sentence. *Ex parte* Lange, 18 Wallace, 163.

69. **Correction of sentence on appeal.** Where no objection is made to the verdict, but the sentence is defective, the judgment will be reversed without disturbing the verdict, and the cause remanded with directions to pronounce the proper sentence. Kelly v. State, 3 Smed. & Marsh. 518.

70. Where the prisoner was not present when sentence of corporal punishment was pronounced, a new trial will not necessarily be granted, but the judgment will be reversed, and the cause remanded, with instructions to the court below to proceed to pronounce sentence upon the prisoner according to law. Cole v. State, 5 Eng. 318.

71. A defendant having been convicted of felony, appealed from the judgment on the ground that the facts stated in the indictment did not constitute felony. The Supreme Court reversed the judgment for this error, and directed the court below to give judgment for a misdemeanor, that being the judgment which should have been there rendered. State v. Upchurch, 9 Ired. 454.

72. In New York, where a murder was committed after the passage of a certain act, and the indictment, trial and conviction were had subsequent to the enactment of a law changing the mode of punishment, but the latter statute declared that no offense committed previous to the time when it took effect should be affected by it, and the court notwithstanding, sentenced the prisoner to the punishment prescribed by it, the court directed the record to be remitted to the Oyer and Terminer pursuant to the laws of 1863, ch. 226, with directions to pronounce the judgment prescribed by the first mentioned act. Ratzky v. People, 29 N. Y. 124; s. p. McKee v. People, 32 N. Y. 239.

73. In Alabama, where the court below, on a trial for larceny, pronounces a wrong sentence, the appellate court will reverse the sentence and pronounce judgment in conformity with the statute. Oliver v. State, 5 How. Miss. 14. And see Sword v. State, 5 Humph. 102; Logan's Case, 5 Gratt. 692.

74. In Arkansas, when the court in passing sentence does not comply with the statute, it will not be ground for the reversal of the judgment, but a compliance with the statute will be directed. Brown v. State, 8 Eng. 96.

75. In Tennessee, where a statute provid-

ed that the defendant on conviction should be fined and imprisoned, and the Circuit Court sentenced him merely to pay a fine, it was held that the Supreme Court might, under the statute of 1800, ch. 49, order his imprisonment. Sword v. State, 5 Humph. 102.

76. **Presumption in favor of sentence.** The appellate court will not presume that the prisoner was tried and sentenced without an indictment, simply because the entries showing the trial, conviction, and sentence are copied from the minutes into the transcript before the indictment. Cawley v. State, 37 Ala. 152.

77. Where the indictment contains several counts, each charging a distinct offense, and a general verdict of guilty is rendered, it will be presumed that the judge who tried the case pronounced judgment for the offense to which the evidence was directed and was applicable. People v. Shotwell, 27 Cal. 394.

78. Where there is a general verdict and a general judgment upon an indictment charging in one count a rape, and in another an assault and battery with intent to commit a rape, it will be intended that the prisoner was sentenced for the rape. Cooke v. State, 4 Zabr. 843.

79. **Execution of sentence.** The time at which the sentence shall be carried into effect, forms no part of the judgment of the court. State v. Cockerham, 2 Ired. 204.

80. Where a person having been convicted of an assault, was sentenced to be imprisoned for two calendar months "from and after first day of November next," but he was not imprisoned according to the sentence, and at a subsequent term of the court it was directed that the sentence for two months' imprisonment should be immediately carried into effect, it was held proper. Ooton v. State, 5 Ala. 463.

81. Where the defendant is sentenced to imprisonment for a certain term, and until he shall pay the costs, if payment is not made, the continued imprisonment, after the expiration of the term, is of the same character as that before. Riley v. State, 16 Conn. 47.

82. Where a prisoner, being sentenced to imprisonment for a term to commence immediately after the expiration of a previous sentence, the first sentence is reversed, the term of the second sentence begins to run from the time of the reversal of the first. Brown v. Com. 4 Rawle, 259.

83. Where there are two sentences of imprisonment, the second imprisonment to commence when the first terminates, if the latter is shortened by a reversal of the judgment or a pardon, it then expires, and the other sentence takes effect the same as if the previous one had expired by lapse of time. Kite v. Com. 11 Metc. 581.

84. Although a prisoner who was convicted in Philadelphia, and sentenced to imprisonment in the jail and penitentiary of that city, ought, upon the sale of the prison, to have been removed to the Eastern Penitentiary instead of to the Moyamensing Prison, as was done, it was held that he could not be discharged on *habeas corpus* on account of the mistake. Reddill's Case, 1 Whart. 445.

85. A person having been sentenced to imprisonment at hard labor for a specified number of years in the jail and penitentiary for the city and county of Philadelphia, and confined, in pursuance of the sentence, in the Walnut street prison, upon its sale, was removed, with other prisoners, to the Arch street prison, and kept there without being put to hard labor. *Held* that he was not entitled to be discharged on *habeas corpus*. Pember's Case, 1 Whart. 439.

86. In cases where, before the expiration of the term of imprisonment, the prisoner escapes, no new award of execution is necessary or proper. The prisoner can be retaken at any time and confined under the authority of the original judgment until his term of imprisonment has been accomplished. If an order be made awarding execution of the sentence, it will not conclude the prisoner on *habeas corpus*, neither is it reviewable on writ of error. Haggerty v. People, 53 N. Y. 476; s. c. 6 Lans. 332.

87. In Massachusetts, sentences of death are carried into effect by a warrant from the executive, at a time therein directed, in the

mode and at the place fixed by law, and the court does not fix the time or place or issue any warrant to the sheriff directing the execution. Webster v. Com. 5 Cush. 386.

88. A sentence was as follows: "That you, A. B., be removed from this place and detained in close custody in the prison in this county, and thence taken at such time as the executive government of this commonwealth may, by their warrant appoint, to the place of execution, and there be hung by the neck until you are dead." The following entry was made in the record: "Whereupon, all and singular the premises being seen and understood, it is considered by the court that the said A. B. be taken to the jail from whence he came, and thence to the place of execution, and there be hanged by the neck until he be dead." *Held* that, as the sentence in the form in which it was entered, did not undertake to direct the place where it should be executed, it was not erroneous. Ib.

89. The sentence may be carried into effect, notwithstanding a repeal of the law, or the enactment of a mitigated punishment. State v. Addington, 2 Bail. 516; *contra*, Com. v. Kimball, 21 Pick. 373.

90. **Effect of sentence on rights of prisoner.** The effect of a sentence by which all the civil rights of the prisoner are suspended, commences, as does likewise the time of imprisonment, from the time of passing sentence. Miller v. Finkle, 1 Parker, 374.

91. The consequence of vacating a sentence and pronouncing a new sentence during the same term, is the same as to the civil rights of the defendant, as if the first judgment had been reversed on error, and the defendant had been again convicted on a second trial. Ib.

92. Where, according to a sentence, the term of imprisonment in the State prison would expire in December, and afterward, at the same term, the sentence was vacated and a new sentence pronounced making it expire in October, and the prisoner, subsequent to the first sentence and before the second sentence, executed an assignment of his book accounts, it was held that such assignment was valid. Ib.

93. **Assignment of error upon.** The defendant may assign error upon a sentence which is not conformable to the statute, although the sentence is less severe than that which the law prescribes. Haney v. State, 5 Wis. 529.

94. **Evidence in mitigation of.** The court will permit the prisoner to offer evidence in mitigation of sentence, after the plea of guilty. Com. v. Horton, 9 Pick. 206.

## Show.

*See* THEATRICAL PERFORMANCE.

## Slave Trade.

1. UNLAWFUL PARTICIPATION IN.
2. SEIZURE AND FORFEITURE OF VESSEL.
3. INDICTMENT.
4. EVIDENCE.

### 1. UNLAWFUL PARTICIPATION IN.

1. **How regarded.** The slave trade is not piracy, unless made so by treaty or law of the nation where the party belongs. The Antelope, 10 Wheat. 67.

2. The slave trade is repugnant to the law of nations, and a claim based upon it will be disregarded in any court where it is asserted, unless the trade is legalized by the nation to which the claimant belongs. La Jeune Eugenie, 2 Mason, 409; The Antelope, *supra*.

3. **Acts of Congress in relation to.** The offense prohibited by the act of Congress of May 10th, 1800, consists in carrying persons from one foreign country to another for the purpose of selling them as slaves. The offense is committed as soon as the vessel reaches her place of destination, whether the slaves are sold or not. U. S. v. Smith, 4 Day, 121.

4. The act of Congress of March 2d 1807, § 7, which prohibits the importation of slaves into any port or place within the jurisdiction, &c., does not embrace the offense of importing persons to be held as

slaves, but of hovering on the coast with such an intent; and although it forfeits the vessel, it is silent as to the disposition of the negroes on board, any further than handing them over to the proper authorities. U. S. v. Preston, 3 Pet. 65.

5. The acts of Congress of May 10th, 1800, and April 20th, 1818, prohibit both the carrying of slaves on freight, and the transportation of them from one port to another of the same foreign country, as well as from one foreign country to another. The Merino, 9 Wheat. 402.

6. The offense of sailing from a port with intent to engage in the slave trade in violation of the act of Congress of April 20th, 1818, ch. 86, §§ 2, 3, is not committed unless the vessel leaves the port. U. S. v. La Coste, 2 Mason, 129.

7. The language of the act of Congress of March 20th, 1818, prohibiting the slave trade, is not applicable to colored persons who were domiciled in the United States, and reconveyed there after a temporary absence. The Ohio, 1 Newberry Adm. 409.

8. Both intent and acts which have a tendency to reduce some person to slavery are essential under the act of Congress of 1820, ch. 113, to make a person guilty of a capital offense; though under other acts of Congress a misdemeanor may be committed by merely transporting slaves from one place to another abroad. U. S. v. Libby, 1 Woodbury & Minot, 221.

9. It is not a violation of the slave trade act of 1820, ch. 113, § 4, for a person to transport slaves for hire from port to port, without any interest in, or power over the negroes so as to impress upon them the future character of slaves. To constitute the offense, the negroes need not have been free when they were seized or received on board the vessel. To make a negro a slave within the meaning of the act, that character must have been fixed upon him for the future. U. S. v. Battiste, 2 Sumner, 240.

10. **State courts have not jurisdiction.** The courts of the several States could not exercise jurisdiction in cases of the violation of the laws prohibiting the slave trade, unless authorized by act of Congress; and all jurisdiction over the subject was taken from them by the 4th section of the act of Congress approved March 3d, 1819. State v. Caroline, 20 Ala. 19.

2. Seizure and forfeiture of vessel.

11. **Vessel, when to be seized.** Under the act of Congress of 1794, ch. 187, § 1, a seizure of the vessel might be made before the vessel went to sea, as soon as the intention of "preparing," &c., or of "causing to sail," &c., was apparent. The Emily and The Caroline, 9 Wheat. 381.

12. **Forfeiture of vessel, when incurred.** The act of Congress of 1800, ch. 51, § 1, prohibits not only the transportation of slaves, but the being engaged in the slave trade. Consequently, a vessel employed in such trade, is liable to forfeiture, although no slaves have been taken on board of her. The Brig Alexander, 3 Mason, 175; U. S. v. Morris, 14 Pet. 464.

13. Under the act of Congress of May 10th, 1800 (Stats. at Large, vol. 2, p. 70), providing that "it shall be unlawful for any citizen of the United States or other person residing within the United States, directly or indirectly to hold or have any right or property in any vessel employed or made use of in the transportation or carrying of slaves from one foreign country or place to another; and any right or property belonging as aforesaid, shall be forfeited," &c., if the master knew that negroes had been taken on board his vessel by the supercargo, on the coast of Africa, in order to be conveyed to Brazil, and they are conveyed there; and the vessel is forfeited, notwithstanding the master may not have known or believed that such persons were slaves. The Porpoise, 2 Curtis, 307.

14. Where a vessel is used as a tender to slavers which procure and convey slaves from Africa to Brazil, it is employed in the transportation of slaves within the meaning of the above act, though no slaves were conveyed on board the tender. Ibid.

15. A vessel on her voyage to Africa to procure a cargo of slaves, is "employed or made use of" for the transportation or carrying of slaves, within the above act, before

any slaves are taken on board. And if the outward voyage was planned and undertaken with the understanding that the ownership and national character of the vessel were to be changed when she reached the coast of Africa, and that she was then to be employed in the transportation of slaves, the vessel comes within the mischief and true intent of the act. U. S. v. Schooner Catharine, 2 Paine C. C. 721.

16. In such case the penalty of forfeiture is incurred from the commencement of the voyage, and follows the vessel wherever she may go or into whatever hands she may fall. Ib.

17. In order to work a forfeiture of a vessel under the act of Congress of April 20th, 1818, for being employed in the slave trade, a criminal intent must exist in the mind of the person who is lawfully entitled to direct the employment of the vessel. If he places her under the control of a factor or master who builds or equips her with such unlawful intentions, having at the time authority from the owner to direct the employment of the vessel, the offense is committed. But if the guilty purpose was entertained by the owner, for whom the vessel was built or equipped, it is immaterial whether the person who builds her or equips her as factor or master was apprised of it or not. Strohm v. U. S. Taney C. C. 413.

18. Where a vessel having been partly equipped for the slave trade in a port of the United States, and then taken to a foreign port for the completion of her equipment, is afterward driven in the course of her voyage into a port of the United States, she is liable to seizure and condemnation. In such case a condemnation may be had on evidence which is wholly circumstantial. The Slavers, 2 Wall. 350.

19. **Remission of forfeiture.** Under the act of Congress prohibiting the importation of negroes after Jan. 1st, 1808, it was held that a forfeiture might be remitted by the District Court under circumstances of extreme hardship. U. S. v. Schooner Kitty, Bee, 252.

20 **When vessel not to be condemned.** Under the act of Congress of April 18th, 1818, a vessel was not liable to condemnation where slaves were transported from the United States to Europe and reconveyed to the United States, in which they were again held to service. U. S. v. Skiddy, 11 Pet. 73.

21. **Disposal of negroes.** Where Africans, having been captured by a belligerent privateer fitted out in violation of our neutrality, or by a pirate, are recaptured and brought into the ports of the United States under circumstances which make it probable that a violation of the slave trade acts was contemplated, they will not be restored without conclusive evidence of the proprietary interest. The Antelope, 10 Wheat. 67.

22. Under the act of Congress of May 10th, 1800, ch. 205, § 4, the owner of the slaves carried away cannot reclaim them in a court of the United States, notwithstanding they may be held to service according to the laws of their own country, unless at the time of their capture by a commissioned vessel the offending ship was in the possession of a non-commissioned captor who had made a seizure for the same offense. The Merino, 9 Wheat. 402.

23. **Effect of taking negro to Africa.** An African negro or mulatto, upon being taken to the coast of Africa by an American citizen, or by any person belonging to an American ship, ceases to be a slave. U. S. v. Battiste, 2 Sumner, 240.

### 3. Indictment.

24. **Against master of vessel.** Under the act of Congress of May 10th, 1800, the master of a vessel is properly charged with serving on board a vessel employed in carrying slaves in violation of the act. U. S. v. Kennedy, 4 Wash. C. C. 91.

25. **Joinder of offenses.** Under the act of Congress of May 15th, 1820, for the suppression of the slave trade, the receiving of the negroes on the coast of Africa, the confining and detaining of them, and aiding and abetting in their confinement and detention, form one transaction, and may be joined in the indictment; but not the charge of the sale and delivery of the negroes on the coast of Cuba, which forms a separate and distinct transaction. U. S. v. Darnaud, 3 Wall. Jr. 143.

**26. Averment of intent.** An indictment under the slave trade act of 1818 which charges that the offense was committed "with the intent that the vessel should be employed," is fatally defective, the words of the act being "with intent to employ the vessel." U. S. v. Gooding, 12 Wheat. 460.

4. EVIDENCE.

**27. Ownership of vessel.** To maintain an indictment under the 4th and 5th sections of the act of Congress of May 15th, 1820, for the suppression of the slave trade, the vessel must either have been owned by a citizen of the United States, or the accused must have been such citizen. U. S. v. Darnaud, 3 Wall. Jr. 143. Such ownership must be affirmatively and distinctly established by competent evidence. The custom house registry of the vessel, under the acts of Congress, is not sufficient proof of such ownership. Ib.

**28.** Where a foreigner claims a vessel which has been seized for being engaged in the slave trade, and his title is derived from American owners, he must show affirmatively that the case has no admixture of American property. La Jeune Eugenie, 2 Mason, 400.

**29. Equipment of vessel.** An indictment under the slave trade act of 1818 will be supported by proof that the vessel was fitted out with the intent to employ her in the illegal voyage, although her equipments for a slave voyage were not actually on board. U. S. v. Gooding, 12 Wheat. 460.

**30.** Evidence that the owner of the vessel commanded, authorized, and superintended her equipment through an agent, the owner not being personally present, will support an indictment under the slave trade act of 1818, which charges that "he did fit out for himself as owner," &c. U. S. v. Gooding, 12 Wheat. 460. The declarations of the master as to his suspicions that the object of the voyage was unlawful, are competent evidence. U. S. v. The Isle de Cuba, 2 Cliff. 295.

**31. Procuring negroes with intent to make them slaves.** On the trial of an indictment under the act of Congress of May 15th, 1820 (3 U. S. Stats. at Large, 601), for forcibly confining and detaining on board of a vessel, owned or navigated for a citizen of the United States, certain negroes, with intent to make them slaves, proof that the vessel was built in and owned by citizens of the United States, fixes her national character and ownership, until they are shown to have been changed; and the burden of proof to show such change is on the defendant. U. S. v. Gordon, 5 Blatchf. 18.

**32.** Evidence that the negroes were taken on board in the Congo river some distance from its mouth, but where it is several miles broad, and in fact an arm of the sea, will support an allegation in the indictment that the offense was committed on waters within the admiralty and maritime jurisdiction of the United States, and within the jurisdiction of the court. Ibid.

**33.** Although to sustain the indictment in such case, it must be proved that the negroes were forcibly confined and detained on board of the vessel, yet the word "forcibly," in the act, does not mean physical or manual force. It is sufficient if they were under moral restraint and fear. Ibid.

**34.** A vessel owned by a citizen of the United States sailed from there under instructions to correspondents in Rio to sell or charter her. The consignees chartered her to a citizen of Brazil for one year, at the customary rate of freight, not to be employed in carrying merchandise or passengers which were unlawful. Rum, cotton goods, brass rings, and gunpowder, suitable for sale or exchange in Africa for slaves, were put on board, and these articles, with their owner, conveyed to the eastern coast of Africa, and landed at slave factories. *Held* that this and other acts of the captain, such as witnessing the purchase of slaves by the owner of the goods, the shipment of them to Brazil in other vessels, and his going there in company with persons who had an interest in the slave trade, were circumstances from which the jury might infer that the captain was also interested and co-operating in such trade; but that to make him guilty of a capital offense committed on board his own vessel, it must be shown that

he did so co-operate and drive, force, or receive some African on board with intent to make him a slave. U. S. v. Libby, 1 Woodbury & Minot, 221.

35. In such case, it was proved that two negroes whom the captain knowingly received on board and took to Brazil, had manumission papers which were attested and sealed by persons who purported to be Portuguese notaries public, and who had officiated as such in other matters. *Held* that if the captain believed that the papers were genuine, though they were not so in fact, and took the negroes on board supposing that they were free, he could not be convicted. Ibid.

36. To show the intent of the captain, his acts on the voyage and near the time of the alleged offense are admissible in evidence; but not what was done by him on a previous voyage. Ib.

37. A passenger is not one of the crew or ship's company within the meaning of the act of Congress of 1820, ch. 113. U. S. v. Libby, 1 Woodbury & Minot, 221.

38. **Burden of proof.** Where a vessel is bound to the western coast of Africa, under strongly suspicious circumstances that she is about to engage in the slave trade, it is incumbent on the persons connected with her to explain the circumstances under pain of forfeiture of the vessel. The Slavers, 2 Wall. 350; Ib. 375.

*See* PIRACY.

## Smuggling.

**What is.** The clandestine importation of dutiable goods, with intent to defraud the revenue, constitutes the offense of smuggling; and not the non-payment of, or not accounting for the duties, prior to their importation. U. S. v. Thomas, 4 Benedict, 370; 2 Abb. 114. The offense is complete, as soon as the goods are clandestinely introduced. Ibid.

*See* REVENUE LAW, VIOLATION OF.

## Sodomy.

1. **When committed.** The penetration of a beast by a man against the order of nature, without emission, constitutes the offense of sodomy. Com. v. Thomas, 1 Va. Cas. 307. As the criminal code of Texas leaves the crime against nature undefined, such crime is not punishable in that State; the code providing that no person shall be punished for any act or omission, as a penal offense, unless the same is expressly defined, and the penalty affixed. Fennell v. State, 32 Texas, 378, Hamilton and Caldwell, JJ., *dissenting;* and see Frazier v. State, 39 Texas, 390.

2. **Indictment.** An indictment for the crime against nature is sufficient, which avers that the defendant "against the order of nature carnally knew," omitting the words "had a venereal affair." Lambertson v. People, 5 Parker, 200.

3. **Testimony of accomplice.** On the trial of an indictment for sodomy with one S. the defendant contended that as S. denied his voluntary participation in the crime, and as the district attorney admitted that S. was in fact in the situation of an accomplice, it followed that he knowingly and willfully testified falsely, and that therefore the defendant could not be convicted upon the testimony of S. *Held* that the refusal of the court so to instruct the jury was proper. Com. v. Snow, 111 Mass. 411.

## Spirituous Liquors, Sale of.

1. UNDER WHAT CIRCUMSTANCES ILLEGAL.
2. COMPLAINT.
3. INDICTMENT.
4. EVIDENCE.
5. VERDICT.
6. SEIZURE AND CONDEMNATION OF LIQUORS.

### 1. UNDER WHAT CIRCUMSTANCES ILLEGAL.

1. **Constitutionality of statutes.** A statute requiring a license to sell spirituous liquors in small quantities, is not in derogation of sections eight and ten of the Constitution of the United States. Smith v. People, 1 Parker, 583. And see City Council v. Ahrens, 4 Strobh. 241; Austin v. State, 10 Mo. 591.

2. The act of New York of April 9, 1855,

for the prevention of intemperance, pauperism and crime, prohibiting the sale of liquor, is not unconstitutional. Wynhamer v. People, 20 Barb. 567.

3. But in Pennsylvania, the statute of 1846, which authorized the citizens of certain counties to decide by vote whether the sale of spirituous liquors should be continued in said counties, and imposing a penalty for the sale of such liquors, where the vote was against the sale, was held unconstitutional. Parker v. Com. 6 Barr, 507.

**4. Construction of city charter.** A city was empowered by its charter to pass ordinances for numerous specified purposes, and among others to prohibit the selling or giving away of ardent spirits by certain persons named, and to forbid the selling or giving away of such spirits to certain persons, and to "make any other by-laws and regulations which may seem for the well-being of the city," &c. *Held* that the authority of the city to enact ordinances on the subject of the sale of spirituous liquors was limited by the special provisions of the charter, and that the general clause conferring power to make any other by-laws and regulations did not enlarge the power. State v. Ferguson, 33 New Hamp. 424.

**5. What deemed spirituous liquor.** In New York, under the statute (1 R. S. 680, § 15), against selling liquors by retail without license, ale is included in the term "strong and spirituous liquors." Nevin v. Ladue, 3 Denio, 437. And it is the same in Missouri, under the statute of 1851. State v. Lemp, 16 Mo. 389.

6. The word "beer," in its ordinary sense, denotes a beverage which is intoxicating, and is within the meaning of the words "strong or spirituous liquors" used in the New York statutes. People v. Wheelock, 3 Parker, 9.

**7. Sale of imported liquor.** To give the right to sell imported liquor under the laws of the United States, it must remain in the hands of the importer and be sold in the condition in which it is imported; and all other sales are subject to the regulation of State laws. Wynhamer v. People, 20 Barb. 567.

**8. Unlawful granting of license.** An indictment may be maintained against commissioners of excise for willfully and corruptly granting a license to a person to sell spirituous liquors as an innkeeper, knowing that he is not possessed of the requisite qualifications. People v. Norton, 7 Barb. 477.

**9. Protection afforded by license.** A tavern license is a personal privilege which is not transferable; nor does the license pass with a lease of the tavern. Com. v. Rucker, 9 Dana, 310; State v. Prettyman, 3 Harring. 570. The same is true of a grocery license. Lewis v. U. S. 1 Morris, 199.

10. The terms "inn, tavern, or hotel," mentioned in the act of New York of 1857, in relation to the granting of a license to sell liquor, are used synonymously to designate what is ordinarily and popularly known as an inn or tavern, or place for the entertainment of travelers, and where all their wants can be supplied. People v. Jones, 54 Barb. 311.

11. A person selling spirituous liquor in a room of an inn by permission of the landlord, is protected by the license of the inn. Duncan v. Com. 2 B. Mon. 281.

12. But where A. obtained a license to keep a tavern, and B. agreed to pay for the license, and sold liquors in an adjoining room, which he rented from A., it was held that B. was not protected by A.'s license, but was liable for keeping a tippling house. Com. v. Branamon, 8 B. Mon. 374.

13. A United States license and payment of the revenue tax constitute no defense to the sale of intoxicating liquors in the State contrary to the law of the same. State v. Delano, 54 Maine, 442; McGuire v. Com. 3 Wallace, 387.

**14. License only applicable to single place.** A person who has a license to retail has no right to conduct the business in more than one place. State v. Walker, 16 Maine, 241.

15. A person who had a license to sell intoxicating liquors at his stand at the corner of A. and B. streets, owned another stand adjoining this, with an internal communication between the two, and sold liquors in

both. *Held* that his license only applied to the place first named. State v. Fredericks, 16 Mo. 382.

**16. Validity of license.** In New Hampshire, under the statute (R. S. ch. 117, § 5), giving selectmen power to license retailers of liquor, a license to sell spirituous liquors for medicinal purposes only, is valid. State v. Emerson, 16 New Hamp. 87.

**17. Keeping liquors for sale.** In Maine, a person charged with keeping intoxicating liquors for unlawful sale, cannot be convicted under the statute (of 1858, ch. 48), simply for the fact that the liquors were found in his possession, or that they were intended for sale by somebody; but only by his having possession with an intent on his part to sell the same in the State in violation of law, or with the intent that the same shall be so sold by some other person, or with the intent to aid some other person in such unlawful sale. State v. Learned, 47 Maine, 426; State v. Miller, 48 Ib. 576.

**18. Sale of liquor for medicinal purposes.** It is no defense to a sale of spirituous liquor without a license, that, at the time of such sale, there was no druggist or other person licensed to sell spirituous liquors in the county, that the sale was made upon the prescription of a physician, and that the liquor sold was necessary for the buyer's use, either as a medicine or for the preservation of his health. Com. v. Sloan, 4 Cush. 52; State v. Keys, 15 Vt. 405.

**19.** But in Indiana, it was held that a druggist, on a proper occasion and with due caution, might retail liquor, to be used only as a medicine, without being guilty of an offense against the statute. Dowell v. State, 2 Carter, 658.

**20. What constitutes a sale.** A sale may be without words. If a customer goes to a store, helps himself openly to what he wants, and places within reach of the salesman a satisfactory price, it is a sale. State v. Wiggin, 20 New Hamp. 449.

**21.** In Massachusetts, it has been held under the statute (R. S. ch. 47) that, where A., not being licensed to sell spirituous liquor, takes money of B. for some other article which B. receives from him, and B. thereupon takes A.'s spirituous liquor without any words concerning it, it is a sale of liquor. Com. v. Thayer, 8 Metc. 525.

**22.** In Indiana, where there was an agreement for the sale of a quart of liquor, the price of a quart paid, a pint taken away by the purchaser, and the other pint left in the cask with other liquor, it was held to be a sale of less than a quart within the meaning of the statute. Murphy v. State, 1 Carter, 366; s. c. 1 Smith, 261.

**23. Place of sale.** A place where beer is sold by the glass or drink is a tippling house within the statute of Illinois. Koop v. People, 47 Ill. 327.

**24.** A city ordinance which prohibits the using or keeping of intoxicating liquors in any refreshment saloon or restaurant in the city is constitutional; and it is a violation of such an ordinance to keep liquor in a cellar underneath an eating house or restaurant. State v. Clark, 28 New Hamp. 176. But it is not a violation of a city ordinance which provides that "no intoxicating liquors shall be used or kept in any refreshment saloon or restaurant within the city for any purpose whatever," to keep a shop for the manufacture and sale of tobacco, snuff and cigars, and strong beer by the glass. State v. Hogan, 30 New Hamp. 268.

**25.** In Alabama, the defendant's buggy in which he carried liquor for sale at a public administrator's sale in the country, was held to constitute "his premises" within the statute (Code, § 1058). Pearce v. State, 40 Ala. 420; approving Brown v. State, 31 Ib. 353; Easterling v. State, 30 Ib. 46, and Patterson v. State, 36 Ib. 298.

**26.** Where a person kept a few goods for sale in order to evade the law against tippling shops, and it appeared that his principal business was selling liquor, and that the liquor was drunk on his premises, it was held that he was not within the provisions of the statute which excepted merchants selling liquor to be used away from their premises. Com. v. McGeorge, 9 B. Mon. 3.

**27.** A citizen of New Hampshire agreeing to sell to a citizen of Vermont part of a cask of brandy, which was then in the latter

State in transit from New York to New Hampshire, the purchaser carried the cask to his house, where he drew out what he wanted, and took the balance with the cask to the vendor's store in New Hampshire. *Held* that the vendor was guilty of a violation of the statute of Vermont of 1852 to prevent the traffic in intoxicating liquors. State v. Comings, 28 Vt. 508.

**28. Sale to several persons at the same time.** One who retails spirituous liquors to two different persons at the same time and place, is guilty of two offenses. Com. v. Dow, 2 Va. Cas. 26. In Vermont, however, where liquor is furnished in answer to a single call, at the same time, and by a single act, it constitutes but one act of furnishing, and the party incurs but one penalty, notwithstanding it may be drank by more than one person. But where the liquor is furnished either on a single call or more, if it be done at different times and by separate acts, no matter how closely these several acts may follow each other in point of time, each act of furnishing constitutes a separate offense, and subjects the party to a separate penalty, whether the liquor be all drank by the same person or by different persons. State v. Barron, 37 Vt. 57.

**29. Sale by clerk or agent.** It is no defense to an indictment for selling liquor contrary to law, that the accused did so as clerk or agent of the person jointly indicted with him, and by his direction. French v. People, 3 Parker, 114; Hays v. State, 13 Mo. 246; State v. Bryant, 14 Ib. 340; Schmidt v. State, Ib. 137; Thompson v. State, 5 Humph. 138.

**30.** In Vermont, where the owner of a store at which spirituous liquors were sold resided out of the State, and the business of the store was managed by his general agent, it was held that such general agent was liable to the penalty imposed by the statute, although the liquors were in fact sold by the clerks. State v. Dow, 21 Vt. 484. And in Massachusetts, a mere hired agent who had no interest in the profits, and acted in the presence and under the direction of his employer, was held liable under the statute (R. S. ch. 47, §§ 1, 2). Com. v. Hadley, 11 Metc. 66. And see State v. Brown, 31 Maine, 520.

2. Complaint.

**31. Averment of time.** A complaint which charges a single sale of spirituous liquor to have been made on the 23d and 29th of July, is fatally defective for uncertainty as to time. Com. v. Adams, 1 Gray, 481.

**32.** In Connecticut, the complaint of a grand juror for a violation of the statute (of 1846, § 2) regulating the sale of wines and spirituous liquors, charged that the offense was committed "on or about the 24th day of May, 1847." *Held* not bad for uncertainty as to time, nor because it was expressed in figures. Rawson v. State, 19 Conn. 292; approved in State v. Fuller, 34 Ib. 280.

**33. Description of place.** In Vermont, a complaint under the statute (G. S. ch. 94, § 22), for the search of premises and seizure of liquors, which designates the place as the American Hotel and the adjacent outbuildings appurtenant to it, designates a single establishment, and is sufficiently specific. State v. Liquor, 38 Vt. 387.

**34. Charging offense in the alternative.** A complaint which alleged that the defendant sold wine, spirituous liquor, or other intoxicating beverage to R., he being a common drunkard, was held bad in charging the offense in the alternative. Smith v. State, 19 Conn. 493.

**35. Duplicity in.** All substantive allegations should be specific and definite. Where a complaint charged that certain liquors were kept or deposited by P., or by some other person with his consent, and were intended for sale in violation of law, it was held that as the keeping and depositing, and consent to keep and deposit intoxicating liquors, were distinct and different acts, the complaint was bad. State v. Moran, 40 Maine, 129.

**36.** Where a complaint for keeping intoxicating liquors, with intent to sell them contrary to law, alleged that they were kept at the defendant's "store, shop, and dwelling-house adjacent thereto, with intent to sell, furnish, and give away the same with-

out," &c., it was held not bad for duplicity, and that the words *the same* referred with sufficient directness to the intoxicating liquors previously mentioned. State v. Clark, 44 Vt. 636.

37. In Massachusetts, a complaint under the statute (R. S. ch. 47, § 3), which alleged that the defendant did presume to be a retailer, and did sell to a person named therein spirituous liquor, was held not bad for duplicity, or defective in not showing what kind of liquor the defendant sold, to whom it was delivered, or by whom it was carried away. Com. v. Wilcox, 1 Cush. 503.

**38. Unnecessary averments.** In Maine, a complaint alleging that intoxicating liquors were kept by the defendant in a place described, he "not being then and there authorized to sell said liquors within said P." and that the same were "intended for sale in this State in violation of law," without alleging that they were unlawfully kept, and deposited, or negativing the authority of the defendant to sell intoxicating liquors within the State, was held sufficient. State v. Connelly, 63 Maine, 212.

39. In Massachusetts a complaint under the statute (R. S. ch. 47, § 2), alleged that the defendant not being first duly licensed according to law, as an innholder or common victualler, and without any authority, &c., then and there sold to A. intoxicating liquor, to be used in and about his, the said defendant's, dwelling-house, &c. *Held* that the averment that the defendant was not licensed as an innholder or common victualler might be rejected as surplusage, and the defendant convicted upon proof of the other averments. Com. v. Baker, 10 Cush. 405.

40. In a complaint for selling intoxicating liquors in violation of law, the words "being a second glass of intoxicating liquor to said L. S. then and there sold and delivered at said B. to said N. T.," are not descriptive, but may be rejected as surplusage. State v. Staples, 45 Maine, 320.

**41. Conclusion.** Where a complaint alleged not only that the defendant on divers days and times had been drunk and intoxicated by the voluntary and excessive use of spirituous and intoxicating liquors, but that on a day named she was a common drunkard, it was held sufficient without concluding "to the common nuisance of all the citizens." Com. v. Boon, 2 Gray, 74.

### 3. Indictment.

**42. Not barred by previous conviction.** A conviction for retailing to one person will not bar an indictment for retailing to another previous to the finding of the indictment on which the conviction was had. State v. Cassety, 1 Rich. 90.

**43. Not taken away by action.** Where a statute prohibits an act under a penalty to be enforced by indictment, and a later statute gives a *qui tam* action for such penalty, the latter does not take away the remedy by indictment. Bush v. Republic, 1 Texas, 455. In New York, the offense of selling strong and spirituous liquors and wines without license, under ch. 628 of laws of 1857, is indictable, though not among the offenses specially declared misdemeanors. Behan v. People, 17 N. Y. 516.

**44. Joinder of parties.** Two or more persons may be jointly indicted for selling spirituous liquors without license. Com. v. Sloan, 4 Cush. 52; Com. v. Harris, 7 Gratt. 600; State v. Caswell, 2 Humph. 399.

**45. Allegation of time.** An indictment which alleges that the defendant was a common seller of spirituous liquor on the first day of December, and on divers days and times between that day and "the day of the finding, presentment and filing of the indictment," is bad for uncertainty. Com. v. Adams, 4 Gray, 27.

46. Where an indictment for selling liquors without license alleged that the offense was committed on the 1st of August, 1857, and "on divers other days and times between that day and the day of the finding of the indictment, to wit, the 1st day of July, 1857," it was held that the *continuando* might be rejected as surplusage. People v. Gilkinson, 4 Parker, 26.

47. In an indictment charging the sale of spirituous liquors on Sunday, the day of the month is immaterial. People v. Ball, 42 Barb. 324; State v. Eskridge, 1 Swan, 413.

**48. Charging sale.** Where an indictment for selling spirituous liquors without license, to be drank on the premises of the seller, charged the sale of liquor by the defendant, to be drank on his premises, "without having obtained a license therefor as a tavern-keeper, or without being in any way authorized to sell the same as aforesaid," it was held that the word *or* did not vitiate the statement of the offense, but that all that followed the word *or* was surplusage. People v. Gilkinson, 4 Parker, 26.

**49.** An indictment under a statute prohibiting the sale of intoxicating liquor "to be used in or about the house of" the vendor, is sufficient which alleges that the liquor was sold to be "used, consumed, and drunk in the dwelling-house by the said M., then and there used and occupied." Com. v. Moulton, 10 Cush. 404.

**50.** In Maine, an indictment under the statute (R. S. ch. 17, § 1), which alleged that the defendant kept a shop for the illegal sale of intoxicating liquors, and that he there sold liquors contrary to law, and for tippling purposes, is sufficient without negativing the defendant's authority to sell. State v. Lang, 63 Maine, 215.

**51.** An indictment charging that J. B. and P. B., "not being then and there a licensed taverner or retailer," did sell spirituous liquors, &c., is good; it being equivalent to the allegation that J. B., not being a licensed taverner, &c., and P. B., not being a licensed taverner, &c., did sell, &c. State v. Burns, 20 New Hamp. 550.

**52.** Where a statute imposes a penalty for selling any intoxicating liquor, an indictment is sufficiently definite which charges the sale of "two glasses" of such liquor. State v. Rust, 35 New Hamp. 438.

**53.** An indictment for being a common seller of intoxicating liquors is sufficient which alleges that the defendant during a fixed period of time sustained that character, without averring specific acts of sale. Com. v. Wood, 4 Gray, 11.

**54.** The charge in an indictment of being a common seller of spirituous liquors, includes a charge of making actual sales. Three different sales on the same day would authorize a conviction for being a common seller. State v. Day, 37 Maine, 244.

**55. Description of liquor.** An indictment charging the sale of rum, brandy and gin, need not allege that they were spirituous liquors. State v. Munger, 15 Vt. 290. In Indiana, it was held that the indictment need not specify the kinds of liquor sold. State v. Mullinix, 6 Blackf. 544. In Missouri, an indictment for keeping a dram shop must allege the kind, quantity and price of the liquor sold. Neales v. State, 10 Mo. 498.

**56.** An indictment which charges that the defendant sold spirituous liquors without license, in quantities less than the revenue laws allowed to be imported, need not state whether or not the liquors were imported. State v. Crowell, 30 Maine, 115.

**57.** An indictment under the act of Congress of July 13, 1866, § 23 (14 Stats. 153), for conducting the business of a distiller of spirits without the payment of the special tax, need not allege particular acts of distilling or the kinds of spirit. Charging that the defendant did "then and there distill and manufacture spirits to a very large amount, to wit, to the amount and number of one thousand gallons of proof spirit," is sufficient. U. S. v. Fox, Low. 199.

**58.** An indictment for retailing liquor without license, which uses the word "spiritual" instead of "spirituous," is not for that reason defective. State v. Clark, 3 Ired. 451.

**59. Averment of place of sale.** An indictment under a statute prohibiting the sale of liquor within two miles of any religious assembly, at "a booth, tent, wagon, huckster shop, or other place erected, brought, kept, continued or maintained," alleged a selling within half a mile of a religious assembly, but did not state that the liquor was sold at a booth, &c., kept, &c. *Held* insufficient. Bonser v. State, Smith, Ind. 408.

**60. Naming person to whom sale was made.** An indictment for selling liquor to divers persons without license, must name the persons to whom the liquor was sold, or

state that they are unknown. State v. Stucky, 2 Blackf. 289.

**61.** In New York, Vermont, and Missouri, an indictment for selling spirituous liquor without license need not give the name of the person to whom the sale was made. People v. Adams, 17 Wend. 475; State v. Munger, 15 Vt. 290; State v. Ladd, 15 Mo. 430. The contrary seems to have been held in Delaware and North Carolina. State v. Walker, 3 Harring. 597; State v. Faucett, 4 Dev. & Batt. 107.

**62.** In Massachusetts, an indictment under the statute (of 1852, ch. 322, § 12), for being a common seller of spirituous liquor, need not contain an allegation as to particular sales, or describe the persons to whom the sales were made, or allege that the liquors sold "were not imported in original packages," or that "they were not cider for other purposes than that of a beverage," &c. Com. v. Hart, 11 Cush. 130. See Com. v. Wilson, Ib. 412.

**63.** Where an indictment for the sale of spirituous liquors contrary to law, described the person to whom the sale was made as Mary Garland, and it was proved that although that was her name at the time of the sale, yet that when the indictment was found, she had acquired by marriage the name of Mary Morrison, it was held that the variance was fatal. Com. v. Brown, 2 Gray, 358.

**64.** Where the sale of spirituous liquor without license is made to an agent, an indictment therefor may charge the sale to have been made either to the principal or agent. State v. Wentworth, 35 New Hamp. 442.

**65.** In Virginia, it was held that an indictment for selling spirituous liquor without a license, might charge the sale to two persons in the same count. Peer's Case, 5 Gratt. 674.

**66. Charging distinct sales.** It is not a ground for arresting judgment that the indictment contained in addition to a count charging the defendant with being a common seller, other counts charging distinct sales to particular persons. Com. v. Moorehouse, 1 Gray, 470.

**67.** An indictment which alleges that the defendant sold at retail to divers citizens of the State, and to divers persons to the jurors unknown, strong and spirituous liquors, to wit: three gills of brandy, three gills of rum, three gills of gin, &c., is not bad for uncertainty and duplicity. Osgood v. People, 39 N. Y. 449.

**68.** The refusal in such case of the request of the defendant's counsel, that the district attorney be required to elect as to the kind of liquor sold, furnished no ground for reversal, it being a matter of discretion on the conduct of the trial, and affording no basis for an exception. Ib.

**69.** In Maine, an indictment was held to charge but one offense, which alleged that the defendant "did take upon himself, and presume to be a common retailer of wine," &c., without license, and "did then and there, as aforesaid, sell, and cause to be sold, to divers persons to the jurors unknown, divers quantities of strong liquor." State v. Stimson, 17 Maine, 154.

**70.** In the same State, an indictment which charged the defendant with being a common seller of intoxicating liquors, on the 1st of July, 1858, and on divers days and times between that day and the finding of the indictment, the following October, is not bad for duplicity, although offenses committed prior to the 15th of July were punishable by the act of 1856, and those committed subsequent to that date by the act of 1858. *Held* further, that the words, "and on divers days," &c., might be rejected as surplusage, and a *nol. pros.* be entered as to offenses which were committed after the law of 1858 took effect. State v. Pillsbury, 47 Maine, 449.

**71.** In the same State, it was held that an indictment was not bad for duplicity which alleged that the defendant, on a certain day and on certain other days and times, between that day and the finding of the indictment, kept a shop which he used for the illegal keeping and sale of intoxicating liquors, and then, and on said other days and times, resorted to for tippling purposes, with the knowledge and consent of the defendant, and in which said shop intoxicat-

ing liquors were then, on said other days and times, sold by the defendant, contrary to law, for tippling purposes, to be drunk in said shop, and then and on said other days and times were actually drunk therein, with the knowledge and consent of the defendant, to the damage and common nuisance of all citizens of said State, &c. State v. Lang, 63 Maine, 215.

72. But, in Maine, under the statute (R. S. ch. 27, § 20), the "carrying for sale, or offering for sale, or offering to obtain, or obtaining orders for the sale or delivery of any spirituous, intoxicating, or fermented liquors," are distinct and independent offenses, and the joinder of them in the same count is ground of demurrer. State v. Smith, 61 Maine, 386.

73. In Massachusetts, where an indictment charged that the defendant sold spirituous liquor without license on a day named, "and on divers other days and times," it was held that the latter allegation might be rejected as surplusage, and the defendant be convicted of a single act of selling. Com. v. Bryden, 9 Metc. 137.

4. Evidence.

**74. Maintaining building for sale of liquor.** An indictment which alleges that the defendant kept and maintained a tenement in a building for the illegal sale of intoxicating liquors, is supported by proof that he used the cellar in his dwelling-house for that purpose. Com. v. Welch, 2 Allen, 510.

75. In Massachusetts, an indictment charging a party with maintaining a building for the illegal sale of intoxicating liquors, under the statute (of 1855, ch. 405), is not supported by proof that the defendant occupied only a part of the building, the residue being occupied by other persons. Com. v. McCaughey, 9 Gray, 296. But it is otherwise where the defendant occupies the entire premises, using only a part for the illegal purpose. Com. v. Godley, 11 lb. 454.

**76. Keeping liquor for sale.** Under an indictment for keeping liquor for sale, it is unnecessary to prove an offer or an attempt to sell. State v. McGlynn, 34 New Hamp. 422.

**77. Giving liquor away.** Evidence of giving away spirituous liquor is admissible under an information against a person for furnishing it. State v. Freeman, 37 Vt. 520.

78. On the trial of an indictment for selling liquor without a license, it is proper for the court to instruct the jury to inquire whether the language used by the parties to the alleged sale, and their accompanying acts, were employed by them to effect a sale of the liquor under such disguises as would render detection difficult; or whether it was the purpose of the defendant to bestow, and of the others to receive, the liquors as a gift. State v. Simons, 17 New Hamp. 83.

**79. Sale by servant or agent.** An unlawful sale of spirituous liquor by the servant or agent of the owner would only be *prima facie* evidence of the assent of the latter to the sale. Com. v. Nichols, 10 Metc. 259.

80. On the trial of an indictment for the illegal sale of intoxicating liquor, a sale of liquor was proved at the defendant's public house, by his servant. *Held* competent to prove that the defendant was at that time engaged in such traffic, as tending, with other proofs, to establish the authority of the servant to make the sale in question. State v. Bonney, 39 New Hamp. 206.

**81. Sale to agent.** Under a complaint for selling intoxicating liquor contrary to law, evidence of a sale to an agent, and that the agent informed the defendant that she was acting for other parties, will not sustain an allegation of a sale to the agent. Com. v. Remby, 2 Gray, 508.

**82. Sale to minor.** On a charge of selling spirituous liquor to a minor, knowing him to be such, delivery of the liquor is sufficient evidence of sale; and it is no defense that a person to whom the liquor might lawfully have been sold sent the minor for it, with the money, and that the defendant was so told when he let the minor have it. State v. Fairfield, 37 Maine, 517.

**83. Proof that the liquor sold was intoxicating.** The question whether the liquor sold was intoxicating is one of fact

for the jury. State v. Wall, 34 Maine, 165; State v. McCafferty, 63 Ib. 223; State v. Barron, 37 Vt. 57.

84. It is not erroneous to instruct the jury that they may infer that gin is intoxicating, without any evidence other than that of its properties or qualities. Com. v. Peckham, 2 Gray, 514.

85. An indictment for selling spirituous liquors to A. is supported by proof that he sold that he sold to A. brandy or gin mixed with sugar and water. Com. v. White, 10 Metc. 14.

86. Where the indictment charged the sale of "strong and spirituous liquors," to wit, "one pint of strong beer," and it was proved that the defendant sold "Dutch beer," it was held that there was no material variance. People v. Wheelock, 3 Parker, 9.

87. A witness who has been in the habit of drinking fermented liquors, and who can distinguish them by their taste, though he has no special knowledge of chemistry, is competent to give his opinion as to whether lager beer is or is not a fermented liquor. Merkle v. State, 37 Ala. 139.

88. **Quantity of liquor sold.** An indictment charging that the defendant sold a pint of spirituous liquor without license, is supported by proof that he sold half a pint. State v. Cooper, 16 Mo. 551; or that he sold two glasses of such liquor. State v. Connell, 38 New Hamp. 81. And under an indictment alleging that the defendant sold a pint of rum, it is sufficient to prove that he sold a quart. State v. Moore, 14 New Hamp. 451; Burke's Case, 6 Leigh, 634.

89. **Person to whom the sale was made.** A complaint for a sale of intoxicating liquors contrary to law, to "George E. Allen," is not supported by proof that the liquor was sold to George Allen; unless it be proved that the vendee was known by the latter name. Com. v. Shearman, 11 Cush. 546.

90. Where the indictment charged a sale of intoxicating liquor to "Cornelius E. Maloney," and the sale was proved to have been made to "Dr. Maloney," the variance was held immaterial. Com. v. Dillane, 1 Gray, 483.

91. A complaint which alleges the unlawful sale of intoxicating liquor to a person unknown, is sustained by proof of a sale to a certain person, and that he was not known to the complainant when he made the complaint. Com. v. Hendrie, 2 Gray, 503.

92. Where the indictment charged that spirituous liquor was sold without license, to persons to the grand jury unknown, it was held that evidence that the persons were known to the grand jury constituted no variance. State v. Ladd, 15 Mo. 430; Halstead's Case, 5 Leigh, 724.

93. In Alabama, on the trial of an indictment for selling spirituous liquor to a free person of color, it was held that the prosecution might show the *status* of the person to whom the liquor was sold, by hearsay and general reputation. Tucker v. State, 24 Ala. 77.

94. **Time of sale.** When the indictment charges a single sale of intoxicating liquor, the time need not be proved as laid. Com. v. Dillane, 1 Gray, 483. And where a sale is alleged to have been made on a particular day of the month, there is no presumption that it was after the finding of the indictment. Ib.

95. On the trial of an indictment for the sale of intoxicating liquor on the first day of March, it is sufficient to prove a sale on the seventeenth of that month. Com. v. Kelly, 10 Cush. 69.

96. Where several complaints charged the defendants with unlawful sales of intoxicating liquor on different days, it was held that as the day alleged was immaterial, the defendant having been proved guilty on one of the complaints might be sentenced thereon, and a new trial be granted on the others. Com. v. Remby, 2 Gray, 508.

97. **Place of sale.** In South Carolina, where on the trial of an indictment for retailing spirituous liquor without a license, the evidence did not show that the defendant's store was in the district laid in the indictment, it was held that the jury might infer that it was in such district, from facts within their own knowledge. State v. Williams, 3 Hill, S. C. 91.

98. Under a statute providing that

"when an offense shall be committed on the boundary of two counties or within five hundred yards of such boundary, an indictment for the same may be found, and a trial and conviction thereon may be had in either of such counties," an indictment for selling spirituous liquors without a license charged that the offense was committed "at the town of R., in the county of S., and on the boundaries of the two counties of S. and Y. aforesaid, and within five hundred yards of such boundary." The proof showed that the offense was committed in the town of R., in S. county, and within less than five hundred yards of the boundary line between the counties of Y. and S., but not precisely on such dividing line. *Held* that there was no variance. People v. Davis, 45 Barb. 494.

**99. Place of drinking.** Although in general, it is a question of fact for the jury whether the place of the drinking of the liquor was "about the premises," of the seller, yet when it is proved that the drinking took place in the public highway in front of the seller's store in full view and within the distance of twenty steps of it, the court may instruct the jury that the liquor was drunk "about the premises." Brown v. State, 31 Ala. 353.

**100.** Where it is shown that the liquor sold by the defendant was drunk "in an alleyway five or six feet wide, which led from the main street between his house and that of an adjoining proprietor; that the defendant had no control over such alleyway, and could not see drinking there from his front door; and that it did not lead into his back yard, nor was there any window opening from his storehouse into it;" these facts alone, without explanation, do not authorize the court to instruct the jury that the place where the liquor was drunk, was "about the defendant's premises." Daly v. State, 33 Ala. 431.

**101.** Where it was proved that the defendant sold two bottles of whisky which the purchaser "carried out into the public road five or ten steps in front of the defendant's store, and that the liquor was drunk by a crowd of persons between the store and the road and in the road," and the court charged the jury that "it was the defendant's duty if he sold the whisky to prevent it from being drunk on or about his premises, and that if the liquor was drunk as stated they should find the defendant guilty," it was held that the instruction was correct, although it was also proved that at the time of the sale the defendant told the purchaser that he must carry the whisky out of the house and away from the premises, and that the purchaser promised to do so. Christian v. State, 40 Ala. 376.

**102. Proof of distinct violations of law.** In Vermont, under an indictment containing several counts for violations of the license law by the sale of spirituous liquors, the prosecution after giving evidence tending to prove as many distinct breaches of the law by the defendant, within the time covered by the indictment, as there are counts in the indictment, may prove other sales within the same period of time. State v. Smith, 22 Vt. 74; State v. Crotean, 23 Ib. 14. In New York, it has been held that the prosecution can only be permitted to prove as many distinct offenses as there are counts in the indictment. Hodgman v. People, 4 Denio, 235.

**103.** In Vermont, under one complaint, information or indictment for disposing of spirituous liquor contrary to law, the prosecutor may show any number of offenses, being bound, if required, to give the defendant before trial a specification of the nature of the offenses which he intends to prove. But the defendant cannot be convicted of giving away liquor under a count for selling, or *vice versa*. State v. Freeman, 27 Vt. 523.

**104.** Where the evidence tends to prove a sale of spirituous liquor by the defendant at a public administrator's sale in the county, and that the liquor was drunk by the purchaser on or about the premises, proof of another sale of liquor by the defendant to other persons at the same public sale and under similar circumstances is competent evidence for the prosecution on the question of guilty knowledge and intent. Pearce v. State, 40 Ala. 720.

**105. Proof that defendant is common seller.** In Massachusetts, a person may be convicted of being a common seller of intoxicating liquor under the statute (of 1852, ch. 322, § 12) on proof of the sale of three glasses of such liquor the same evening, each of which was drunk and paid for when delivered. Com. v. Rumrill, 1 Gray, 388.

**106.** Under an indictment for being a common seller of intoxicating liquors, it is not necessary to prove that the offense was committed during the whole time charged, although a conviction or acquittal would bar a prosecution for the same offense during the entire time alleged. Com. v. Wood, 4 Gray, 11; Com. v. Putnam, Ib. 16.

**107.** Where an indictment for being a common seller of intoxicating liquor limits the time within which the acts were done to a particular day, evidence is not admissible of sales before or after that day. Com. v. Elwell, 1 Gray, 463. Therefore, on the trial of an indictment alleging that the defendant presumed to be and was a common seller of wine, brandy, &c., on a day named and on divers subsequent days, evidence of his presuming to be such seller on a day prior to that which was specified was held not admissible. Com. v. Briggs, 11 Metc. 573.

**108.** The defendant being indicted as a common seller of spirituous and intoxicating liquors, was furnished before trial by order of court with a list of the names of the persons to whom the alleged sales were made. *Held* that evidence of sales not mentioned in the list was inadmissible. Com. v. Giles, 1 Gray, 466.

**109.** Where on the trial of an indictment for being a common seller of intoxicating liquor, evidence was admitted against the defendant's objection that he kept an inn, and had thereon a tavern keeper's sign, it was held ground for reversal. Com. v. Madden, 1 Gray, 486.

**110.** In Maine, no particular number of sales is necessary to be proved in order to convict a person as a common seller of intoxicating liquors under the statute of 1858, but the jury must be satisfied from the evidence that selling intoxicating liquors was the defendant's common and ordinary business. State v. O'Conner, 49 Maine, 594.

**111.** Under an indictment charging the defendants with being common sellers of spirituous liquors, evidence of sales of ale, porter and cider is not admissible. State v. Adams, 51 New Hamp. 568.

**112. Sale by partners.** On the trial of an indictment which alleged that the defendants, being joint grocers, sold spirituous liquors without license, it was held competent in order to prove the partnership to show that one of them was often in the store which the defendants had formerly occupied as partners; that he was accustomed, as before the supposed dissolution, to buy, sell and barter there; that he examined the books and made charges in them; that he went to Boston and made purchases, and that the sign of the old firm remained upon the building. State v. Wiggin, 20 New Hamp. 449.

**113. Sale by married woman.** On the trial of an indictment against a married woman for the unlawful sale of intoxicating liquor, the following instruction was held proper: That if the defendant, in the absence of her husband, sold intoxicating liquor under such circumstances as proved her to be a common seller, and if there was no evidence that she sold it by his command, or that in selling it she was under any coercion or influence of his, she should be found guilty. Com. v. Murphy, 2 Gray, 510. But if the husband was near enough for the wife to act under his influence and control, though not in the same room, she would not be liable. Com. v. Burk, 11 Ib. 437.

**114.** To convict a husband for the unlawful sale by his wife of spirituous liquor in his store in his absence, the jury must be satisfied beyond a reasonable doubt that her illegal act was done by his authority. Mere proof that she was his clerk or agent is not sufficient. Seibert v. State, 40 Ala. 60.

**115. Sale to common drunkard.** On a trial for selling liquor to a person alleged to be a common drunkard, evidence is admissible to show that he was habitually intoxicated for several weeks after the sale. Barnes v. State, 20 Conn. 232; and also that

the defendant had for a long time before the sale charged been accustomed to sell liquor to such person to be taken by him to excess. Wickwire v. State, 19 Ib. 477; also that such person had during the preceding year bought liquor at other places than the defendant's and become drunk thereon. Smith v. State, Ib. 493.

**116.** In Alabama, it was held on a trial for retailing liquor without a license (Code, § 1059), that evidence that the intemperate habits of the person to whom the liquor was sold, were generally known in the community, was irrelevant. Stanley v. State, 26 Ala. 26. But, in a subsequent case, it was held that the fact that the intemperate habits of the person to whom the liquor was sold were notorious where the defendant lived, was proper for the consideration of the jury, in determining whether his habits were known to the defendant. Stallings v. State, 33 Ala. 425.

**117.** Whether the defendant knew of the intemperate habits of the person to whom he sold the liquor, should be left to the decision of the jury upon the evidence. A charge which assumes that such knowledge was brought home to him, is erroneous. Elam v. State, 25 Ala. 53.

**118.** In Connecticut, it has been held that to sustain a prosecution for selling liquor to a common drunkard, the State need not prove that the defendant knew that the person to whom the liquor was sold was a common drunkard. Barnes v. State, 19 Conn. 398.

**119. Proof of second conviction.** In Massachusetts, to render the defendant liable to the aggravated punishment prescribed for a second conviction by the statute (of 1852, ch. 322, § 7), it must be proved that the sale charged was made subsequently to the previous conviction. Com. v. Daley, 4 Gray, 209.

**120. Burden of proof on defendant.** On a charge of retailing liquor without a license, the burden is on the defendant to show a license. Haskill v. Com. 3 B. Mon. 342; Schmidt v. State, 14 Mo. 137; State v. Woodward, 34 Me. 293; State v. Morrison, 3 Dev. 290; Genig v. State, 1 McCord, 573; State v. Crowell, 25 Me. 171; State v. Foster, 3 Foster, 348; Shearer v. State, 7 Blackf. 99.

**121.** In New York, where a person is charged with selling liquor by retail without license, he must show not only that it was bought under the direction and prescription of a licensed physician, but also that it was prescribed for medicinal purposes. People v. Safford, 5 Denio, 112.

**122.** No one but the importer of intoxicating liquors has the right to sell, except as allowed by the laws of the State; and he can sell only in the original packages. The power of the State is plenary to regulate or prohibit all sales except such as are made by the importer himself; and the burden of proof is on him to show that he was the importer. State v. Robinson, 49 Me. 285.

**123. Proof in justification.** On a prosecution for selling liquor to a minor, it is competent for the defendant to prove that the person was a stranger to him, that from his appearance any one of common observation would believe him to be an adult, that he represented that he was such, and that he was so treated by his parents and the community. State v. Kalb, 14 Ind. 403.

**124.** Where, on a prosecution for selling spirituous liquor to a person in the habit of getting drunk, it was proved that he was a stranger to the defendant; that the latter had no knowledge of his habits; that he was sober at the time, and had no appearance of one accustomed to intoxication; it was held that the defendant was entitled to acquittal. Deveny v. State, 47 Ind. 208.

**125.** Where a license has been granted to a man to keep a tavern, and he has removed from it, another man who is indicted for retailing liquor in the house may show, in defense, that he did it as the agent or partner, and under the license of him to whom the license was granted. Barnes v. Com. 2 Dana, 388.

**126. Irrelevant testimony.** The exception taken in the first section of the act of April 9, 1855, for the prevention of intemperance, pauperism and crime, as to the right to sell given "by any law or treaty of the United States," is not applicable to liquor held by one who has bought it from the im-

porter in the original packages, and who retails it from such packages; and evidence in behalf of the defendant on the trial of an indictment under the act, that it was so sold, is immaterial. Wynehamer v. People, 20 Barb. 567; s. c. 13 N. Y. 378.

**127.** On the trial of a complaint for illegally transporting intoxicating liquors intended for sale, evidence is not admissible to show the result of a prosecution against the party for keeping with intent to sell in violation of law, the liquor which the defendant is accused of having transported to him. Com. v. Waters, 11 Gray, 81.

**128.** On the trial of an indictment for selling and furnishing intoxicating liquors, several witnesses testified that they had drank liquor in rooms in the defendant's house, on public occasions, when asked to do so by parties occupying such rooms, but did not know where the liquor came from. *Held*, that evidence on the part of the defendant, that travelers were in the habit of carrying liquor with them, was irrelevant. State v. Barron, 37 Vt. 57.

**129.** Under an indictment for selling spirituous liquor without a license, the accused cannot be convicted on proof that having a tavern-keeper's license, he sold a glass of liquor on Sunday, which was drank on the premises. People v. Brown, 6 Parker, 666.

**130.** Although a license from the United States authorities is not a justification for a violation of a State law which prohibits the sale of spirituous liquor, yet such a license does not raise a presumption of guilt. State v. Stutz, 20 Iowa, 488.

### 5. Verdict.

**131. In case of several acts of sale.** In Vermont, on the trial of an information for selling spirituous liquor without a license, it was held not improper for the court to instruct the jury "to return a verdict of guilty for each act of selling." State v. Paddock, 24 Vt. 312.

**132.** In Massachusetts, three several sales of spirituous liquor being charged in the indictment and proved, there may be convictions thereon, notwithstanding the defendant might have been charged and convicted as a common seller. Com. v. Tuttle, 12 Cush. 505.

**133. Discharge of defendant.** Where on the trial of an indictment for selling spirituous liquors without a license the defendant has been convicted and sentenced to pay a fine and the costs of prosecution, the court cannot discharge him and order execution to issue against his property. State v. Robinson, 17 New Hamp. 263.

### 6. Seizure and condemnation of liquors.

**134. Course of procedure.** In Maine, (L. of 1858, ch. 33, § 12), where an officer seizes intoxicating liquors upon a warrant issued therefor, he is required also to arrest the person in whose custody they are alleged in the complaint to be, and to have both the person and the liquors before the magistrate who issued the warrant. The person is put on trial for having had such liquors in his possession with intent to sell the same in the State in violation of law; and the liquors are libeled. The acquittal of the person does not entitle him to a restoration of the liquors; nor does a condemnation of the liquors necessarily result in a conviction of the person. The hearing may be at the same time, but there must be a separate decree and judgment; and either may be appealed without the other. State v. Miller, 48 Maine, 576. In a prosecution against the person, it is no defense that the seizure was illegal. State v. McCann, 61 Maine, 116.

**135. Subject of inquiry.** On the trial of a libel against intoxicating liquors, the court being asked to charge the jury that they should find "the item of ten barrels of rum were not rum, but a different article, the libel could not be maintained for that if item," instructed them to confine their inquiries to the liquors which were specified in the claim and libel; that if liquors were seized and not libeled, the owner must seek his remedy in another suit; and if liquors were libeled and not claimed, the law would provide for their disposal. *Held* that the claimant had no ground of complaint. State v. Smith, 54 Maine, 33.

**136. Proof of possession and destruction of liquor.** In Maine, under the statute (L. of 1858, ch. 33, § 14), the fact that the liquors described in the complaint were found in the defendant's possession in the place searched, must be proved before the magistrate by evidence under oath, and not by the return of the officer. Under section 20, of the same statute, authorizing the arrest of the defendant, if the liquors be destroyed by him, and requiring the officer to make return upon his warrant that he was prevented from seizing the liquors by their destruction, and to state in his return the quantity destroyed; the fact of such destruction must be proved by testimony under oath; but the return need not be made previous to the arrest. State v. Stevens, 47 Maine, 357.

**137. Proof of ownership of liquor.** Where on the trial of a libel for the condemnation of intoxicating liquors, the judge told the jury that it would be unnecessary to inquire into the ownership of the liquors if intended for sale within the State in violation of law, it was held error; such inquiry being material on the question of illegal intent. State v. Intoxicating Liquors, 63 Maine, 121.

**138. Warehouseman's lien.** In Maine, the lien of a warehouseman does not affect the liability of liquors to forfeiture. If the liquors be designed by the owners when they shall reach their destination for unlawful sale in the State, they will be liable to forfeiture, though the warehouseman had no unlawful intent. State v. Intoxicating Liquors, 50 Maine, 506.

**139. Officer's return.** Where the officer did not return that he found any intoxicating liquors on the premises of the defendant, but that he found a "demijohn containing one gallon more or less, of what I called St. Croix rum," it was held that as the defendant by destroying the liquors rendered it impossible for the officer to determine with certainty their quality, he could not object to the return as not sufficiently certain. State v. Stevens, 47 Maine, 357.

*See* LICENSE.

## Statutes.

**1. How proved.** The statutes of another State must be proved by an authenticated copy. People v. Lambert, 5 Mich. 349. Statute books purporting to be published under the authority of another State, are competent proof of its statute law. State v. Abbey, 29 Vt. 60.

**2. Unconstitutionality of.** An act which requires a party charged with crime to be tried by a court without a jury, is unconstitutional. Wynehamer against People, 13 N. Y. 378.

3. The act of New York of 1855, p. 340, for the prevention of intemperance, pauperism and crime, which substantially destroys property in intoxicating liquor owned and possessed in the State when the act took effect, is unconstitutional. Wynehamer against People, *supra*.

4. The following portions of the act of New York of April 9, 1855, "for the prevention of intemperance, pauperism and crime" declared unconstitutional: So much of section 1 as provides that intoxicating liquor shall not be sold or kept for sale, or with intent to be sold, except by the persons and for the special uses mentioned in the act; so much of sections 6, 7, 10 and 12 as provide for its seizure, for forfeiture and destruction; so much of the 16th section as declares that no person shall maintain an action to recover the value of any liquor sold or kept by him which shall be purchased, taken, detained, or injured, unless he prove that the same was sold according to the provisions of the act, or was lawfully kept and owned by him; so much of section 17 as declares that upon the trial of any complaint under the act, proof of delivery shall be proof of sale, and proof of sale shall be sufficient to sustain an averment of unlawful sale; and so much of section 25 as declares that intoxicating liquor kept in violation of any of the provisions of the act, shall be deemed to be a public nuisance. People v. Toynbee, 20 Barb. 168.

5. A statute (Laws of Mich. of 1873), provided, in substance, that, when the defense of insanity was set up in certain cases, the

jury should find specially whether the prisoner was insane when the alleged crime was committed, and if acquitted on that ground, the verdict should so declare. In such case, the court was to sentence him to confinement in the insane asylum in the State prison until discharged. This could only be done when the prison inspectors summoned the circuit judge of the circuit from which he was sent, and the medical superintendent of the insane asylum, who were thereupon to examine into his condition, and if they certified that he was not insane, the governor was to discharge him. *Held* unconstitutional. Underwood v. People, 32 Mich. 1.

6. A statute prohibiting the intermarriage of white persons and negroes who are citizens, and forbidding the performance of the marriage ceremony, is unconstitutional. Burns v. State, 48 Ala. 195.

7. **When deemed constitutional.** It is not an infringement of the provision of the Constitution that "trial by jury in all cases in which it has been heretofore used, shall remain inviolate forever," for the Legislature to confer upon Courts of Special Sessions power to try offenses which are not "capital or otherwise infamous crimes." Plato v. People, 3 Parker, 586.

8. A statute giving to a Court of Special Sessions exclusive power to hear, try and determine all cases of petit larceny not charged as a second offense arising within the county, is constitutional; and the court having exclusive jurisdiction of the offense is bound to try it, and has no right to take bail. People v. Rawson, 61 Barb. 619.

9. The New York statute, that "on any trial for any offense punishable with death or imprisonment in the State prison for the term of ten years or for a longer term, the people shall be entitled peremptorily to challenge five of the persons drawn as jurors for such trial, and no more" (Laws of 1858, ch. 332, § 1), is constitutional. Walter v. People, 32 N. Y. 147; affi'g 6 Parker, 15.

10. A statute prohibiting citizens of other States from taking oysters in the navigable waters of Rhode Island, is not repugnant to the constitutions of the State and United States, or the charter of Charles 2d to the colony of Rhode Island. State v. Medbury, 3 R. I. 138.

11. A statute (to be in force only in those towns in which it is adopted in town meeting), which provides that bowling alleys within twenty-five rods of a dwelling-house shall be deemed nuisances, is constitutional. State v. Noyes, 30 New Hamp. 279.

12. A statute which forbids bowling alleys to be used later than six o'clock Saturday afternoon, is constitutional. Com. v. Colton, 8 Gray, 488.

13. The denial to females of the right to vote by the Constitution and laws of New York is not a violation of the provision of the 14th Amendment of the Constitution of the United States, that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U. S. v. Anthony, 11 Blatch. 200.

14. **When deemed ex post facto.** A law is *ex post facto* when it punishes the offense in a different manner, or by a different kind of punishment than it was punishable with when committed. Shepherd v. People, 25 N. Y. 406; Hartung v. People, 26 N. Y. 167; s. c. 28 Ib. 400.

15. Judgment was reversed after conviction of murder and sentence, because the Legislature had subsequently enacted a statute which forbade the execution of such sentence, and had required that such convicts should be subjected to imprisonment at hard labor for one year, and thereafter be executed if the governor should issue his warrant for that purpose; the statute being deemed *ex post facto*, because it attempted to change the punishment which the law had attached to the offense when it was committed. Hartung v. People, *supra*.

16. Before the passage of the act of New York of April 14th, 1860, entitled "An act in relation to capital punishment, and to provide for the more certain punishment of the crime of murder," J. K. murdered his wife by poisoning her. After that act went into effect he was tried, convicted and sentenced to be executed pursuant to its provisions. On writ of error, the only question was as to the illegality of the judgment.

*Held* that, as the act was *ex post facto* so far as the offense in question was concerned, the prisoner must be discharged. Kuckler v. People, 5 Parker, 212.

17. A city ordinance provided that no awning should be placed or continued over any sidewalk, unless the same should be constructed of cloth or canvas, and supported by iron rods. *Held* the continuance of a wooden awning, erected previous to the passage of the ordinance, was not a violation of it. State v. Cleaveland, 3 R. I. 117.

**18. When not regarded as ex post facto.** Where, after the commission of an offense, a statute is passed lessening the punishment, it is not open to the objection of being an *ex post facto* law. State v. Kent, 65 N. C. 311.

19. A statute prescribing an alternative punishment for an offense, in mitigation of the punishment prescribed by a former law, is not *ex post facto* as to offenses already committed. Turner v. State, 40 Ala. 21.

20. It is competent for the Legislature, by a general law, to remit any separable portion of the prescribed punishment. And any change which should be referable to prison discipline, or penal administration, as its primary object, might also be made to take effect upon past as well as future offenses. Hartung v. People, 26 N. Y. 167; s. c. 28 Ib. 400.

**21. When doctrine in relation to ex post facto law not applicable.** The doctrine that no *ex post facto* law is valid, has no application to the rules of evidence or the details of the trial. These may be changed as to prior, equally with subsequent offenses. Stokes v. People, 53 N. Y. 164.

**22. Effect of repeal of statute.** The prisoner cannot be convicted after the repeal of the law, unless the repealing act contains a provision for that purpose. Taylor v. State, 7 Blackf. 93; Mayers v. State, 2 Eng. 68.

23. A party cannot be convicted after the law under which he may be prosecuted has been repealed, although the offense may have been committed before the repeal; and this principle is applicable where the law is repealed or expires pending an appeal on a writ of error from a judgment of an inferior court. Keller v. State, 12 Md. 322.

24. Where a statute creating an offense has been repealed, or has expired previous to the finding of an indictment, a prosecution cannot be sustained; and if after conviction there can be no sentence. Com. v. Pennsylvania Canal Co. 66 Penn. St. 41; Wall v. State, 18 Texas, 682; Greer v. State, 22 Ib. 588.

25. When the repeal of a statute is in express terms, and without a saving clause as to offenses committed in violation of the repealed statute, an indictment previously found under it will be quashed on motion. U. S. v. Finlay, 1 Abb. 364; Griffin v. State, 39 Ala. 541.

26. Where the act which imposes a penalty is repealed after conviction, the judgment is arrested; and when it is repealed subsequent to judgment, the judgment may be reversed on writ of error. Hartung v. People, 22 N. Y. 95; rev'g 4 Parker, 319.

27. The repeal of a penal statute operates as a pardon of all crimes committed before that time, except when the repealing statute contains a provision expressly saving the right to prosecute. Wharton v. State, 5 Cold. Tenn. 1.

28. If an offense is committed against a statute, and afterward and before sentence the statute is repealed, any proceedings under it which were not closed are arrested the same as if the statute had never existed. State v. Daley, 29 Conn. 272; State v. Grady, 34 Conn. 118.

29. On the trial of an indictment for manslaughter, it appeared that at the time of the commission of the offense the following statute was in force: "Every person who shall commit manslaughter shall forfeit and pay a fine not exceeding one thousand dollars, and suffer imprisonment in the State prison for a term not less than two nor more than ten years." Subsequently the following statute repealing the former one, was passed: "Every person who shall commit manslaughter and be duly convicted thereof, shall forfeit and pay a fine not exceeding one thousand dollars, and suffer imprisonment in the State prison or county jail for a

term not exceeding ten years." The latter act took effect previous to the trial and conviction of the prisoner. *Held* on motion in arrest of judgment that the prisoner could not be convicted or sentenced under either of the statutes. State v. Daley, 29 Conn. 272.

30. The statute which existed at the time a theft was committed provided for the punishment by imprisonment in a common jail, in all cases of larceny where the value of the property did not exceed the sum of $50, and imprisonment in the State prison not exceeding five years, where the value of the property stolen exceeded the sum of $50. Afterward a statute was enacted repealing so much of the former statute as was inconsistent with it, and providing that if the value of the property stolen should exceed the sum of $2,000, the punishment should be imprisonment in the State prison for a term not exceeding twenty years. *Held* that so much of the prior statute as related to the stealing of less than $2,000, was not repealed by the subsequent statute. State v. Grady, 34 Conn. 118.

31. **Revival of statute.** The repeal of a repealing statute revives the original statute, although the repeal was only by implication. People v. Davis, 61 Barb. 456.

32. **Operation of statute of limitations.** A statute of limitations does not operate as a bar to the prosecution of offenses committed before it went into effect. Martin v. State, 24 Texas, 61. (Wheeler, Ch. J., *dissenting,* held that such a statute ought to be construed to relate to past as well as to future offenses, when its operation was beneficial to the accused, unless the Legislature had plainly declared that it was not to receive such a construction.)

33. **Statute imposing no penalty.** Where the defendant was convicted under a statute which prescribed no penalty, on motion in arrest of judgment, the court discharged him. State v. Ashley, Dudley, Ga. 188.

34. **In relation to freedmen.** In Alabama, since the abolition of slavery, the general criminal statutes of the State are applicable to offenses committed by freedmen, although they were not so applicable at the time they were enacted. Eliza v. State, 39 Ala. 693; Aaron v. State, Ib. 684; Witherby v. State, Ib. 702; Ferdinand v. State, Ib. 706; Miller v. State, 40 Ala. 54; Stephen v. State, Ib. 67; Tempe v. State, Ib. 350.

35. **Creating and regulating courts.** A court derives its authority to take cognizance of criminal proceedings not from special statutes, but from the act constituting it a court. State v. Wilbor, 1 R. I. 199.

36. That which concerns the administration of public justice (like legislation respecting a court, though it be of limited jurisdiction, and though its sittings be confined to a certain specified locality), is a public law—a law which affects, and in which the public generally are interested. Within this rule, a statute creating or regulating the Court of Special Sessions of the city and county of New York, as it affects the public, is not local within the meaning of the Constitution. People v. Davis, 61 Barb. 456.

37. State laws do not control in criminal proceedings in the United States courts, either in the mode or form of charging the offense, in the rules of evidence, or in the manner of conducting the trial; but the proceedings are according to the course of the common law except so far as has been otherwise provided by act of Congress or by constitutional provision. U. S. v. Shepard, 1 Abb. 431.

38. **City ordinances.** Where a city charter declares that the violation of the ordinances of the city which may be made on certain subjects within certain limitations shall be a misdemeanor, and may be prosecuted as such, and such ordinances are passed, they have the authority of a statute. State v. Tryon, 39 Conn. 183.

39. **Effect of statute imposing penalty.** Where an act which is not criminal at common law is prohibited by statute, and a penalty is imposed in the same statute declaring such prohibition, the act is not indictable. But where the act was criminal at common law or already prohibited by a former statute, the imposition of a civil penalty does not take away the power to punish by indictment; so, where the statute itself contains

any provisions showing that the Legislature did not intend that the civil penalty should constitute the only punishment, the remedy by indictment is not taken away. Behan v. People, 17 N. Y. 516; People v. Shea, 3 Parker, 562.

40. When a statute revises the whole subject of an offense, making that a qualified offense which was before absolute, or changing the time or mode of prosecution, or the degree of punishment, it may be a repeal of the common law. A statute is not of this character which prescribes a penalty for using without license a building in the dense part of a town as a slaughter-house. State v. Wilson, 43 New Hamp. 415.

41. **Legalizing obstruction of highway.** The defendant having been convicted of a nuisance in unlawfully constructing a railroad in a highway, before sentence could be pronounced, a statute was passed confirming the location of the defendant's road. *Held* that such confirmation was no ground for arresting judgment; the effect of the statute being to prevent a subsequent encroachment from being deemed a nuisance, but not acts committed prior to its passage. Com. v. Old Colony, &c. R. R. Co. 14 Gray, 93.

42. **General rule of construction.** In the construction of a statute, the language may be qualified by reference to other parts of the same statute, and to the circumstances and facts to which it relates, as well as by reference to cotemporaneous legislation. Smith v. People, 47 N. Y. 330.

43. When there are employed in a later statute, the terms used in an earlier one which has received a judicial construction, that construction is to be given to the later statute. Com. v. Hartnett, 3 Gray, 450.

44. Statutes *in pari materia* are to be read together, for the reason that it is to be presumed that a code of statutes relating to one subject is governed by the same spirit, and intended to be harmonious and consistent. Statutes enacted at the same session of the Legislature are within the reason of this rule. Smith v. People, *supra*.

45. It is only when an exception is found in the enacting clause of a statute, that it becomes necessary to show by averment that the offense does not fall within the exception. Mathews v. State, 24 Ark. 484.

46. **When to be liberally construed.** In giving construction to a statute for the purpose of imprisoning or justifying the imprisonment of a party as a punishment for an offense, a humane interpretation should prevail. People v. Kelly, 35 Barb. 444, per Potter, J.

47. **Meaning of word offender.** The term "offender," in the New York Revised Statutes defining the term "felony," is not used as a word of limitation making it dependent upon the personal *status* of the criminal, or his exemption from a particular punishment by reason of age or mental incapacity, where the offense for which he is convicted is a felony; but a word of general application, and means any crime which is punishable by death or by imprisonment in State prison, without reference to the personal exemptions or exceptions of the criminal. People v. Park, 41 N. Y. 21, Lott, J., *dissenting;* affi'g 1 Lans. 263.

48. **When it includes persons not named in it.** In general, where a statute creates a felony and prescribes a punishment therefor, or where a statute provides a punishment for a common-law felony by name, those who were present, aiding and abetting in the commission of the crime, are held to be included by the statute, although not mentioned as such in the statute. But where the punishment is imposed by the statute upon the person alone who actually committed the acts constituting the offense, and not in general terms upon those who were guilty of the offense, mere aiders and abettors will not be deemed to be within the act. Stamper v. Com. 7 Bush, Ky. 612.

49. **Construction in case of repeal.** Where a statute is in part repealed or altered, the original and amendatory acts must be considered together. Where the amendatory act prescribes a different mode of distributing the penalty from that directed by the original act, the amendment does not affect the offense or the penalty, but only changes the form of the judgment. State v. Wilbor, 1 R. I. 199.

50. A clause in a statute purporting to

repeal other statutes is subject to the same rules of interpretation as other enactments, and the intent must prevail over literal construction. Smith v. People, 47 N. Y. 330.

## Subornation of Perjury.

*See* PERJURY AND SUBORNATION OF PERJURY.

## Summary Conviction.

**1. Is regulated by statute.** The power of summary conviction being in derogation of the common law, it must be confined to special statutes from which its force is derived. People v. Phillips, 1 Parker, 95.

**2. When statute must be strictly followed.** Where a statute prescribes the form of summary conviction, it must be strictly followed. But it is otherwise when the statute is merely directory. Com. v. Hardy, 1 Ashm. 410.

**3. Proceedings.** Where the proceedings are according to the course of the common law, every ingredient in the offense must be repeated in the proof on the record, and cannot be supplied by reference to the accusation. Ibid.

4. There must be an information or charge, and the defendant summoned. All of the proceedings, including the evidence, conviction, judgment and execution, must be according to the course of the common law in trials by jury, unless otherwise directed by statute. There must be a record, otherwise the magistrate will be liable as a trespasser. The record must show: the circumstances of the offense; the plea; the names of the witnesses; that the testimony was given in the presence of the defendant; the evidence; and the adjudication. In the absence of appeal, the remedy of the defendant is by habeas corpus or certiorari. People v. Phillips, *supra*.

**5. When it will be sustained.** Where the proceedings are at common law, and the justice is bound to send up the evidence as part of his record, his conclusions will be sustained if the evidence be such as might have been left to a jury. Com. v. Hardy, *supra*.

**6. Statute in relation to, when void.** The charter of a city authorizing the passing of ordinances, the punishment for the violation of which shall be imprisonment on summary conviction, is unconstitutional and void. Barter v. Com. 3 Penn. 253; Pittsburgh v. Young, 3 Watts, 363.

## Sunday.

**1. Right to enforce the observance of.** The Christian religion is a part of the common law, and statutes for the punishment of Sabbath breaking are not in derogation of liberty of conscience. Shover v. State, 5 Eng. 259.

2. Conduct which has a tendency to bring religion into contempt, is punishable at common law, and the Legislature has the constitutional right to pass laws for the protection of the Christian Sabbath, and to prohibit dramatic performances on Sunday. Lindenmuller v. People, 33 Barb. 548.

**3. Construction of statute.** A statute against keeping open on Sunday, "a shop, house, store, saloon, or other building in which it is reputed that spirituous and intoxicating liquors, ale and lager beer are exposed for sale," does not include an inclosed park of four acres within which is an open uncovered platform for dancing, from which lager beer is sold. State v. Barr, 39 Conn. 40.

**4. Labor upon, when not prohibited.** In North Carolina, it is not an indictable offense to labor on Sunday. State v. Williams, 4 Ired. 400.

5. In New Jersey, the sale of liquor by a tavern-keeper, on Sunday, is not within the statute against the profanation of the Lord's day, for the reason that he is compelled by his occupation to keep a house of entertainment at all times. Hall v. State, 4 Harring. 132.

6. In Indiana, it was held that the manufacture of malt beer on Sunday was not a

desecration of the Sabbath. Crocket v. State, 33 Ind. 416.

7. **Work of necessity.** On the trial of an information for the violation of the Sabbath, it appeared that the defendant was engaged on Sunday in gathering and boiling on his premises sap for maple sugar; that it was a good day for the flowing of the sap; that his troughs were full and running over; and that he had no way of saving the sap but by gathering and boiling it. *Held* a work of necessity. Morris v. State, 31 Ind. 189.

8. In Arkansas, on the trial of an indictment for laboring on the Sabbath, the following instruction was held erroneous: That the defendant had a right to preserve his property from waste on the Sabbath; and if it was going to waste, and likely to be lost, by any unforeseen or unavoidable circumstance, he was justified in laboring to preserve it. State v. Goff, 20 Ark. 289.

9. **Complaint.** In Massachusetts, a complaint was held sufficient under the statute (Genl. Sts. ch. 84, § 1), which alleged that the defendant did, on a certain day, "that day being the Lord's day, and between the midnight preceding and the midnight succeeding the said day, at," &c., "keep open his shop there situate, for the purpose of doing business therein, the same not being then and there works of necessity or charity." Com. v. Wright, 12 Allen, 187.

10. **Indictment.** An indictment for keeping a grocery open on Sunday, need not charge a criminal intent, or that the defendant is the owner. Shover v. State, 5 Eng. 259; Brittin v. State, Ib. 299. See Hall v. State, 3 Kelly, 18.

11. In Indiana, an indictment for the desecration of the Sabbath, was held sufficient which charged that the defendant, being over fourteen years of age, was found on Sunday unlawfully at common labor, engaged in his usual avocation, to wit, selling and delivering to J. O. two quarts of beer, and receiving from him twenty-five cents in payment therefor. Eitel v. State, 33 Ind. 201.

12. **What evidence sufficient to show violation of.** In Massachusetts, a complaint under the statute (R. S. ch. 50, § 1), for keeping a shop open on Sunday for business, is supported by proof that the door was suffered to remain unlatched in order that persons might pass in and out on business. Com. v. Lynch, 8 Gray, 384.

13. Proof that though the outer entrances were closed, yet if the defendant permitted general access to his shop through the dwelling-house to any one that pleased to enter for the purpose of traffic, will support a complaint for keeping open a shop on the Lord's day. Com. v. Harrison, 11 Gray, 308. It may be left to the jury to determine the time when the sun set on the day of the offense. Ib.

14. **Burden of proof.** On the trial of a complaint for doing business in a saloon in violation of the statute for the observance of the Lord's day, the persons who did the business being unknown, and no connection having been shown between them and the defendant, the court charged that "the jury had a right to consider whether it was probable that a mere stranger to the defendant would or could get access to, and possession of the saloon in the day time and continue to do so for the length of time spoken of by the witnesses." *Held* erroneous: the burden being on the prosecution to establish the fact that the persons who made the sales were agents of the defendant, and a probability of guilt not being sufficient to authorize a conviction. Com. v. Mason, 12 Allen, 185.

15. **Reasonable doubt.** Where the desecration consists in the alleged sale of an article, if there is a reasonable doubt as to whether the transaction was a sale or a gift, there can be no conviction. Mayer v. State, 33 Ind. 203. See Foltz v. State, Ib. 215; Voglesong v. State, 9 Ib. 112.

16. **Is not a day of the term of a court.** Sunday being *dies non juridicus*, it is not one of the days of the term of a court. Read v. Com. 22 Gratt. 924; s. c. 1 Green's Crim. Reps. 267; referring to Michie v. Michie's Adm'r, 17 Gratt. 109.

*See* RELIGIOUS MEETING.

## Theatrical Performance.

**Indictment for unlawful exhibition of.** An indictment which alleges that the defendant "unlawfully exhibited a theatrical performance" should state the facts which show that it was unlawful. Pike v. Com. 2 Duvall, Ky. 89.

## Threatening to Accuse of Crime.

**1. What constitutes.** On the trial of an information for threatening to accuse another of crime with intent to extort money, it appeared that the threatening letter stated that one A. would commence proceedings against E. if the prosecuting attorney did not, and would also bring an action for damages, in both of which suits he intended defendant for chief witness, whose testimony would be sufficient to convict; and it demanded of E. whether he would stand trial and be sent to State prison for a term of years, or pay defendant a sufficient sum to enable him to leave that part of the country, and not appear against him. *Held* by Cooley, J., and Christiancy, J., sufficient under the statute of Michigan (Comp. L. 1871, § 7528), to authorize a conviction; but by Graves, Ch. J., and Campbell, J., that in order to satisfy the statute, the accusation menaced must be threatened as one to come from the author of the threat, and not from a third person. People v. Braman, 30 Mich. 460.

**2.** In Maine, the offense of obtaining property of another by means of threats, consists in maliciously threatening to accuse one of an offense or to injure his person or property with intent to extort money or pecuniary advantage or with intent to compel him to do an act against his will, whether the threats did or did not produce the desired effect. State v. Bruce, 26 Maine, 71.

**3. What does not amount to.** The following communication was held not to be a threatening letter within the statute of Ohio, although at a subsequent meeting between the parties, verbal threats were made which resulted in the person threatened giving to the other his note for a hundred dollars: "Dear sir: Upon examining the excise law, I find that note you made me require stamp, and that you are liable to fine of two hundred dollars for not stamping it. You will please call immediately, and make satisfaction, and save yourself trouble. Yours with respect. W. A. Brabham." Brabham v. State, 18 Ohio, N. S. 485.

**4. Indictment.** In Massachusetts, an indictment under the statute (Gen. Stats. ch. 160, § 28), for attempting to extort money by the threat of a criminal accusation, need not set out the precise words of the threat. Com. v. Moulton, 108 Mass. 307. And the indictment need not name the offense threatened. The averment that the defendant falsely stated that a warrant had been issued to arrest a person for a crime, which would be served unless money was paid to stay the process, was held sufficient. Com. v. Murphy, 12 Allen, 449.

**5.** An indictment charged that O., C. and H., on, &c., "intending fraudulently and maliciously to deprive B. of his good name and character, and to subject him, without any cause, to punishment for the crime of adultery, and to extort from him money to the amount of," &c., "did falsely, unlawfully, wickedly and maliciously combine, conspire, confederate, and agree together to entrap, seduce and insnare, and falsely charge and accuse him said B. of the crime of adultery, and thereby and by the means aforesaid, to extort," &c., *Held* that the indictment was not bad on the ground that it set forth an executed conspiracy; nor on the ground that it was double, vague, uncertain, and contradictory. Com. v. O'Brien, 12 Cush. 84.

**6.** An indictment charged that the defendant willfully and maliciously threatened E. to accuse him of committing the crime of fornication and adultery, with intent then and there by such threat to extort money, to wit: the sum of $1,000, from him. The words of the threat as set forth were:

"Halloo, old fellow, I want you; you have seduced this girl; she will swear you have; her oath will stand twice as strong as yours, and send you to the State prison for twenty years. Go with me; I am Detective Jones, and if you will give me a thousand dollars I will let you go." It was objected that the language used did not import a threat to accuse of crime, but assumed a state of facts upon which an accusation had already been made, and amounted to an offer to compound the offense for money; and further, that the word "seduced" did not imply a criminal offense accomplished. *Held*, after verdict, that the objection was insufficient. Com. v. Dorus, 108 Mass. 488.

7. In Tennessee, an indictment under the statute (Code, § 4623), providing that, "If any person, either verbally or by written or printed communication, shall maliciously threaten to accuse another of a crime or offense, or to do any injury to the person or property of another, with intent thereby to extort any money, property, or pecuniary advantage whatever, or to compel the person so threatened to do any act against his will, he shall, on conviction, be punished," &c., is sufficient which charges that the defendant "maliciously threatened one B. that he should suffer the consequences (meaning that he would kill him, or do him some great bodily harm, then and there pursuing the said B. with a pistol), unless the said B., against his will, should leave Smith's Cross Roads immediately, with intent thereby to compel the said B. to leave Smith's Cross Roads against his will, from fear of injury to his person, so menaced and threatened by the defendant." State v. Morgan, 3 Heisk. 262; s. c. 1 Green's Crim. Reps. 521.

8. **Evidence.** An indictment charging the defendant with maliciously threatening to enter a complaint against M. to an officer for adultery is supported by proof that the defendant having discovered M. in a suspicious position with a woman, after some conversation between the three as to the commission of adultery by M. with her, took M.'s note for $50, and afterward told M. that if the note was not paid in three days he would have him arrested for adultery. Com. v. Carpenter, 108 Mass. 15.

*See* LIBEL.

## Toll.

**Indictment for exacting.** In Alabama, an indictment against the keeper of a public bridge for exacting illegal toll (Code, § 1199), must allege that the bridge was licensed, and the prescribed rates of toll must be specified. An averment that the bridge "was chartered," and that "the defendant being employed as the keeper of said bridge, did demand and collect from B. F. P. larger toll than is authorized by said charter," is not sufficient. Lewis v. State, 41 Ala. 414.

## Treason.

1. WHAT CONSTITUTES.
2. INDICTMENT.
3. JURY.
4. EVIDENCE.

### 1. WHAT CONSTITUTES.

**1. Entering the service of the enemy.** Enlisting in the service of the enemy is treason, and it can only be justified by the fear of immediate death. Resp. v. McCarty, 2 Dall. 86.

**2. Persuading another to join the enemy.** The person persuaded to join the enemy must have enlisted in order to make the persuader liable for treason. Robert's Case, 1 Dall. 39.

**3. Restoring prisoners.** Giving up prisoners and deserters to the enemy is treason. U. S. v. Hodges, 2 Wheeler's Crim. Cas. 477, Houston, J., *dissenting*.

**4. Resisting act of Congress.** To constitute treason against the United States, in resisting an act of Congress, there must be a conspiracy to resist it generally and publicly by force or by intimidation of numbers, and not a conspiracy to resist such law in particular instances only for a personal or private purpose. U. S. v. Hanway, 2 Wallace, Jr. 139.

**5. What deemed a levying of war.** To constitute a levying of war there must be an assemblage for the purpose of accomplishing by force a treasonable purpose. The enlistment of men to serve against the government is not enough. *Ex parte* Bollman, 4 Cranch, 75.

**6.** An assemblage of men for the purpose of revolutionizing by force the government established by the United States in any of its territories, constitutes a levying of war. The meeting, and then marching from places of partial to places of general rendezvous, is such an assemblage. But the traveling of individuals to the place of rendezvous is not sufficient. Ibid.

**7.** The promotion of a rebellion will not sustain a conviction for treason under the clause of the Constitution in relation to adhering to enemies giving them aid and comfort. But aiding a rebellion constitutes a levying of war; and the buying of a vessel, guns, and ammunition, and getting her ready for service in a rebellion, constitute overt acts of treason, whether or not the vessel actually sails, or makes a successful cruise. U. S. v. Greathouse, 2 Abb. 364.

**8.** As to what constitutes treason in levying war against the United States, and the evidence by which it is to be shown. U. S. v. Vigol, 2 Dall. 346; U. S. v. Mitchell, Ib. 348.

**9. Who regarded traitors.** In case of the levying of war, all persons who take any part in it, however small, or however remote from the scene of hostilities, and who are leagued in the general conspiracy, are deemed traitors. *Ex parte* Bollman, 4 Cranch, 75.

**10. What not deemed treason.** Forcibly resisting the execution of a law of the United States for a private purpose is not treason. U. S. v. Hoxie, 1 Paine, 265.

**11.** Going from an enemy's squadron to the shore with the intention, peaceably, to procure provisions for the enemy, was held not to amount to an act of treason. But if the intention of the defendant had been to obtain provisions for the enemy and to join him in hostilities against the citizens of the United States, his going toward the shore would have been an overt act of favoring the enemy, though no other act were committed. U. S. v. Poyer, 3 Wash. C. C. 234.

**12.** State courts have not jurisdiction of treason against the United States, and therefore the giving aid and comfort to the public enemies of the United States is not treason against a State. People v. Lynch, 11 Johns. 549.

### 2. Indictment.

**13. Need not be specific as to the number engaged.** The fact that the overt act was not committed by the number of insurgents alleged in the indictment is immaterial. U. S. v. Vigol, 2 Dall. 346.

**14. Nature of intelligence sent must be alleged.** Charging that the defendant sent intelligence, without stating the nature of it, is not sufficient. Carlisle's Case, 1 Dall. 35.

### 3. Jury.

**15. Composition of.** As to the number and addition of jurors to be returned, and the form of the panel in a trial for high treason in the United States Circuit Court. U. S. v. Insurgents, 2 Dall. 335.

### 4. Evidence.

**16. Place of offense.** After an overt act of treason has been proved to have been committed in the county where the indictment is found, evidence may be given of an overt act in another county. Malin's Case, 1 Dall. 33.

**17. Presumption from authority of defendant.** Proof that a city being in possession of the insurgents, the defendant had authority to grant passes, is competent, but not conclusive evidence that he held a commission under the enemy. Carlisle's Case, 1 Dall. 35.

**18. Proof of distinct offense.** On a trial for treason, a felonious act for which the defendant is held on another indictment, is not admissible in evidence. U. S. v. Mitchell, 2 Dall. 348.

**19. Admissions and declarations of defendant.** The language of the prisoner showing his intention to join the enemy, is

admissible in evidence on the question of guilty motive. Resp. v. Malin, 1 Dall. 33. As to the admissibility of the defendant's confession, see Robert's Case, 1 Dall. 39; Resp. v. McCarty, 2 Dall. 86.

20. **Defendant as witness.** Where two persons are separately indicted for treason, one is a competent witness for the other. U. S. v. Hanway, 2 Wallace, Jr. 139.

## Trespass.

1. **Meaning.** The word trespass when used in the criminal code, has a technical and definite meaning. It is descriptive of offenses of a lower grade only, and is included in the term misdemeanor. U. S. v. Flanakin, Hemp. 30.

2. **Invading another's premises.** Where four men went upon another's premises, under proceedings before a justice of the peace, which were a nullity, ejected the occupant and his family from the house, and carried away his effects, it was held that they were guilty of trespass. State v. Yarborough, 70 N. C. 250.

3. On the trial of an indictment for trespass, it was proved that the defendants, armed with a stone, a stick, a cowhide and a pistol, in a violent manner and threatening language, demanded of the prosecutor to come out and take a whipping. This was at a gate within forty feet of his house. *Held* that a conviction was proper. State v. Buckner, Phil. N. C. 558.

4. The defendants from near dark until eleven o'clock at night rode back and forth on the highway in front of the prosecutor's house, who owned the land on both sides of the highway, dancing, singing, cursing and firing off two shots, the prosecutor's wife being at the time seriously ill, and refused to desist upon being requested. *Held* that they were guilty of forcible trespass. State v. Widenhouse, 71 N. C. 279; approving State v. Buckner, *supra*.

5. **In taking personal property.** Although a person may wrongfully take the goods of another, yet unless he intended to assume the property in them, and to convert them to his own use, it will be trespass and not robbery. State v. Sowls, Phil. N. C. 151; State v. Deal, 64 N. C. 270.

6. At common law, a trespass in relation to personal property was not an indictable offense without a breach of the peace, or unless the act complained of directly and manifestly tended to it by being done in the presence of the owner, or to his terror, or against his will. State v. Phipps, 10 Ired. 17.

7. Forcibly taking from another his horse, is not indictable. State v. Farnsworth, 10 Yerg. 261. But it is otherwise as to a trespass which is accompanied with a breach of the peace. State v. Batchelder, 5 New Hamp. 549.

8. To constitute an indictable trespass in taking the personal property of another, there need not have been an actual putting in fear. It is only necessary that the force be such as is calculated to intimidate or alarm or involve or tend to a breach of the peace. State v. Pearman, Phil. N. C. 371.

9. Two white men went to the house of a colored man, and one of them claiming a cow which was there, said that he intended to take her away. The colored man insisted upon his right to the cow, and went to a neighbor's to get a witness to prove his title. While he was gone the men took possession of the cow; but when he returned, he forbade them to drive her off, which however they did. *Held* that they were guilty of trespass. State v. McAdden, 71 N. C. 207.

10. **Destruction of personal property.** In Maine, to constitute the wrongful destruction of personal property within the statute (R. S. ch. 162, § 13), it makes no difference whether the defendant's possession was rightful or wrongful. State v. Pike, 33 Maine, 361.

11. **Right of entry.** One who has been in the employ of another, has a right to go on to his former employer's premises to demand his wages, but if ordered to leave he cannot lawfully remain. People v. Osborn, 1 Wheeler's Crim. Cas. 97.

12. **Right to expel intruder.** Where a person enters peaceably on the land of another,

and is committing no violence, there must be a request to depart and refusal before the owner can expel him by force. State v. Woodward, 50 New Hamp. 527.

13. A person may lawfully go to an inn as a guest, or for the purpose of selling anything. He has a right to remain there as a guest so long as he behaves himself properly and pays for his entertainment. If he goes there to sell articles, when that is done he is to leave, if the owner of the house desires him; and if he refuse, the innkeeper may expel him with so much force as is necessary. If the party refuse to go, and arm himself, threatening to resist, the innkeeper is not bound to commence his removal by such gentle modes as would be ineffectual and dangerous to himself. State v. Whitby, 5 Harring. 494.

14. The authority of a person to expel an intruder is not confined to the walls of his house, but extends to the pavement or walk before the door. Ibid.

**15. Right of landlord to resume possession.** When a tenant's right of possession is at an end, the landlord may resume possession without process, if he can do so without a breach of the peace; but when resisted, he cannot lawfully take out the windows and doors, and remove the tenant's property. Com. v. Haley, 4 Allen, 318.

**16. Unjustifiable force in retaking personal property.** The owner of personal property, in attempting to retake it from a trespasser, will not be justified in using a deadly weapon, although in consequence of the superior strength of the trespasser he cannot otherwise get possession of it; nor will he be justified in resorting to such force as even amounts to a breach of the peace. Kunkle v. State, 32 Ind. 220.

**17. When an indictment will lie.** A forcible entry on land is indictable at common law. State v. Morris, 3 Mo. 127.

18. To render a trespass on land indictable, it must have been committed in a manner which amounts to a breach of the peace, or which would have led thereto if the person in possession had resisted the entry. State v. Ross, 4 Jones, 315; State v. Covington, 70 N. C. 71.

19. An act which is only a private trespass, cannot be made indictable by being charged to have been committed with force of arms, maliciously, without claim of right, or without any motive of gain. Therefore, an indictment charging that the defendant "with force and arms, unlawfully, willfully, and maliciously, did break in pieces and destroy two windows in the dwelling-house of A., to the great damage of the said A., and against the peace," &c., does not state an indictable offense. Kilpatrick v. People, 5 Denio, 277.

**20. Averment of act constituting offense.** An indictment which alleges that the defendant entered the premises of the prosecutor with a strong hand, he being then and there present, sufficiently charges a forcible trespass. State v. Buckner, Phil. N. C. 558.

21. An indictment at common law for "unlawfully and injuriously taking a horse with force and arms," does not charge a breach of the peace. Israel's Case, 4 Leigh, 675.

**22. Description of place.** In an indictment for willfully cutting timber on the land of another, under the statute of New York, the close or lot on which the timber was cut must be described with reasonable certainty. People v. Carpenger, 5 Parker, 228.

23. An indictment alleged that the defendant did unlawfully cut down and remove on and from the land belonging to M. S., in said county, a tree, the property of M. S., &c. *Held* that the description of the lands where the trespass was committed was sufficient. Newland v. State, 30 Ind. 111.

**24. Trial.** Where several are indicted for trespass, one of the defendants cannot claim, as matter of right, that the jury shall be required to pass upon the guilt or innocence of the others first. Such a course, although in the discretion of the court, is rarely pursued, unless there is no evidence against one of the defendants, or the court is satisfied that he was joined in the indictment to prevent his being a witness. State v. Bogue, 9 Ired. 360.

**25. Evidence.** An indictment for forcible trespass to personal property is not sustained by proof of carrying away rails from a fence; the fence, when constructed, becoming a part of the land. State v. Graves, 74 N. C. 396.

**26.** The intent with which a child, under twelve years of age, is forcibly taken from its parents, is a question of fact to be determined by the jury. Oliver v. State, 17 Ala. 588.

*See* FORCIBLE TRESPASS.

# Trial.

1. MATTERS PRELIMINARY TO.
2. IMPANELING JURY.
   (*a*) *Excusing jurors.*
   (*b*) *Of challenges in general.*
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## 1. MATTERS PRELIMINARY TO.

**1. Right of prisoner to speedy trial.** A person charged with crime has the constitutional right to a speedy and impartial trial. Nixon v. State, 2 Smed. & Marsh. 497.

**2. Place of trial where offense is committed on vessel.** In Missouri, the statute providing that the trial of a person guilty of felony on board of a vessel, might be had in any county through which such vessel should pass, or at which such voyage should terminate, was held constitutional. Steerman v. State, 19 Mo. 503.

**3. Summoning jury and filing jury lists.** Where a sheriff is directed to summon a jury, he may do it himself, or direct it to be done by a constable or deputy. People v. McGeery, 6 Parker, 653. The statute of New York as to the date of the jury lists, and the time they shall be filed is directory. Such lists are valid, though made and filed at later dates than those mentioned in the statutes. Gardiner v. People, 6 Parker, 155. Nor is it essential to the validity of a list of jurors, that the town clerk was present when it was signed. Ib. When the list as re-returned is valid on its face, it is conclusive upon the prisoner as to its regularity. Ib.

**4. Serving prisoner with copy of indictment and venire.** Where a statute provided that in capital cases the prisoner should have a copy of the indictment and of the venire two entire days before the trial, it was held the duty of the court to see that it was done, and that the sheriff was the proper person to serve such copy. Friar v. State, 3 How. Miss. 422.

**5.** In Alabama, it was held that in computing the two days before the trial within which the prisoner in a capital case was entitled to be furnished with a list of the jurors, the day of delivery, and the day of trial were to be excluded. State v. McLendon, 1 Stew. 195. In South Carolina, where the prisoner was entitled to three days in which to prepare for trial, it was held that the time included the day on which the prisoner moved for a copy of the indictment. State v. Briggs, 1 Brev. 8.

**6. Waiver of right to copy of indictment.** Where the prisoner is entitled by law to a copy of the indictment and venire before trial, he waives the right by pleading not guilty. State v. Johnson, Walker. 392.

**7.** In Georgia, it was held that although a prisoner might refuse to be arraigned until furnished with a copy of the indictment and a list of the witnesses who testified before the grand jury, yet, that the neglect of the prisoner to demand such copy and list on the arraignment, was a waiver of the

right, and left it discretionary with the prosecuting attorney whether or not he would afterward furnish them. State v. Calvin, R. M. Charlt. 142. In New Hampshire, it was held not error in the court on the trial of an indictment for carnally knowing and abusing a female child under the age of ten years, to refuse to instruct the jury that they could only convict the defendant of a simple assault because a copy of the indictment was not furnished to him before he was arraigned. Lord v. State, 18 New Hamp. 173.

**8. Employment of counsel by prosecution.** In Massachusetts, where additional counsel are employed by the prosecution, it must be at the request of the district attorney, and under some stringent reason arising in the particular case; and the control and direction of the case must remain with the public prosecutor. Com. v. Williams, 2 Cush. 583.

**9. Compelling bill of particulars.** The court may, when justice cannot otherwise be done, compel the production of a bill of particulars. Com. v. Snelling, 15 Pick. 321.

**10. Release of prisoner for want of trial.** The New York statute which provides that unless the prisoner shall be brought to trial before the end of the next court held in the county after indictment found, he shall be entitled to be discharged, is not a statute of limitations, but a failure to comply with it is a mere irregularity. People v. Ruloff, 5 Parker, 77. In Alabama, it was held under the statute of that State, that if the prisoner in a capital case was not indicted and tried before the second term of the court after his commitment, he must be discharged, notwithstanding the trial was unavoidably postponed, unless the postponement was on the prisoner's application, or with his consent. State v. Phil, 1 Stew. 31.

**11.** In Missouri, it was held that the statute which provided that persons indicted and imprisoned should be discharged in case they were not tried during the second term after the indictment was found, was applicable to a pending indictment only, and that where the defendant had been imprisoned under an indictment which had been quashed, the time of such imprisonment could not be added to the time of his imprisonment under a second indictment for the same offense. Fanning v. State, 14 Mo. 386.

**12. Moving case for trial.** In New York, a case cannot be moved out of its order on the calendar by the prisoner's counsel, unless the notice of argument states his intention to bring it on out of its order. Barron v. People, 1 Barb. 136.

**13.** In Tennessee, where the prisoner was put upon his trial on the presentment of the grand jury, instead of an indictment, it was held that this practice had been so long pursued in that State, its legality could not be questioned, although it might not be sanctioned by established principles. Smith v. State, 1 Humph. 396.

**14.** The judge has no power to order the names of any of the defendants to be erased from the indictment. State v. Lendon, 5 Strobh. 85.

**15. Separate trial in discretion of court.** Where several are jointly indicted for a felony, they are not entitled to separate trials as a matter of right, although they sever in their pleas; but the court may, in its discretion, allow them to be tried separately. People v. Stockham, 1 Parker, 424; U. S. v. Gibert, 2 Sumner, 19; State v. Lendon, 5 Strobh. 85; Com. v. Eastman, 1 Cush. 189. It was therefore held not ground of exception that before the jury were impaneled for the trial of persons jointly indicted for murder, they moved that they be allowed separate trials, which motion was denied. State v. Conley, 39 Me. 78, referring to State v. Soper, 16 Ib. 293, and U. S. v. Merchant, 12 Wheat. 480. In New York, where prisoners are jointly indicted and they elect to have separate trials, the district attorney may determine which of them he will first put upon his trial, and a refusal of the court to interfere with his discretion forms no ground of exception. Patterson v. People, 46 Barb. 625. And see Jones v. State, 1 Kelly, 610.

**16. Arraignment of prisoner.** When the prisoner was not arraigned, the judg-

ment will be reversed. Powell v. U. S. 1 Morris, 17. If a deaf and dumb person be arraigned, the indictment must be explained to him by a sworn interpreter. Com. v. Hill, 14 Mass. 207. When the prisoner has been arraigned in the court where the indictment was found, it is not necessary that he be arraigned at the court to which the case is removed, the arraignment not being part of the trial. Price v. State, 8 Gill, 295. But his second arraignment would not be error. Gardiner v. People, 3 Scam. 83.

17. Where the prisoner is discharged upon an indictment, he cannot afterward be arraigned or tried under that indictment. But another indictment may be found for the same offense. State v. Garthwaite, 3 Zabr. 143.

18. **Prisoner standing mute.** Where a prisoner upon being arraigned stands mute, and it is suggested that he is deaf and dumb, a jury should be impaneled to try the fact, and if the finding be in the affirmative, and that he is incapable of understanding the nature and incidents of a trial, the court should order it to be so certified, to the end that provision may be made for his safe keeping in an asylum for the insane, or otherwise according to law. State v. Harris, 8 Jones, 136.

19. A prisoner arraigned for larceny stood mute; and a jury having found that he stood mute fraudulently, willfully and deliberately, he was sentenced as upon conviction. Com. v. Moore, 9 Mass. 402.

20. A conviction before a magistrate will be sustained by a record showing that the defendant upon being asked whether he was guilty or not guilty, fraudulently and willfully stood mute, and that after the examination of witnesses, and a full hearing of the case, he was adjudged guilty and sentenced to imprisonment. Ellenwood v. Com. 10 Metc. 222.

21. **Waiver of arraignment.** In misdemeanor, the prisoner may waive a formal arraignment. Kluget v. State, 1 Kansas, 365.

22. A person accused of murder, having been served with a copy of the indictment according to law, went with the prosecuting attorney and his own counsel before the court, personally waived an arraignment, and entered such waiver and his plea of not guilty on the indictment. *Held* that he could not object after conviction, that he had not been arraigned. Goodin v. State, 16 Ohio, N. S. 344.

23. When the defendant is present in person and by counsel states that he is ready for trial, and is tried by a jury regularly impaneled and sworn, he waives the failure to arraign him, and to enter a formal plea of not guilty. State v. Cassady, 12 Kansas, 550.

24. The record is sufficient when, although it does not state that the defendant was arraigned, yet states that he appeared, moved by his counsel to quash the indictment, which being overruled, he pleaded not guilty. Sohn v. State, 18 Ind. 389.

25. On the trial of an indictment for an assault with intent to kill, the defendant being present and announcing that he was ready, a jury was impaneled. After the prosecution had examined in chief the first witness, it was discovered that the defendant had not been arraigned. This was then done and the defendant pleaded not guilty. The defendant thereupon objected to any further proceedings, and moved that he be discharged, which motion was overruled. The jury were then resworn, and the trial begun *de novo*. *Held* that there was no error. State v. Weber, 22 Mo. 322.

26. **Plea in abatement.** The prisoner when first arraigned, though at a subsequent term of the court, may plead in abatement that the grand jurors who found the indictment were not selected conformably to the statute. Vattier v. State, 4 Blackf. 73.

27. Advantage of the misnomer of the defendant's christian name, sirname, or addition, must be taken by motion to quash or plea in abatement on his arraignment. And if there be no addition, and the party appear and plead not guilty, he will be deemed to have waived the defect. State v. McGregor, 41 New Hamp. 407.

28. **Plea of non-identity.** This plea which is made *ore tenus* at the bar of the court, is never allowed, unless the prisoner has escaped after verdict and before judg-

ment or execution. Joseph v. State, 5 How. Miss. 20.

**29. Proof of identity.** The fact that the prisoner has been arraigned and pleaded to the indictment, is sufficient proof of his identity. Hendrick v. State, 6 Texas, 341.

**30. Replication to plea.** A replication to a plea of former conviction in these words: "Arrest of judgment," is bad on demurrer. The replication ought to show that the former indictment was insufficient, or that the defendant could not be convicted for the offense charged in the second indictment. Henry v. State, 33 Ala. 389.

**31.** Where two defective special pleas in bar, substantially the same, are interposed by the prisoner, and issue is taken on one of them, the failure of the court to require the prosecution to demur, reply, or take issue on the other, is not ground of objection on error. Ibid.

**32. Plea of guilty.** This will not be received in a capital case until after the court has advised the prisoner of its effect, and upon proof that it is done freely, and that the prisoner is sane. Com. v. Batris, 1 Mass. 95; Kinney v. People, 2 Gilman, 540.

**33. Determination of question as to insanity of prisoner.** Although when the insanity of the prisoner is alleged or suspected, the most prudent method of determining the question is a trial by jury, yet other modes may be adopted, in the discretion of the court. Freeman v. People, 4 Denio, 9.

**34. Plea of not guilty.** Where a prisoner on a trial for murder pleads not guilty, and for his trial "puts himself upon his country," it is sufficient without saying "on God and his country." State v. Reeves, 8 Ired. 19.

**35.** The prisoner, by pleading not guilty, admits the name by which he is described in the indictment, and is estopped from afterward denying it. Uterburgh v. State, 8 Blackf. 202.

**36. Waiver of objection to grand juror.** After a plea to the merits, the defendant cannot object that one of the grand jurors who found the indictment was an alien, although he had no knowledge of the disqualification until after the filing of the plea. Byrne v. State, 12 Wis. 519; Grubb v. State, 14 Ib. 434.

**37. Refusal to plead.** When the defendant refuses to plead, the plea of not guilty should be entered. Kinney v. People, 2 Gilman, 540; Thomas v. State, 6 Mo. 457; Meader v. State, 11 Ib. 363.

**38.** After the prisoner's plea of once in jeopardy was overruled, he was required by the court to plead over to the indictment, and on refusing so to plead, a plea of not guilty thereto was entered on the indictment by order of the court. *Held* that this was proper under the statute (3 N. Y. R. S. 5th ed. p. 1022, § 74.) Gardiner v. People, 6 Parker, 155.

**39. Remanding prisoner.** Where the prisoner is infected with the small-pox, a trial demanded by him may be refused, although the statute requires that he be tried at the second term of the court after the finding of the indictment. Com. v. Jailer, 7 Watts, 366.

**40.** Where at the first term of the court after the finding of the indictment, a witness for the prosecution who was under recognizance to attend fraudulently neglected to do so, it was held that the prisoner might be remanded, although it did not appear that he had anything to do with keeping the witness away. Com. v. Carter, 11 Pick. 277.

### 2. Impaneling jury.

#### (*a*) *Excusing jurors.*

**41. Authority of court in.** The court may excuse jurors in a capital case, upon their application, for any reasonable cause. State v. Craton, 6 Ired. 164.

#### (*b*) *Of challenges in general.*

**42. In United States courts.** The act of Congress of July 20th, 1840 (5 Stats. at Large, 394), confers upon the courts of the United States the power to regulate the challenges of jurors, except in capital cases, and in those the act of 1790 gives the right of peremptory challenge. U. S. v. Shackleford, 18 How. U. S. 588.

**43. Challenge to the array.** Objections to the mode of summoning the jury are

made by a challenge to the array, or by motion to quash the indictment. Stone v. People, 2 Scam. 326.

44. The irregular drawing and summoning of jurors, without fraud or corruption on the part of the officers or prejudice to the prisoner, is not a ground of challenge to the array. Ferris v. People, 48 Barb. 17; affi'd 35 N. Y. 125.

45. That the court excused a majority of the jurors drawn from attendance without reasonable cause is not a ground of challenge to the array. Ib.

46. The formation or expression of an opinion by the sheriff as to the guilt or innocence of the prisoner is not a ground of challenge to the array. Some other fact must be alleged in the challenge, as that the sheriff had intentionally omitted to summon some juror, or had stated his opinion to some juror. Ib.

47. The *venire* or list of jurors summoned in a capital case will not be quashed because one of the persons summoned was a member of the grand jury which found the indictment. Birdsong v. State, 47 Ala. 68.

48. The fact that the officer whose duty it is to summon jurors has expressed an opinion as to the guilt or innocence of the prisoner is not ground of challenge to the array. Friery v. People, 2 N. Y. Ct. of Appeals Decis. 215; affi'g 54 Barb. 319; s. c. 2 Keyes, 424.

49. The district attorney need not verify his answer to a challenge to the array. Gardiner v. People, 6 Parker, 155.

50. **Order of challenge to the polls.** Challenges to petit jurors are first made by the prisoner, and afterward by the prosecution. Jones v. State, 2 Blackf. 475.

51. **Challenge in case of joint defendants.** Each defendant in a joint trial under a joint indictment may challenge the entire number of jurors that he would be entitled to if tried separately. Brister v. State, 26 Ala. 107.

52. **Right to interrogate juror.** Neither side has a right to interrogate a juror before he is challenged. State v. Flower, Walker, 318; Com. v. Webster, 5 Cush. 295; State v. Zellers, 2 Halst. 220; King v. State, 5 How. Miss. 730.

53. Counsel has no right to interrogate the jurors with a view of showing their bias or prejudice, by facts drawn out by a cross-examination. Com. v. Gee, 6 Cush. 174.

54. The prosecution cannot ask a juror whether he has so made up his mind that it cannot be changed on the trial; the prisoner not being obliged to take upon himself the burden of altering the juror's mind. Whitman's Case, 2 Wallace, Jr. 147.

55. But where a juror is challenged to the favor and called as a witness in support of the challenge to show a bias derived from what he has heard or read on the subject, he may be asked on his cross-examination, his opinion as to the character and extent of the supposed bias, and whether he thinks it will influence him after hearing the evidence. People v. Knickerbocker, 1 Parker, 302.

56. The testimony of a juror on the challenge to him for favor which is taken after a challenge for principal cause, cannot be considered on the question whether the challenge for principal cause was properly decided. Cancemi v. People, 16 N. Y. 501.

57. **Mode of determining challenge to the polls.** It is the duty of counsel to state the ground of challenge. People v. Freeman, 4 Denio, 9. If the grounds stated are such as in law render the juror incompetent, the challenge is for principal cause. When the causes assigned do not, in and of themselves render the juror incompetent, but are such as indicate partiality or bias, or other incompetency, but are not conclusive of it, the challenge is to the favor. The opposite counsel may demur, or deny the truth of the matter alleged, and put the challenger to proof of them. If he demurs, the facts are admitted, and the question is one of law, and the decision may be reviewed on writ of error. If the facts are denied, and they are heard by the court or triers, and are found not to be true, the decision, as a question of fact, is final. People v. Mallon, 3 Lans. 224; People v. Allen, 43 N. Y. 28.

58. It is competent for either party to challenge first for principal cause; and failing to sustain it, he may then challenge to

the favor, and submit the same evidence to the triers that had been given on the challenge for principal cause; and the triers may, upon the same evidence, find the juror incompetent because of prejudice or partiality. People v. Mallon, *supra*.

59. Where the prisoner's counsel did not specify any ground of challenge, but the juror was examined as to whether he had formed or expressed an opinion, it was held that that must be assumed to be the ground of challenge, and also that it was for principal cause, that being the most favorable ground for the prisoner. Ib.

60. **Trial of challenge by court.** The legal mode of trial of a question of fact on a challenge for principal cause, in the absence of consent to a different mode, is by triers appointed by the court. It is competent however, for the parties by consent, to submit to the court the trial of this question of fact. Stout v. People, 4 Parker, 132. In the absence of objection or exception, after the question has been determined by the court, the consent of counsel on both sides will be presumed. s. c. Ib. 71; O'Brien v. People, 36 N. Y. 276.

61. In Maine, the court is the only tribunal which the statute has provided for the trial of challenges of jurors. State v. Knight, 43 Maine, 11.

62. In New Hampshire, the order of challenge, and the determination of it is for the judge at the trial; and his finding is not the subject of exception. State v. Pike, 49 New Hamp. 399.

63. **Consent that court try challenge, cannot be revoked.** Where on a trial for felony, the prisoner by his counsel, consents to substitute the court for triers, upon challenges to jurors, such consent cannot afterward be revoked. People v. Rathbun, 21 Wend. 509.

64. **Triers, how sworn.** It is not enough that the triers of a challenge for favor are sworn to find whether the juror is indifferent "upon the issue joined." They must also be sworn to find whether the juror is impartial between the parties. Freeman v. People, 4 Denio, 9.

65. **Written instructions to triers not proper.** Where a juror has been put upon triers at the request of the prisoner, and they have retired to their room, it is not proper for the defendant's counsel to move the court to send written instructions to the triers to put to the juror a particular question. Whaley v. State, 11 Ga. 123.

66. **Testimony on trial of challenge.** Where a challenge for principal cause is tried by the court, it must be upon the testimony of the juror alone on his *voir dire*—if by triers, then by other evidence to the exclusion of the oath of the juror. Stewart v. State, 8 Eng. 720. Upon such trial, the party may object to the admission of evidence, or to the instructions of the court. Ib.

67. **Juror not bound to criminate himself.** In examining a juror as to his having formed and expressed an opinion, he ought not to be required to criminate himself. State v. Benton, 2 Dev. & Batt. 196; Sprouce v. Com. 2 Va. Cas. 375. Where the challenge of a juror tends to his infamy, it must be supported by extrinsic proof. Hudson v. State, 1 Blackf. 317.

68. **Examination of witnesses.** Although as a general rule, after putting a juror upon his *voir dire*, a want of impartiality cannot be proved by witnesses, yet, where a cause of challenge exists which could not be known to the juror, it is otherwise. Com. v. Wade, 17 Pick. 395.

69. **Prisoner bound by his challenge.** Where the prisoner challenges a juror for favor, and the prosecutor admits the cause assigned to be true, the prisoner is bound by his challenge, and cannot afterward have the matter tried. State v. Creasman, 10 Ired. 395.

70. Where the court improperly sets aside a competent juror, on the application of the prisoner, the latter cannot afterward object to it as error. McAllister v. State, 17 Ala. 434.

71. **Challenge after previous challenge overruled.** A juror may be challenged to the favor, after a challenge for principal cause has been tried and overruled. Carnal v. People, 1 Parker, 272.

72. **Waiver of challenge.** Where the

prisoner waived his right to object to a juror against whom he had good cause of challenge, it was held that the prosecution could not insist upon having the juror excluded under an agreement that all should be regarded as being challenged by both sides. People v. Mather, 4 Wend. 229.

73. If the juror is accepted by both the prosecution and the prisoner, the State's right of challenge on the ground of a fixed opinion of the juror is lost, and cannot be again revived, against the objection of the prisoner, although the existence of the cause of challenge was unknown when the juror was accepted. Stalls v. State, 28 Ala. 25.

74. If the court improperly set aside a juror for a cause of challenge on the part of the prosecution which has been lost by previously accepting him, and the prisoner excepts, the error entitles him to a reversal of the judgment. Ib.

75. **When challenge too late.** After a juror is sworn in the case, it is too late to challenge him for any cause which existed at the time he was put on the prisoner. State v. Morea, 2 Ala. 275; Ward v. State, 1 Humph. 253; Gillespie v. State, 8 Yerg. 507.

76. After the jury were impaneled on a trial for murder, and three days had been spent in the introduction of evidence, the defendant objected to going on with the trial, for the reason that several of the jurors had, before the trial commenced, expressed opinions that the defendant was guilty. *Held* that the objection was rightly overruled. State v. Howard, 17 New Hamp. 171.

77. **Decision of court.** Where a juror is challenged for cause, by the prosecution, the court need not render an immediate decision, but may wait until the panel is gone through. State v. Overton, 6 Ired. 165.

78. **Review of decision.** A challenge for principal cause being a part of the record, a certiorari will lie to review it. *Ex parte* Vermilyea, 6 Cow. 555.

79. A bill of exceptions may be maintained for refusing triers, or upon any question arising upon a challenge to jurors in a case where triers may be demanded. People v. Rathbun, 21 Wend. 509; State v. Shaw, 3 Ired. 532; People v. Bodine, 1 Denio, 281.

80. The fact that the prisoner did not avail himself of a peremptory challenge to exclude a juror who was found competent upon a challenge for cause, will not prevent him from taking advantage of an error committed on the trial of the challenge for cause, though his peremptory challenges were not exhausted when the jury was completed. People v. Bodine, *supra*.

81. The improper rejection of a juror is not ground for a reversal of the judgment, if the defendant obtains an impartial jury of his own selection. Henry v. State, 4 Humph. 270.

82. **Right of court to set juror aside after he is sworn.** Where after a juror is sworn, and has taken his seat, he is discovered to be incompetent, the court may set him aside at any time before evidence is given. People v. Damon, 13 Wend. 351.

(*c*) *Grounds of principal challenge to the polls.*

83. **That a juror is not qualified to serve.** The non-possession of any natural faculty stands in respect to a juror in the same category with alienage, or infancy, or sex, and must be taken advantage of before verdict, and by challenge. U. S. v. Baker, 3 Benedict, 68.

84. On a trial for grand larceny, a juror upon challenge for principal cause testified that he had been a farmer; had sold his farm the previous spring and taken back a mortgage; that he could not tell whether or not he was assessed for personal property this year; that he was not assessed last year for personal property but was for real estate. *Held* that the challenge was properly sustained. Armsby v. People, 2 N. Y. Supm. N. S. 157.

85. It is not a good ground of challenge for cause, that the juror was challenged peremptorily by the prisoner on a former trial of the same case. State v. Henley, R. M. Charlt. 505.

86. The objection that persons returned by the sheriff have not the proper qualifications of jurors must be made before the

jurors are placed on the panel. Com. v. Gee, 6 Cush. 174.

**87. That a juror is of kin to party.** Where a juror was challenged for cause on the ground that his wife was cousin to the prisoner's deceased wife, who left no children, it was held not a cause of challenge, the affinity having ceased with her death. State v. Shaw, 3 Ired. 532.

**88. Conscientious scruples of juror.** It is a good ground of challenge that a juror has conscientious scruples against finding a a verdict of guilty. U. S. v. Wilson, 1 Bald. 78; Gross v. State, 2 Carter, 329; Com. v. Lesher, 17 Serg. & Rawle, 155; Williams v. State, 3 Kelly, 453; Lewis v. State, 9 Sm. & Marsh. 115; People v. Mather, 4 Wend. 229; People v. Damon, 13 Ib. 351; Willis v. State, 12 Ga. 444; Wade v. State, Ib. 25; Payne v. State, 3 Humph. 375; Neely v. People, 13 Ill. 687; State v. Jewell; 33 Me. 583; Walter v. People, 32 N. Y. 147.

**89.** Where the accused may be punished capitally or by confinement in the penitentiary, it is good ground of challenge for cause by the prosecution that a juror has a fixed opinion against capital or penitentiary punishment. Stalls v. State, 28 Ala. 25.

**90.** It is good ground of challenge for cause, that a juror is opposed to capital punishment, and that his opinion will influence his verdict. Martin v. State, 16 Ohio, 364.

**91.** It is not only the right, but the duty of the court, apart from any statute, on a trial for murder, to permit an inquiry to be made whether persons returned to serve as jurors are opposed to capital punishment. State v. Howard, 17 New Hamp. 171; Pierce v. State, 13 Ib. 556.

**92.** Where a juror, upon challenge for principal cause, testified that he had conscientious scruples in finding a verdict where the penalty was death, but that his scruples would not prevent him from finding a verdict of guilty of murder if the evidence required him to do it, it was held that he was properly rejected. O'Brien v. People, 48 Barb. 274; s. c. 36 N. Y. 276; 2 N. Y. Trans. of App. 5.

**93.** A juror is disqualified where he is not opposed to the policy of the law inflicting capital punishment, but his scruples consist in tender feelings toward the prisoner—a fear that he shall do him wrong. Ib.

**94.** A juror in a capital case having been challenged for principal cause, was declared competent and sworn. Some time afterward, but before any evidence had been given, he stated to the court that he had misunderstood the previous question, and given a wrong answer, and desired to correct himself and say that he could not, under any circumstances, convict on a charge of murder. The challenge to him was thereupon opened, and having repeated his last statement, he was set aside. *Held* proper. People v. Wilson, 3 Parker, 199.

**95.** A juror testified that he had no conscientious scruples against finding a man guilty of an offense punishable with death where the proof was positive, but no amount of circumstantial evidence would induce him to render such a verdict. Another juror said that he should be very reluctant to render a verdict of guilty of a capital offense, even if his judgment was convinced of the prisoner's guilt; that he would probably be the last juror to agree to such a verdict, but he did did know but that he might be starved to render it; he thought he should hang the jury and thus defeat a verdict of guilty. On challenge for cause, these jurors were set aside. Gates v. People, 14 Ill. 433.

**96.** In Alabama, a juror in a capital case who has a fixed opinion against capital punishment may be challenged for cause by the prosecution (Penal Code, § 630), or be set aside by the court, although he also states in answer to questions by the prisoner, "that if he were on the jury and the law required him to convict, he would do so." Waller v. State, 40 Ala. 325.

**97.** On a trial for counterfeiting, the prosecution may ask a person presented as a juror whether he has taken an oath to acquit all counterfeiters. He may, however, decline to answer. Fletcher v. State, 6 Humph. 249.

**98. Juror competent although opposed to capital punishment.** A juror who is

opposed to capital punishment is competent, if he believe he can give a verdict according to the evidence. Com. v. Webster, 5 Cush. 295.

**99.** Where on a trial for murder, a juror upon being challenged by the prosecution, testified that he was opposed to the punishment of death, but that he should, if sworn as a juror, and the evidence of guilt was clear, find the accused guilty, it was held that he was competent. People v. Wilson, 3 Parker, 199.

**100.** On a trial for murder, a juror was asked if he entertained such conscientious opinions where the offense charged was punishable with death, as would preclude him from finding the defendant guilty; to which he replied, that he was opposed to capital punishment on principle. A challenge for cause by the prosecution was sustained. *Held* error. People v. Stewart, 7 Cal. 140.

**101.** On a trial for murder, the court ruled that if a juror upon being interrogated, answered merely that "he was opposed to capital punishment," he was incompetent to sit. *Held* error. Atkins v. State, 16 Ark. 568.

**102. Prejudice of juror against a certain class.** On the trial of citizens of Mexico for an assault with intent to murder, it was held error in the court to rule out the following questions put to a juror: 1. Are you not a member of a secret and mysterious order known as, and called Know-Nothings, which has imposed on you an oath or obligation, beside which an oath administered to you in a court of justice, if in conflict with that oath or obligation, would be by you disregarded? 2. Are you a member of any secret association, political or otherwise, by your oaths or obligations to which, any prejudice exists in your mind against Catholic foreigners? 3. Do you belong to any secret political society known as, and called by the people at large in the United States, Know-Nothings; and if so, are you bound by an oath or other obligation, not to give a prisoner of foreign birth, in a court of justice, a fair and impartial trial? 4. Have you at any time taken an oath, or other obligation of such a character, that it has caused a prejudice in your mind against foreigners? 5. Are you under any obligations not to extend the same rights, protection, and support to men of foreign birth as to native born American citizens? 6. Have you any prejudice whatever against foreigners? People v. Reyes, 5 Cal. 347.

**103.** A person who states that he would convict a colored man on less evidence than he would a white man for the same offense, is incompetent to sit as a juror on the trial of an indictment against a colored man. Milan v. State, 24 Ark. 346.

**104. Opinion of juror that law is unconstitutional.** A juror is incompetent to sit who states that he has formed such an opinion of the unconstitutionality of the statute on which the prosecution is founded, that he could not find a verdict of guilty, whatever might be the evidence. Com. v. Austin, 7 Gray, 51.

**105. Opinion of juror as to guilt or innocence of prisoner.** Where a juror has expressed an opinion against the prisoner, from his knowledge of the case, and not from any favor or ill will, it is a principal cause of challenge; and the same is true when the opinion is founded on the information of others. *Ex parte* Vermilyea, 6 Cow. 555; People v. Rathbun, 21 Wend. 509; Sprouce v. Com. 2 Va. Cas. 375; Littlejohn v. Com. Ib. 297; Freeman v. People, 4 Denio, 9; Ned v. State, 7 Porter, 187; Quesenberry v. State, 3 Stew. & Port. 308; People v. Mather, 4 Wend. 229; U. S. v. Wilson, 1 Bald. 78. In New Jersey, it has been held that a juror who has formed and expressed an opinion of the guilt of the prisoner, founded on his knowledge of the facts or upon information supposed to be true, is not thereby disqualified. State v. Fox, 1 Dutch. 566.

**106.** On the trial of a challenge, the prisoner's counsel put this question: "If the defense in this case should be the insanity of the defendant, have you formed or expressed an opinion on the subject?" *Held* improper; the investigation being confined to the general question of opinion as to the guilt or innocence of the prisoner. State v. Arnold, 12 Iowa, 479.

**107.** Where upon a trial for murder, it appeared that the mind of a juror on his being challenged for principal cause, was preoccupied with an opinion upon the issues to be tried, which it would require evidence to remove, it was held that he was incompetent. Cancemi v. People, 16 N. Y. 501.

**108.** It is not a good cause for principal challenge on the trial of an indictment for murder, that a juror had formed an opinion that the prisoner killed the deceased; as he might have killed him and still not have committed any crime. Lowenberg v. People, 27 N. Y. 336; 5 Parker, 414. And in the same case on a challenge for favor, the court refused to charge the triers that they should find the challenge true, if they found that the juror believed that the person alleged to have been murdered was killed by some one. In Tennessee, on a trial for murder, jurors stated that from rumors and reports in their neighborhood they had heard that a man had been killed, that the prisoner was accused of the murder, and had attempted to make his escape, and that upon the facts and circumstances, they had formed and expressed an opinion. *Held* that they were competent. Payne v. State, 3 Humph. 375.

**109.** The statute of New York (Laws of 1872, ch. 475), which provides that an opinion as to the guilt or innocence of the accused shall not be ground of challenge for principal cause if the juror declare on oath that he can render an impartial verdict, and the court is satisfied that he has not such a present opinion as would influence his verdict, is constitutional. Stokes v. People, 53 N. Y. 164.

**110.** The fact that a juror has expressed an opinion respecting the case before he was summoned, is not necessarily a ground of principal challenge. But if the evidence shows also malice, ill-will, interest, or a fixed opinion, that raises a legal presumption against the indifference of the juror. State v. Howard, 17 New Hamp. 171. In New Jersey, it was held not cause of principal challenge to a juror, that he had formed an opinion relative to the matter to be tried, if it was not done through ill-will or malice. State v. Spencer, 1 Zabr. 196.

**111. Opinion to exclude, must be absolute.** To disqualify a juror upon challenge for principal cause, on the ground that he has formed and expressed an opinion, his mind must be at rest as to the prisoner's guilt, or the question to be tried. The opinion must be fixed and unconditional, one that has been deliberately formed, and is still entertained, and which in an undue measure, shuts out a different belief. State v. Kingsbury, 58 Me. 238; Staup v. Com. 74 Penn. St. 458; O'Mara v. Com. 75 Ib. 424. Upon a challenge for favor, to be determined by triers, the rule is different. The triers may find the existence of bias, although there is no direct proof that the juror has formed or expressed such an opinion as necessarily constitutes a legal disqualification. People v. Stout, 4 Parker, 71; Ib. 132.

**112.** Upon a trial for murder, a juror, upon being challenged for principal cause, testified that he thought he had an impression; he rather thought he had formed an opinion: he presumed he had expressed it, and thought he retained it; that he had formed an opinion, if the newspaper accounts of the transaction (of which he had read only a part) were true; that he rather thought they were true, and that so far as he read, he gave them credence, but did not arrive at a definite opinion. *Held* that he was competent. Ib.

**113.** Upon a challenge for principal cause on a trial for murder, the juror said he had read an article in a newspaper concerning the homicide, and that although he had an impression that a homicide was committed, he had none as to the guilt or innocence of the prisoner. The challenge being overruled and the juror challenged for favor, he again testified that he had read the statement in the newspaper without any impression remaining on his mind as to the guilt or innocence of the prisoner, and that "it would require evidence either the one way or the other to make him convinced of the prisoner's guilt or innocence." The judge declined to charge that the challenge was well taken, and the triers found the juror competent.

*Held* that there was no error. O'Brien v. People, 48 Barb. 274; affi'd 36 N. Y. 276; 2 N. Y. Trans. of App. 5.

**114.** Where on a trial for murder, a juror upon being challenged for cause, said that he had formed an opinion, which it would require some evidence or explanation to remove, that the prisoner killed the deceased, that such opinion had been formed from rumor and newspaper accounts, and that he believed that he could sit and decide the case with the same impartiality as if he had never heard of the case, it was held that he was competent. State v. Lawrence, 38 Iowa, 51.

**115.** On a trial for murder, a juror stated that he had heard as rumor what purported to be the facts in the case, but not from a witness, nor from a person professing to have knowledge of such facts, and from what he had heard had "formed an opinion as to the guilt or innocence of the accused;" that he had no reason to doubt what he had heard, and at the time believed it; and if the facts turned out the same as he had heard them, his "opinion was formed." *Held* that the juror was not disqualified. People v. Williams, 17 Cal. 142.

**116.** Where upon a trial for murder, a juror upon being challenged for principal cause, testified that he had read about the homicide in a newspaper, and had formed an opinion as to the guilt or innocence of the accused, which had not been changed, and for the removal of which evidence would be required; and that, from the facts he had heard, he could not sit exactly indifferent. Upon cross-examination, he testified that if he was on the jury, he would try to be governed by the evidence, but would have a little prejudice; that he read the evidence at the time in the newspapers, and assuming the statements to be true, he had formed an opinion, but that the opinion thus formed, would not affect his mind in determing the case on the evidence. *Held* that the juror was incompetent. People v. Mallon, 3 Lans. 224.

**117. Opinion which is not relative to the issue.** Where a juror, without forming or expressing any opinion as to the issue, had formed an opinion that the laws had been outraged, it was held that he was competent. Brinton's Case, 2 Wallace, Jr., 149.

**118.** Where a juror upon being interrogated, stated that he was not satisfied that he was perfectly impartial; that he had partiality in his mind; that he did not personally know the prisoner or the facts of the case, and had no prejudice against him as an individual, but that he was prejudiced in all such cases, because of the offense; it was held that he was competent to sit. Parker v. State, 34 Ga. 262.

**119.** On the trial of an indictment for a nuisance in maintaining a dam, a juror upon being challenged, stated that he had formed and had an opinion, that mill dams generally in that part of the country were nuisances, but that he was not much acquainted with the dam in question, and had not formed or expressed any opinion regarding it. *Held* that the juror was not competent. Crippen v. People, 8 Mich. 117.

**120. Juror member of grand jury.** It is a good challenge for cause that the juror was one of the grand jury by whom the indictment was found, and if the challenge is disallowed, and the defendant excepts, and then challenges him peremptorily, the defendant is entitled to the benefit of his exception although his peremptory challenges be not exhausted before the jury is completed. Birdsong v. State, 47 Ala. 68.

**121. Juror sworn on previous trial.** Where there are separate trials on a joint indictment, it is not a ground of challenge that a juror was sworn on the first trial, which terminated in a verdict of guilty, though it is sufficient ground to submit his indifference to triers. U. S. v. Wilson, 1 Bald. 78.

**122. Juror witness on former trial.** It is not a cause of challenge, that a juror was called as a witness for the prosecution, on a former trial of the same indictment, to testify against the character of the prisoner. Fellow's Case, 5 Maine, 333.

*(d) Grounds of challenge to the polls for favor.*

**123. Unsettled opinion.** A settled opinion of the guilt or innocence of the accused need not be shown where the challenge is

for favor. People v. Bodine, 1 Denio, 281. If the juror has an opinion which it will require testimony to remove, he is disqualified, although the opinion be founded on rumor alone. People v. Mather, 4 Wend. 229; Reynolds v. State, 1 Kelly, 232; Boon v. State, Ib. 631; *contra*, Moses v. State, 11 Humph. 232; Nelms v. State, 13 Sm. & Marsh. 500; Sam v. State, Ib. 89. But not where the juror's mind is free to act upon the testimony. King v. State, 5 How. Miss. 730; State v. Ellington, 7 Ired. 61; Smith v. Com. 7 Gratt. 593; People v. Bodine, *supra;* commented on and explained, People v. Honeyman, 3 Denio; 121.

**124.** Where it appeared on a trial for treason that a juror had formed but not expressed an opinion as to the nature of the offense, but not as to the guilt of the prisoner, the court thought he had better be withdrawn. Smith's Case, 2 Wallace, Jr., 150; Walsh's Case, Ib. 143. But see Lyon's Case, Ib. 149; Reynold's Case, Ib. 145.

**125.** A merely hypothetical opinion is not cause for principal challenge, but of challenge to the favor. State v. Benton, 2 Dev. & Batt. 196; Freeman v. People, 4 Denio, 9.

**126.** Where on a trial for burglary, a juror stated that he had no bias or prejudice, and could give the defendants a fair trial according to the law and the evidence; that he believed the statements in the newspapers that there had been a housebreaking, and if the prisoners were the persons named in the newspapers he had an opinion of their guilt or innocence, it was held that he was incompetent to sit. Gray v. People, 26 Ill. 344.

**127. Opinion founded on report.** It is not a sufficient objection to a juror that he has heard about the case, if he has formed no opinion, and is sensible of no bias. State v. Howard, 17 New Hamp. 171.

**128.** Where a juror before a trial for murder was talking about the circumstances of the homicide, and in reply to the remark of a person replied that "if that were so the prisoner ought to be hung," it was held that he was not incompetent. Mercer v. State, 17 Ga. 146.

**129.** Hostility or prejudice cannot as a rule be inferred from an opinion formed and expressed simply from reading or hearing stated as current news of the day the fact of a homicide and the circumstances attending it. There should be found some other circumstances acting at the same time upon the mind, and giving it a bias, or the juror should be accepted. State v. Wilsen, 38 Conn. 126.

**130.** A juror in a capital case is not disqualified who states that he has a faint recollection of hearing of the occurrence through the newspapers, which left no particular impression on his mind as to the guilt of the person named, except as a newspaper statement; that he believed a homicide had been committed, and by the person named. O'Brien v. People, 36 N. Y. 276.

**131.** A juror, upon being challenged for favor, said that "he had read part of the statements in the papers at the time of the homicide, and had formed a preconcived idea in regard to the prisoner's guilt or innocence, but had no bias one way or the other; that his preconceived idea or impression would in no way influence his verdict, but he would be governed entirely by the evidence produced on the stand." *Held* that the juror was competent. Sanchez v. People, 4 Parker, 535; 22 N. Y. 147.

**132.** A juror testified that he had formed and expressed an opinion as to the defendant's guilt from report, but that he had heard no witness speak of the transaction; that he lived 18 miles from the defendant, and had not been in the defendant's neighborhood since the occurrence. *Held* that there was no ground of challenge. McGregg v. State, 4 Blackf. 101.

**133. Opinion of prisoner's character.** The mere statement of a juror that he has formed an opinion that the general character of the prisoner is bad, does not *per se* disqualify him. People v. Allen, 43 N. Y. 28; 57 Barb. 338.

**134. Opinion derived from proceedings in court.** Where on the challenge of a juror to the favor, the court ruled that an impression of the guilt of the prisoner which the juror had formed from the proceedings in court was not a subject of inquiry, it was

held error. Thompson v. People, 3 Parker, 467.

135. A juror who had heard the testimony, and then formed an opinion upon it, and did not know whether he had expressed the opinion or not, but thought it most probable that he had done so, but who stated that at that time he had no prejudice against the prisoner, and believed he could give him as fair a trial as if he had not heard anything on the subject, was held competent. Pollard v. Com. 5 Rand. 659. And see Brown's Case, 2 Leigh, 769; State v. Dorr, 10 Ired. 469; Baldwin v. State, 12 Mo. 223; Moran's Case, 9 Leigh, 651; State v. Potter, 18 Conn. 166; Smith v. Com. 6 Gratt. 696; Trimble v. State, 2 Greene, 404.

136. **Statement of juror that he can decide impartially, notwithstanding a fixed opinion.** A juror is incompetent to sit who states that he has formed and expressed an opinion which it will take direct evidence to remove, although he further says he thinks he can do justice between the State and the prisoner, and that the opinion he has formed will not influence his mind as a juror. State v. Bunger, 11 La. An. 607.

137. Where on a trial for murder, a juror stated that he had formed an opinion as to the commission of the offense and as to the guilt or innocence of the prisoner, but had confidence in his ability to decide the case impartially, it was held that he was incompetent. Fouts v. State, 7 Ohio, N. S. 471.

138. Where a person was present at the scene soon after a murder, and formed an opinion of the prisoner's guilt from information derived from persons who assumed to have knowledge of the facts attending the homicide, it was held that he was incompetent to serve as a juror, and that his statement that he had no opinion, was not of itself sufficient to remove the objection to his competency. Norfleet v. State, 4 Sneed, 340.

139. On a trial for grand larceny, a juror on his direct examination said: "I have formed a fixed decided opinion in regard to the guilt or innocence of the defendant. My opinion is such that I would be willing to act upon it in the ordinary affairs of life. I have reached a conclusion or conviction such as I would be willing to act upon in my business transactions. I believe what I heard. I heard what purported to be the facts of the case. I believe what I heard now. It will require evidence to remove the opinion now existing in my mind." On cross-examination he said: "My opinion is not an unqualified one. I could try the case and render a verdict according to the evidence, notwithstanding any opinion previously formed by me in regard to the case." *Held* that the juror was not competent. People v. Weil, 40 Cal. 268.

*(e) Peremptory challenge.*

140. **When to be made.** The right of the prisoner to challenge a juror peremptorily, remains until the juror is sworn. Morris v. State, 7 Blackf. 607; Lindsley v. People, 6 Parker, 233.

141. It is error in the court to compel the prisoner to exhaust his peremptory challenges before challenging for cause. State v. Fuller, 39 Vt. 74.

142. **Questions upon.** A juror may be asked by the defense whether he has formed an opinion, in order to determine as to a peremptory challenge. State v. Godfrey, Brayt. 170.

143. Jurors were challenged for principal cause first, and then for favor upon the ground that they had formed or expressed an opinion, and upon the trier's finding against the challenges, they were challenged peremptorily by the prisoner. *Held* that the questions raised previous to the peremptory challenges were not open for examination at the instance of the prisoner. Friery v. People, 54 Barb. 319; affi'd 2 N. Y. Ct. of Appeals Decis. 215.

144. **Effect of peremptory challenge.** A party who challenges a juror peremptorily when he is not obliged to do so, waives his exception. Stewart v. State, 8 Eng. 720.

145. But if the court err in overruling the prisoner's challenge to a juror for favor, and then the prisoner peremptorily challenges the juror, the error of the court is not cured, although the prisoner had not exhausted his peremptory challenges when the jury was completed. Dowdy v. Com. 9 Gratt. 727.

**146.** In Tennessee however, where incompetent jurors were admitted by the court, and peremptorily challenged by the prisoner, it was held that this was no ground of reversal, the jury being completed before he had exhausted his challenges. Carroll v. State, 3 Humph. 315.

**147.** And in New York it has been held that, where on the trial of a challenge to the favor, improper evidence is admitted, and the triers find the juror indifferent, and he is then challenged peremptorily, and it appears the prisoner had not exhausted all his peremptory challenges when the jury was completed, the prisoner cannot afterward object to the admission of such incompetent evidence. People v. Knickerbocker, 1 Parker, 302.

**148. Waiver of peremptory challenge.** B. having been called as a juror and examined as to his bias, and no reason to except to him on that account appearing, the counsel for the prisoner were told by the court that they could then challenge B. peremptorily if they wished. They declined to do so, however, and B. was directed to take his seat as one of the jurors. After the panel was full, the peremptory challenges not having been exhausted, the prisoner's counsel claimed the privilege to challenge B. peremptorily. *Held* that in the absence of any reason for a peremptory challenge then, which did not exist before, it was too late. State v. Potter, 18 Conn. 166.

**149.** Where after the prisoner's challenge of a juror had been overruled, the court informed the prisoner that the juror should stand aside and not sit in the case if he desired it, and that what had occurred should not diminish his number of peremptory challenges, and the prisoner stood mute, though told by the court that it would regard his silence as a consent on his part to the sitting of the juror, it was held that whatever irregularity or error had been committed in permitting the juror to sit in the case was cured. Gardiner v. People, 6 Parker, 155.

(*f*) *Completion of jury.*

**150. Number of jurors required in case of felony.** Upon an indictment for felony, it is not competent for the prisoner by waiver or stipulation to authorize his trial by a jury of a less number than twelve. State v. Mansfield, 41 Mo. 470. Where therefore, on a trial for murder, the fact that one of the jurors was an alien was not known to the prisoner or his counsel until after the verdict, it was held that he was entitled to a new trial. Hill v. People, 16 Mich. 351.

**151.** Upon a conviction for murder, the *postea* embraced in the formal record of judgment, and the bill of exceptions showed that the trial was had by twelve jurors. The return to the writ of error included a certificate of the judge before whom the indictment was tried, stating that after the jury were sworn, one of the jurors was withdrawn by consent, and the trial proceeded with eleven jurors. An order of the court at special term recited the aforesaid certificate, and stated that the general term ordered that the fact so certified should appear as a reason for a motion in arrest of judgment made by the prisoner, and directed the certificate and reason for arrest of judgment founded thereon to be annexed to the record. *Held* that the conviction of the prisoner by eleven jurors was illegal. Cancemi v. People, 18 N. Y. 128.

**152. Less number than twelve jurors, when permitted.** On a trial for a misdemeanor, where the punishment is a fine, an agreement by the defendant to be tried by a less number than twelve jurors is valid. Murphy v. Com. 1 Metc. Ky. 365; Tyra v. Com. 2 Ib. 1.

**153.** When on a trial for a misdemeanor, a juror is necessarily withdrawn by the consent of the counsel on both sides, and the trial proceeds with eleven jurors, a verdict of guilty will not be set aside on that ground. Com. v. Dailey, 12 Cush. 80.

**154.** But where on a prosecution for malicious trespass, the defendant's attorney consented to a trial by a jury of eleven, and the defendant though present was not consulted and did not know that he could object to the act of his attorney, it was held that the defendant was not bound by the consent. Brown v. State, 16 Ind. 496.

155. So likewise, where the record showed that the defendant was tried for assault and battery by a jury of six men, and it did not also appear that he consented thereto, it was held ground for reversal. State v. Van Matre, 49 Mo. 268.

3. Initiatory proceedings in the case.

156. **Swearing jury.** The court has the power before the jurors are sworn, to discharge one of their number upon his refusal to take the oath; but not to recall him afterward. Isaac v. State, 2 Head, 458. The jury should be sworn for the trial of each particular case, and not the whole panel be sworn to try all the causes for the term. Barney v. People, 22 Ill. 160; *contra*, People v. Albany Common Pleas, 6 Wend. 550.

157. In Arkansas, where issue is joined on two or more counts, it has been held error to impanel and swear the jury to try the issue to a single count. Adams v. State, 6 Eng. 466. But in Maryland, although a prisoner has pleaded generally to an indictment containing two counts, yet the jury may be sworn and charged as to one of the counts only. Burk v. State, 2 Har. & Johns. 426.

158. **Form of oath to jury.** In Arkansas, it has been held that the jury should be sworn to try the case according to the law as well as the evidence. Patterson v. State, 2 Eng. 60; Sandford v. State, 6 Ib. 328. In Alabama, they are sworn a true verdict to render according to the evidence. State v. Jones, 5 Ala. 666. In Iowa, where they were sworn "the truth to speak on the issue joined," it was held insufficient. Warren v. State, 1 Greene, 106; Harriman v. State, 2 Ib. 270.

159. **Reswearing of jury by consent of parties.** Where on the trial of an indictment for a felony after the impaneling of the jury, the prisoner stated that he desired to make a motion to quash the indictment, and the judge said that if all parties would consent that what had been done should be treated as null, he would entertain the motion, and if it should be overruled the jury would be sworn over again, and the required consent being given, the motion was heard and overruled, the court adjourned, and the prisoner tried and convicted at a subsequent term, it was held that he had no cause of exception on the ground that he had been once in jeopardy. Com. v. Sholes, 13 Allen, 554.

160. **Recital in the record, that the jury were sworn.** In capital cases and other felonies, unless the record shows that the jury were duly sworn, the judgment will be reversed. Johnson v. State, 47 Ala. 10, 62; Bugg v. State, Ib. 51; Horton v. State, Ib. 58; Smith v. State, Ib. 540; Stephens v. State, Ib. 696; Lockett v. State, Ib. 42.

161. Where the record shows that the oath which the statute requires has not been administered to the jury, it will be ground for reversing the judgment. But where the record states that the jury were duly sworn, it will be presumed that the proper oath was administered to them. Arthur v. State, 3 Texas, 403; Bell v. State, 5 Eng. 536. If however, it nowhere appears from the record, that the jury were sworn, the defect will be fatal. Nels v. State, 2 Texas, 280.

162. Where the oath administered to the jury is set out in the minute entry of the trial, an omission of an essential part of it will render the conviction erroneous. But if the entry does not purport to set out the oath, but states that the jury "was duly sworn according to law," or was "duly sworn," it will be sufficient. Gardner v. State, 48 Ala. 263.

163. There is no precise form in which the court is required to make its minutes at the trial. The minute entry, after reciting that the jury were impaneled well and truly to try the issue joined between the State and the defendant, and that the trial not being finished, the court adjourned and reassembled on the following morning, continued as follows: "Thereupon also came the defendant and his counsel, as also the counsel for the State, together with the jury that had been impaneled and sworn as aforesaid, and the trial of said cause was resumed; and after the evidence of all the witnesses had been given in, and the argu-

ment of counsel had been heard, the jury received the charge of the court and retired in the charge of the sheriff to make up their verdict, and now return into court and on their oaths do say," &c. *Held* that the record sufficiently showed that the jury was sworn before the testimony was heard. Crist v. State, 21 Ala. 137.

**164. Amendment of minutes as to swearing of grand jury.** Where the minutes of the court omit to mention that the grand jury was sworn, upon proof that it was done, and that the omission was inadvertent, the minutes may be amended. State v. Folke, 2 La. An. 744.

**165. Presence of accused necessary on trial for felony.** In prosecutions for felony, the defendant must be personally present whenever any step is taken by the court in his case, and this must be affirmatively shown by the record. Sperry's Case, 9 Leigh, 623; McQuillan v. State, 8 Sm. & Marsh. 587; Dougherty v. Com. 69 Penn. St. 286; Brown v. State, 24 Ark. 620; Osborn v. State, Ib. 629; Holton v. State, 2 Fla. 500; Gladden v. State, 12 Ib. 562.

**166.** A motion to set aside the verdict as contrary to evidence was made on one day and overruled on a subsequent day. The record stated that the prisoner appeared on both days by attorney, and there was nothing to show that the prisoner was present. *Held* error. Hooker v. Com. 13 Gratt. 763.

**167.** On a trial for burglary, the judge directed the jury and witnesses for the prosecution who had testified to visit and inspect the premises where the burglary was alleged to have been committed. But the prisoner was not allowed to accompany them, and the witnesses were directed to point out to the jury the places marked on a diagram of the premises. *Held* error. State v. Bertin, 24 La. An. 46.

**168. Presumption as to the presence of the accused.** In general it will not be inferred that because the record shows that the prisoner was present in court on one day, he was therefore present on the following day. State v. Cross, 27 Mo. 332; State v. Schoenwald, 31 Ib. 147.

**169.** But in Illinois, it has been held that where the record does not show affirmatively that the defendant was present in court when the verdict was rendered and judgment pronounced, and no interval appears between the arraignment, trial, verdict and judgment, it will be presumed that the prisoner was personally present during the whole time, including the moment when sentence was passed upon him. Schirmer v. People, 33 Ill. 276.

**170. Prisoner's right to be present cannot be waived.** The right of a prisoner indicted for felony to be present in court at his trial cannot be waived either by himself or his counsel, by consent or otherwise. Paine v. Com. 18 Penn. St. 108; Dunn v. Com. 6 Barr, 384.

**171.** Communications made by the court to the jury after they have retired to deliberate upon their verdict, in answering questions proposed by them relating to the case, are a proceeding upon the trial within the meaning of a statute which provides that the prisoner shall be personally present during the trial. Maurer v. People, 43 N. Y. 1.

**172.** The reading of evidence taken by deposition, although done after the jury have retired, is a part of the trial within the rule requiring the presence of the prisoner. People v. Kohler, 5 Cal. 72.

**173. Temporary absence of prisoner not improper.** A prisoner indicted for felony may waive the right to be present, so far at least as to be temporarily absent from the room during some portion of the trial, and the burden is on him to show that he was deprived of the right to be present. Hill v. State, 17 Wis. 675.

**174. Removal of prisoner from court-room for interrupting counsel.** On a trial for perjury, the defendant was present during the impaneling of the jury and during a portion of the opening of the case by the district attorney, when he commenced interrupting the district attorney and denying his statements in a loud voice, although admonished by the court to desist. The action of the prisoner continuing to be such as to make it impossible to proceed with the trial, he was ordered to be removed from the court room and to be detained in an

adjoining room with liberty of access for his counsel. At the conclusion of the opening, the trial was postponed to the next day, when it was continued in the presence of the prisoner, and concluded without further disturbance. *Held* that no error was committed. U. S. v. Davis, 6 Blatchf. 464.

**175. When presence of accused not required.** In Pennsylvania, in felonies not capital, the record need not show that the prisoner was present when the verdict was rendered, but his presence will be presumed unless the contrary appears. Holmes v. Com. 25 Penn. St. 221.

**176.** In Arkansas, in indictments for slight misdemeanors, the accused may be tried without being personally present. Sweeden v. State, 19 Ark. 205; Warren v. State, Ib. 214.

**177.** In Vermont, where conviction is not followed by imprisonment, the accused may appear by counsel, and having done so, the trial may proceed without regard to the continued presence of either the accused or his counsel. *Ex parte* Tracy, 25 Vt. 93.

**178. Presumption as to demand for trial.** A demand to be tried may be by acts or words, or both. Where the prisoner appeared and ratified the act of his counsel in setting down the cause for trial, challenged jurors, produced and examined witnesses, and summed up, it was held equivalent to a formal demand to be tried. People v. Frost, 5 Parker, 52.

**179. Continuance of cause need not be shown.** The record need not show how the cause was continued from the first day of the term to the day of the trial. Berrian v. State, 2 Zabr. 9.

**180. Death of prosecutor.** Under the law of Tennessee requiring some citizen to act as prosecutor, his death does not discharge the accused. State v. Loftis, 3 Head, 500.

**181. Proceedings upon original indictment after indictment which was substituted for it has been quashed.** An indictment for an assault with intent to inflict bodily injury was supposed to be lost, and another indictment presented for the same offense. The second indictment being defective, was quashed. In the mean time, the lost indictment was found, and upon this, the defendant was tried, and found guilty. *Held* no error. Reddan v. State, 4 Greene, 137.

**182. Effect of dismissal of sufficient indictment.** Where the indictment is sufficient, and the accused is arraigned, pleads, and the jury is impaneled and sworn, a dismissal of the indictment without his consent operates as an acquittal. Lee v. State, 26 Ark. 260.

**183. Prosecution when compelled to elect.** Where the same offense is charged in different forms in several counts, it is in the discretion of the court to compel the prosecution to elect on which count he will proceed. State v. Jackson, 17 Mo. 544.

**184.** A motion of the prisoner's counsel that the prosecutor be compelled to elect on which count in the indictment he will proceed, will not be entertained by the court until after the jury are sworn and charged with the case. Stephen v. State, 11 Ga. 225.

**185. Accused not confined to one of several pleas.** The prisoner cannot be compelled to select and rely upon one of several pleas submitted by him. State v. Greenwood, 5 Porter, 474.

**186. Retrial after conviction upon one of several counts.** Where under an indictment containing two counts the defendant having been found guilty on but one, obtains a new trial, he may be tried again on both counts. State v. Commissioners, 3 Hill, S. C. 239.

**187. Issue on special plea to be tried first.** Where issue is joined on the pleas of not guilty and *autrefois acquit* or *convict*, the issue on the special plea must be first tried and decided; and if both issues be submitted to the jury at the same time, injury will be presumed unless the record shows otherwise. The failure of the prisoner to object, will not be a waiver of the irregularity; nor is a bill of exceptions necessary when the error appears of record. Foster v. State, 29 Ala. 229; Lee v. State, 26 Ark. 260. In Alabama, it has been held that although if the defendant in a case of misde-

meanor goes to trial on both issues at the same time without objection, he thereby waives the irregularity; yet if the jury find a verdict without finding upon the special plea, no judgment can be rendered against the defendant. Dominick v. State, 40 Ala. 680.

4. Proceedings in the conduct of the case.

(*a*) *Introduction of evidence.*

**188. What notice sufficient.** Notice to a person to produce a telegram received by him, is reasonable, if given before the commencement of the trial. State v. Litchfield, 58 Maine, 267.

**189. Objection that witnesses' names have not been furnished to defendant.** In New Hampshire, it is competent for the defendant when indicted for an offense, the punishment of which may be death or confinement at hard labor for life, to except to a witness that he is not named in the list of witnesses furnished pursuant to the statute (R. S. ch. 225, § 3), unless the exception applies to the whole list of witnesses, in which case, he must make the objection when the case is called, or it will be deemed waived. There is no particular formality required in designating the places of abode of the witnesses in the list. Naming the town and State after the name of each witness is sufficient. Lord v. State, 18 New Hamp. 173. To render admissible the testimony of a witness whose name has not been furnished to the defendant before the trial, the defendant must have offered evidence of new matter, or the testimony proposed to be introduced must go to discredit that of the defendant. State v. Hartigan, 19 New Hamp. 248.

**190.** In Illinois, the prosecution is not restricted to the witnesses whose names are indorsed on the indictment and furnished previous to the arraigument; but the court in the exercise of a sound discretion, may permit such other witnesses to be examined as the justice of the case may seem to require. Gardner v. People, 3 Scam. 83.

**191. Requiring counsel to state what they expect to prove.** It is discretionary with the court whether or not to require counsel to disclose what they expect to show by a witness before he is examined. In such case, counsel will be required to state the substance of what they expect to prove. People v. White, 14 Wend. 111.

**192. Inquiry as to the competency of proof.** When a preliminary examination is instituted by the court into the circumstances under which a confession was obtained, the judge may direct the prosecuting officer to conduct it; and the course and extent of it, and its effect, are to be determined by the judge. Com. v. Morrell, 99 Mass. 542.

**193.** Upon the question whether a written instrument is sufficiently proved to have been written by the defendant to allow it to be submitted to the jury as a standard of comparison, the judge at the trial must pass in the first instance; and so far as his decision is of a question of fact merely, it must be final if there is any proper evidence to support it. Com. v. Coe, 115 Mass. 481.

**194. When witness must be objected to.** Objections to the competency of a witness must be made before his examination, if known to the party objecting. When this knowledge is first acquired after the examination of the witness has commenced, the objection will be waived if the witness is suffered to proceed after the discovery. State v. Damery, 48 Maine, 327.

**195. Objection to evidence, how made.** When objections are made to the admission of evidence, they must be specifically set forth. State v. Bowe, 61 Maine, 171

**196.** Where part of a question is legal and proper, if the other part is objectionable, the objection to be available must be specifically pointed out. Hochrieter v. People, 2 N. Y. Ct. of App. Decis. 363; s. c. 1 Keyes, 66.

**197.** But where evidence is *prima facie* improper, the party objecting to it need not state the ground on which the objection is founded. Davis v. State, 17 Ala. 415.

**198. Objecting to mode of proof.** An objection to the mode of proving a fact, and not to the proof of the fact itself (as that a written instrument cannot be proved by parol), must be distinctly placed upon

that ground. Murphy v. People, 6 N. Y. Supm. N. S. 369.

199. Objections and rulings were made and exceptions taken to certain questions put to witnesses, but not to their answers, which were directly responsive to the questions. *Held* that the defendant was entitled to raise the points and review the erroneous rulings. Shaw v. People, 5 N. Y. Supm. N. S. 439.

200. **Admitting evidence without objection.** An exception cannot be taken to an answer which is responsive to a question put without objection. State v. Nutting, 39 Maine, 359.

201. Where immaterial evidence has been admitted without objection, it is too late afterward to object to its effect. Stephens v. People, 4 Parker, 396; affi'd 19 N. Y. 549.

202. But after a letter offered by the prosecution, has been examined by the defendant's counsel, put in evidence, and partly read with his consent, the refusal of the court to entertain an objection to its admission is within its discretion. Com. v. Marks, 101 Mass. 31.

203. **Answer not responsive to question.** When the party examining a witness is willing to accept an answer not responsive to his question which he would have had a right to elicit, the opposite party cannot complain. The rule may be different in the case of testimony taken by deposition. Hamilton v. People, 29 Mich. 173.

204. **Witness testifying without being sworn.** The prosecution having but one witness, he gave his evidence without being sworn. The summing up being closed, defendant's counsel moved the court to instruct the jury to acquit, as there was no evidence before them. This motion was overruled, and the witness was sworn and permitted to testify over again. *Held* error. Thompson v. State, 37 Texas, 121.

205. **Evidence given in absence of judge.** On a trial for murder, the court was composed of a circuit judge, county judge, and two justices of the sessions. While the evidence was being given, one of the justices of sessions absented himself from the court during an entire day, but resumed his seat on the bench the next day, and the trial proceeded without his having read the evidence given in his absence. *Held* error which could not be waived by the prisoner. Shaw v. People, 5 N. Y. Supm. N. S. 439.

206. **Admission of hearsay.** Where on a trial of an indictment for robbery, the prosecutor was allowed to testify that he gave to the police officers a description of the persons who assaulted him, and the officers were also permitted to testify that by means of that description they recognized the defendants as assailants, it was held error. Com. v. Fagan, 108 Mass. 471.

207. **Proof of part only of transaction not proper.** The prosecution cannot claim a conviction, upon submitting evidence of a part only of an entire transaction, unless evidence of the rest is not attainable; and the prosecution should examine all their witnesses to the transaction before the accused is put to his defense. Hurd v. People, 25 Mich. 405; Wellar v. People, 30 Ib. 16.

208. **Jury viewing premises.** The court may permit the jury in a capital case to view the premises, accompanied by an officer of the court and by the respective counsel. Com. v. Webster, 5 Cush. 295.

209. **Purpose for which premises may be viewed.** The jury are permitted to view premises, not for the purpose of furnishing evidence upon which a verdict is to be rendered, but in order to enable them better to understand and apply the evidence which is given in court. Chute v. State, 19 Minn. 271; s. c. 1 Green's Crim. Reps. 571.

210. Where on a trial for larceny the court permitted the jury to go out and inspect the animal alleged to have been stolen, for the purpose of determining the question of identity and ownership, it was held error. Smith v. State, 42 Texas, 444.

211. **Latitude of proof allowed one of several defendants.** On the trial of an indictment against several jointly charged with the commission of the same crime, each is entitled to pursue his own line of defense, although in so doing he may introduce evidence which is injurious to his codefendants. Com. v. Robinson, 1 Gray, 555.

**212. When testimony should be stricken out.** Where the opposite party has lost, without his own fault, neglect or consent, the opportunity to cross-examine, the evidence on the direct examination should be stricken out. On the close of her direct examination, A., who had been under great nervous excitement during the time she was testifying, fainted away. She had convulsions during the night, and was incapable of being cross-examined on the next day. The prisoner's counsel insisting on his right to cross-examine the witness, requested the court to strike out her evidence, to postpone the trial, or discharge the prisoner, each of which requests was refused. *Held* error. Cole v. People, 43 N. Y. 508; affi'g 2 Lans. 370.

**213. Admitting testimony after case is closed.** In Massachusetts, the admission of additional evidence in behalf of the prosecution after the defendant has closed his case is a matter of judicial discretion, and not the subject of exception. Com. v. Arrance, 5 Allen, 517. And whether the defendant will be permitted to introduce further evidence after both sides have rested, and the prisoner's counsel has made his closing address, and the prosecuting attorney has nearly finished his reply thereto, is likewise in the discretion of the court. Com. v. Dower, 4 Ib. 297.

**214.** In Georgia, it has been held, that after the case had been submitted to the jury on both sides, the prosecution will not be permitted to introduce further evidence. Judge v. State, 8 Ga. 173; but that the rule does not apply where no motion has been made, or testimony tendered by the defense, or the witnesses discharged. Haskins v. State, 11 Ib. 92. Where on a trial for murder, after the evidence for the prosecution had closed, and the prisoner's counsel had stated that he would not introduce any testimony, a witness who had been sworn and examined in the case, corrected his testimony in a private interview with the judge, which correction the judge announced in the presence and hearing of the jury, it was held error. Crawford v. State, 12 Ga. 142.

**215.** In Missouri, the court may allow witnesses to be recalled and examined at any time before the jury retire, in order to supply testimony that has been omitted. Freleigh v. State, 8 Mo. 606. But in that State, where on the trial of a capital case, after the close of the evidence in behalf of the prosecution, none being offered by the defense, the jury were allowed by consent of parties, to go home until morning, and upon the reopening of the court, the prosecution reexamined witnesses, and introduced some additional testimony, it was held error. Mary v. State, 5 Mo. 71.

**216.** In New York, the court may permit the prosecution to introduce further evidence after the summing up has commenced. Kalle v. People, 4 Parker, 591; and it is in the discretion of the court to reject testimony offered by the prisoner after the close of the proof and the summing up of the case to the jury. Wilke v. People, 53 N. Y. 525. In Vermont, it has been held that proof of a former conviction for the purpose of increasing the penalty, need not be submitted to the jury, but may be given after the verdict. State v. Haynes, 36 Vt. 667.

(*b*) *Ruling of court.*

**217. As to intercourse with the bench.** Unless the rights of the parties are affected, the court will not direct as to the manner of intercourse between the bench and the bar, during the trial. Long v. State, 12 Ga. 293.

**218. Refusing to hear argument.** The court is not obliged to hear argument upon a question of law, if its opinion is already formed. Howell v. Com. 5 Gratt. 664.

**219. Giving prosecution the benefit of legal doubts.** Where the presiding judge remarked, on determining certain motions to quash an indictment, that he had doubts about the law, and would give the State the benefit of them because the State was not allowed to carry the case to the Supreme Court, it was held to be neither an error nor an irregularity. Cook v. State, 11 Ga. 53.

**220. Judge expressing an opinion as to the evidence.** It is error in the court to tell the jury that a fact is positively estab-

lished. Hill v. State, 17 Wis. 675. Although the judge may with propriety correct counsel when they mistake the evidence, yet he has no right to express an opinion as to the facts of the case. Bill v. People, 14 Ill. 433. But see Conraddy v. People, 5 Parker, 234.

221. It is error for the judge to say in the hearing of the jury, "never mind reading over the testimony taken down on cross-examination, it does not amount to much any way." Crawford v. State, 12 Ga. 142.

222. On the trial of an indictment for rape, the accused offered to prove that the prosecutrix had said that another person committed the offense. The court in excluding the evidence remarked that "it amounted to nothing." *Held* error. Kennedy v. People, 44 Ill. 283.

223. On a trial for murder, the State's attorney asked a witness what the condition of the mind of the deceased was towards the prisoners after the mortal wounds were given, whether kind or malevolent. The judge in ruling out the question remarked that "H. (the deceased) had a right to be mad." *Held* error. Horne v. State, 37 Ga. 80.

224. Where the court on a trial for murder referred to the deceased as "a victim," it was held that it had no right to make use of such an expression, it being nearly equivalent to characterizing the defendant as a criminal. People v. Williams, 17 Cal. 142.

225. It is error to rule that a witness is not to be regarded as an accomplice unless "an admitted accomplice or proved to be so, beyond a reasonable doubt;" the question being one of fact for the jury. Com. v. Ford, 111 Mass. 394; Com. v. Glover, Ib. 395.

226. It is not error for the court to express an opinion upon the evidence, when the jury are afterward instructed that they are the judges of all questions of fact. Stephens v. People, 4 Parker, 396; 19 N. Y. 549. *Contra*, State v. Ah Tong, 7 Nev. 148; State v. Harkin, Ib. 377.

227. **Instructing jury to disregard evidence.** It is error to admit illegal evidence, although the court afterward instructs the jury to disregard it. State v. Mix, 15 Mo. 153; State v. Wolf, Ib. 169.

228. On the trial of an indictment for murder, the prosecution was permitted to read in the presence of the jury a written statement purporting to have been sworn to before the coroner's jury by a witness on the stand, for the purpose of refreshing her memory. The witness who was the daughter of the defendant, denied all knowledge or recollection of such a statement; and the court said to the jury: "You are not to allow her testimony in the slightest degree to influence you against the defendant." *Held* that there was no error. Harvey v. State, 40 Ind. 516.

229. **Admitting evidence previously excluded.** The error of excluding evidence is cured by its subsequent admission. Coats v. People, 4 Parker, 662.

230. An error in permitting evidence to be given that a witness had on a certain occasion made statements inconsistent with his testimony, without first calling the attention of the witness to such statements, was held cured by the defense afterward calling the witness and his denying the statements. U. S. v. McHenry, 6 Blatch. 503.

231. **Setting aside juror.** After a juror is accepted and sworn, he cannot be discharged without the consent of the prisoner, for any cause which existed when he was sworn, although the cause may have been discovered after he was impaneled. State v. Williams, 3 Stew. 454.

232. On the trial of a felony, it is error for the court, against the objection of the accused, to discharge a juror, because since such juror was summoned, and before he was drawn, he had been convicted of an assault, and at the time of the trial was confined in the county jail. Boggs v. State, 45 Ala. 30.

233. On a trial for murder, a juror having been accepted and sworn, informed the court that he was legally exempt from serving on juries, and asked to be discharged. The court said this could not be done; whereupon the juror stated that he would discharge himself, and left the court room. The court then, without discharging the juror, caused another juror to be selected in his place without the consent of the prisoner.

*Held* cause for a new trial. Powell v. State, 48 Ala. 154.

**234.** On a trial for murder, a jury having been selected and sworn, and a witness examined, one of the jurors announced to the court that he then recollected that he was a member of the grand jury that found the indictment against the prisoner. Thereupon, the court set the juror aside, and substituted another juror in his place, to which the defendant objected. *Held* that such action of the court operated as an acquittal. O'Brian, v. Com. 9 Bush, Ky. 333; s. c. 6 Ib. 563.

**235. Discharging jury.** If the court discharge the jury without necessity therefor, the prisoner may plead it in bar of another trial. McCauley v. State, 26 Ala. 135. Sickness of jurors, when it can be remedied by refreshment, is not such necessity. Com. v. Clue, 3 Rawle, 498; Ned v. State, 7 Porter, 187; Williams' Case, 2 Gratt. 567; Judge v. State, 8 Ga. 173; State v. Ephraim, 2 Dev. & Batt. 162. Insanity of a juror would be a sufficient cause for discharging the jury. U. S. v. Haskell, 4 Wash. C. C. 102. The mere opinion of the judge that the evidence shows the defendant to be guilty of a higher degree of crime, is not such a necessity as justifies the discharge of the jury. People v. Hunckeler, 48 Cal. 331. A court of the United States has authority to discharge a jury from giving a verdict, without the consent of the defendant, whenever, in its opinion, there is a manifest necessity for the act, and to do so with the consent of the defendant in a case which falls short of being one of manifest necessity. But the fact that the court regarded the defendant as consenting to such discharge, will not, in the absence from the minutes of the court of any statement to that effect, conclude him. Where the jury was discharged and the trial postponed on account of the illness of the district attorney, and it did not appear from the minutes that such illness occurred after the jury was sworn, or that the assistant district attorney might not have conducted the trial, or that the defendant consented to the postponement, it was held equivalent to an acquittal. U. S. v. Watson, 3 Benedict, 1.

**236.** On the trial of several for murder, the court decided that each defendant was entitled to be examined for the others, whereupon the solicitor for the State appealed; and on motion of the solicitor, and against the objection of the defendants, the court discharged the jury. *Held* that such discharge operated as an acquittal. State v. Prince, 63 N. C. 529.

**237.** Where on a trial for murder, one of the jurors becoming ill, requested to be discharged, but made no statement under oath as to his condition, and no medical evidence was submitted in his behalf, and the jury were discharged by the court without the prisoner's consent, it was held a bar to a retrial. Rulo v. State, 19 Ind. 298. And where in a capital case, the jury at the close of the evidence, were placed in the custody of two bailiffs, who were instructed by the court to keep them in a room, and not permit them to communicate with any one, and the bailiff who had charge of them, took them into a public square, left them, and went to the grocery of the defendant, who was out on bail, and there procured from his bar-keeper a pitcher of beer, which the jury drank, and the court, contrary to the defendant's objection, discharged the jury, it was held that such discharge operated as an acquittal. State v. Leunig, 42 Ind. 541.

**238.** After a trial for bigamy had gone on some time, it was discovered that the defendant had not been arraigned or asked to plead to the indictment. The defendant was then arraigned and the indictment read to him. The defendant objected to any further proceedings being taken. The objection was overruled, and on request, the defendant pleaded not guilty. The defendant again objected to any further proceedings, and the court discharged the jury. *Held* not a bar to further trial. King v. People, 12 N. Y. Supm. N. S. 297.

**239.** Where on the trial of an indictment for selling spirituous liquors without a license, the prisoner consented, in order to avoid a postponement of the case on account of the intoxication of a material witness for the prosecution, that the cause might be withdrawn from the jury if it ap-

peared in the progress of the trial that the witness was too much intoxicated to testify intelligibly, which proved to be the case, it was held that the court might discharge the jury against the prisoner's objection. Hughes v. State, 35 Ala. 351.

*(c) Deportment of the jury while the case is before them.*

**240. Juror leaving box.** The court may allow a juror to leave the jury box for a brief time, even during the trial of a capital case. State v. Anderson, 2 Bail. 565.

**241. Juror talking with bystander.** When a juror during the trial talks with a bystander, or leaves the court room without the permission of the court, he is guilty of a misdemeanor, for which he is liable to punishment. Barlow v. State, 2 Blackf. 114.

**242. Separation of jury.** After the trial had been partly had, the court adjourned. During the adjournment, one of the jurors separated from his fellows, and when the court met, the juror was dismissed and another person substituted. *Held* error. Grable v. State, 2 Greene, 559.

**243.** In South Carolina, it is discretionary with the court to permit the jury to separate during the adjournment from day to day during the trial. State v. Anderson, 2 Bail. 565.

**244.** In Missouri, where both sides consent to the separation of the jury before verdict, it is not error for the court to permit it. State v. Mix, 15 Mo. 153. But it has been held in that State, that the jury, after they are sworn, should not be allowed to separate until they have rendered their verdict, and that if permitted to do so, the judgment will be reversed. McLean v. State, 8 Mo. 153.

**245.** In Indiana, it appeared from the record in a capital case, that after the jury were sworn the court adjourned until the next day, but not that the jury were legally disposed of during the adjournment. *Held* error. Jones v. State, 2 Blackf. 475.

**246.** Where the jury through inadvertence separated and mingled with the crowd, but the court was satisfied that the prisoner was not prejudiced thereby, it was held that the verdict would not be disturbed. Roberts v. State, 14 Ga. 8.

**247.** Where jurors slept apart, distributed in five different rooms in the third story of a hotel, opening upon a common passage which communicated with the street below by flights of stairs, the doors of their chambers being unlocked during the night, and there being no doors or other fastenings at either end of the passage, it was held that it was not equivalent to a separation. Thompson v. Com. 8 Gratt. 637.

**248.** In Alabama, it has been held that if, after the evidence is closed, the jury are permitted to separate, such separation is not ground for the prisoner's discharge, but that it will be considered a very strong reason for granting a new trial in all felonies. Williams v. State, 45 Ala. 57.

*(d) Summing up of counsel.*

**249. Right to open and close.** The party having the affirmative is entitled to open and close. Doss v. Com. 1 Gratt. 557.

**250.** On the trial of an indictment for murder, the defense of insanity, under the plea of not guilty, does not give the affirmative to the defendant and entitle him to open and close. Loeffner v. State, 10 Ohio, N. S. 598.

**251.** The order in which counsel shall address the jury is in the discretion of the court. On the trial of an indictment for an assault with intent to kill, after the evidence was submitted, the prosecuting attorney opened the case to the jury. After he had got through, the prisoner's counsel declined to address them, whereupon the court permitted the assistant of the prosecuting attorney to address them. *Held* no error. State v. Waltham, 48 Mo. 55.

**252. Right and duty of judge to direct as to the remarks of counsel.** It is error in the court, when objection is made, to allow counsel to comment in their argument to the jury on facts not proved. Mitchum v. State, 11 Ga. 615. But where incompetent evidence has been given without objection, counsel may rightfully comment upon it in summing up. Free v. State, 1 McMullan, 494.

253. On a trial for murder, counsel for the prosecution commented on the frequent occurrence of murder in the community, and the formation of vigilance committees and mobs, remarking that the same were caused by the laxity of the administration of the law, and stating to the jury that they ought to make an example of the defendant. The defendant objected to such comments because there was no evidence of such matters before the jury, but the court said they were proper subjects for comment. *Held* error. Ferguson v. State, 49 Ind. 33.

254. The permitting an irrelevant argument is not ground for exception unless the jury were erroneously instructed in relation to it. Com. v. Byce, 8 Gray, 461.

255. A judge has a right to stop counsel who, in remarking upon the evidence, grossly abuses a witness. State v. Williams, 65 N. C. 505.

256. **Reading books by counsel.** The court may refuse to permit counsel to read from law books in their argument to the jury. Murphy v. State, 6 Ind. 499.

257. It is not error for the court to permit counsel to read extracts from a law work as a part of his argument, the court informing the jury that such extracts are not to be regarded by them as evidence. Harvey v. State, 40 Ind. 516.

258. Although it is permissible for counsel, by way of illustration, to read to the jury reported cases or extracts from text books, yet it is the duty of the court to check promptly any effort of counsel to induce the jury to take the law of the case from the books rather than from the court. People v. Anderson, 44 Cal. 65.

259. **Counsel remarking upon refusal to answer or omission of witness.** Where a witness was asked on cross-examination whether he had not been convicted and punished for an infamous crime, and he declined to answer, it was held that such refusal might be urged by counsel in addressing the jury as warranting the inference that the witness was unworthy of credit. State v. Garrett, Busbee, 357. But the mere omission of a witness on a trial for murder to state a fact, or stating it less fully before the coroner, is not a subject for comment to the jury, unless the attention of the witness was particularly called to it at the inquest. Com. v. Hawkins, 3 Ga. 463.

260. **Correction of misstatements.** Counsel has a right to correct misstatements of the evidence made by his adversary, and it is improper for the court not to allow the correction to be made. Long v. State, 12 Ga. 293.

(e) *Charge of judge.*

261. **To be given when the case is submitted.** After the testimony on a trial for assault and battery was closed, the court called the next case on the docket, which was against another defendant for misdemeanor, the same jury were sworn, and after the testimony in the second case was finished the jury were instructed as to the law of the first case. *Held* error. State v. Devlin, 25 Mo. 174.

262. **How to be construed.** The language of the charge of the court is to be construed in the light of the evidence to which it was applied, and as it would naturally be understood by the jury. People v. Bransby, 32 N. Y. 525.

263. **Must embrace whole case.** Where the case has several aspects, some favorable to the prisoner, it is error in the court to present to the jury only the view unfavorable to him. State v. Gentry, 2 Jones, 406. Where the instructions on a material point are contradictory, there should be a new trial. People v. Anderson, 44 Cal. 65.

264. Where an instruction grouped together certain prominent facts which the evidence conduced to prove, and irrespective of others, stated them hypothetically to the jury, as constituting sufficient grounds for finding the defendant guilty of murder, it was held error. Williams v. Com. 9 Bush, Ky. 274.

265. But where on a trial for grand larceny, the court grouped together and recited to the jury facts all of which bore against the defendant, it was held that the instruction was not necessarily erroneous, as it was competent for the defendant to ask and have given an instruction embodying the

facts in his favor. State v. Carnahan, 17 Iowa, 256.

**266. To be confined to actual facts.** It is error for the court to state to the jury a purely hypothetical case, and ask them what is the presumption in such a case. McAlpine v. State, 47 Ala. 78.

**267. Should present the case in all its aspects.** If the facts proved are capable of two constructions, or if in one view of the evidence a particular intent might be found, and yet the facts might justify the finding of an intent involving another degree of guilt, the court is bound upon the request of the prisoner, to declare the rule of law applicable to the case in either aspect. Foster v. People, 50 N. Y. 598.

**268. Omissions in.** The omission to instruct the jury that the evidence does not prove the offense laid in the indictment, is ground of exception. Com. v. Merrill, 14 Gray, 415.

**269.** It is not error in the court to omit to charge the jury as to the rules of law applicable to circumstantial testimony. That is a matter in the discretion of the court, and no error is committed unless it gives instructions which may mislead. State v. Roe, 12 Vt. 93.

**270.** On the trial of an indictment upon a statute, the court need not instruct the jury whether the charge could be sustained at common law. State v. Hart, 34 Maine, 36.

**271. Omitting to charge as to degree of offense.** It is proper that the judge should instruct the jury as to what constitutes the several degrees of crime included in the indictment; but the mode and extent of doing it is in his discretion. State v. Conley, 39 Maine, 78.

**272.** Where on a trial for murder, the judge in charging the jury did not instruct them as to the various degrees of murder in the second degree and of manslaughter, but told them if they had doubt as to which degree of murder the defendant was guilty they should convict of the lesser degree, and if they had doubts of the intent to take life they could convict of one of the lesser degrees, it was held that although if the definition of the offense had been given to the jury, they would more clearly have seen the distinction between it and murder, yet that there was no error. Manuel v. People, 48 Barb. 548.

**273. Attention of court must be called to omission.** Where the charge of the court is correct as far as it goes, if the prisoner desires a more full instruction on any point, he must ask for it. Dow v. State, 22 Ala. 23. But if the court withdraw from the jury material evidence, it will be error. Holmes v. State, 23 Ala. 17.

**274.** If the court in admitting evidence for a specific purpose, omit to limit it to such purpose, it is the duty of counsel to call attention to the fact and to request a proper charge on the point; otherwise, all objection will be waived. People v. Collins, 48 Cal. 277; State v. Conley, *supra*.

**275.** No omission or failure of the judge to charge the jury upon a particular point of law, will be sustained as error, unless his attention be specially called to it. Cato v. State, 9 Fla. 163; State v. Reed, 62 Maine, 129; State v. O'Neal, 7 Ired. 251.

**276. Refusal to charge as to reasonable doubt.** The refusal of the court to charge the jury that the evidence must satisfy them beyond a reasonable doubt of every fact necessary to establish the prisoner's guilt, will be ground for a new trial. Walker v. State, 49 Ala. 398.

**277.** The court is not required to select each fact constituting an offense, and to charge the jury if they have a reasonable doubt of that fact, they must acquit—but only to charge generally that they must acquit, if on the whole case they have a reasonable doubt of the prisoner's guilt. State v. Dunn, 18 Mo. 419.

**278.** When the facts showing the guilt of the accused are clearly established, it is not error in the court to refuse to charge the jury as to the legal effect of a doubt. Pilkenton v. State, 19 Texas, 214.

**279.** Where there is positive evidence against the accused, it is proper for the court to refuse to charge that the case being one of circumstantial evidence, the jury must acquit unless the circumstances excluded any other hypothesis except that

of the prisoner's guilt, as that would assume that the positive evidence was unworthy of credit. People v. Kaatz, 3 Parker, 129.

**280. Refusal to charge as to effect of false testimony.** A refusal to charge the jury as follows, held error: "If the jury believe from all the evidence that the witness M. has testified falsely in respect to any material fact, it is their duty to disregard the whole of her testimony." Campbell v. State, 3 Kansas, 488.

**281. Refusal to instruct just as requested.** When a proper and legal request is made to the court to charge the jury, the party making such request has a right to have the instructions prayed for given to the jury in the manner requested. Davis v. State, 10 Ga. 101.

**282.** The prisoner is entitled to have written instructions asked for by him, given in the very terms asked, if correct; and it is error to refuse them, though charges similar in principle have already been given. Williams v. State, 47 Ala. 659.

**283.** On a trial for robbery, the evidence tended to establish the alleged offense; but the prisoner gave testimony in his own behalf which, if believed by the jury, would have justified a conviction for a lesser offense. At the close of the charge, to which no exceptions were taken, the counsel for the prisoner requested the court "to charge the jury that they can render a verdict of guilty of larceny from the person, or of an assault and battery." To this request the court responded by saying: "It is in your power to find this man guilty of arson in setting fire to the City Hall; you are only to find such a verdict as the facts that have been proven before you will justify." *Held*, that as the charge must be deemed adverse to the prisoner, and therefore legally injurious to him, he was entitled to a new trial. Murphy v. People, 5 N. Y. Supm. N. S. 302.

**284. When request to charge is only in part correct.** It is not error in the judge to refuse to charge as requested, when a part of the request is right and a part wrong. Tomlinson v. People, 5 Parker, 313.

**285.** When an exception is relied upon for refusing to charge as requested, the request must be proper as an entirety. If it embraces an idea or view which ought not to be presented, it destroys the value of the exception, although a part of the legal proposition embraced, if detached and presented separately, might be proper. People v. Holmes, 6 Parker, 25.

**286.** It is not the duty of the court to eliminate the errors in a requested instruction—to select a portion and refuse the residue. Where on the trial of a married woman for being a common seller of intoxicating liquors, the judge was asked to charge the jury that "if any of the sales were made by the wife in the presence of her husband, she would be presumed to act under the coercion, compulsion, or direction of her husband, and would not be liable for such sales," it was held that the instruction was properly refused; the presumption that the wife committed the offense by the coercion of the husband being slight and susceptible of rebuttal. State v. Cleaves, 59 Maine, 298.

**287. Refusing to charge the same proposition over again.** If the court refuses a charge once clearly given, on the ground that it has already given it in different terms, it should distinctly inform the jury that this is the reason for the refusal; otherwise, the refusal will be error. People v. Harley, 8 Cal. 890; affi'd, People v. Ramirez, 13 Ib. 172; People v. Williams, 17 Ib. 142.

**288. Refusing to charge abstract proposition.** The court may refuse to instruct the jury on an abstract proposition of law. Daniel v. State, 8 Smed. & Marsh. 101; Corbin v. Shearer, 3 Gilman, 482; Pate v. People, Ib. 644; Long v. State, 12 Ga. 293; and where an instruction, as asked, requires a qualification, or explanation, it may be refused. Swallow v. State, 22 Ala. 20; Baxter v. People, 3 Gilman, 368; Preston v. State, 25 Miss. 383; State v. Rash, 12 Ired. 382.

**289.** The request to charge an abstract proposition should be refused, although the proposition itself be correct. Murray v. State, 18 Ala. 727; People v. Cunningham, 1 Denio, 524; Morris v. State, 25 Ala. 57.

**290.** It is not erroneous in the judge to

refuse to charge that if the grand jury knew at the finding of the indictment whom the prisoner intended to defraud, he could not be convicted of an intent to defraud persons unknown, when there is no evidence in the case to show that the grand jury had any such knowledge. People v. Noakes, 5 Parker, 291.

**231. Instruction need not be given as to what is obvious.** The court is not required to instruct the jury as to matters of which they are supposed to possess a competent knowledge. It was therefore held proper for the court on a trial for assault and battery to refuse to charge, that an unloaded pistol, and a pistol without a cap was not a deadly weapon. Flournoy v. State, 16 Texas, 31.

**292. Charging as to probabilities.** When the jury being unable to agree come into court for further instructions, it is not error for the judge to remark, that it is more probable the recollection of a majority of the jury is correct than that of the minority. State v. Blackwell, 9 Ala. 79.

**293.** But it is not proper to charge the jury that upon the doctrine of chances, it is more probable that the defendants are guilty than that they are innocent, even if the probabilities are as one million, or any indefinite number, in favor of their guilt to one in favor of their innocence. Lyons v. People, 68 Ill. 271.

**294. Presenting to jury considerations of public policy.** The following instruction on a trial for murder, was held erroneous: That "cases of murder were fearfully numerous; that a conviction on a charge of murder, had ceased to be a cause of excitement, and had become a common affair of almost daily occurrence; that confinement in the State penitentiary for life was no adequate punishment for the crime of murder, and that juries had no right to qualify their verdict unless there were mitigating circumstances; that convicts in the penitentiary seldom served out their term when confined there for life; that a late governor had pardoned almost every body, and that convicts were always in the hope that after a few years they would appeal to a clement executive, and that nothing but capital punishment would put a stop to the practice now common of man and woman killing; that he the judge, had been told by prisoners in the penitentiary, that they hoped in a short time to get out." State v. Melvin, 11 La. An. 535.

**295.** On a trial for murder, under a statute permitting the jury to qualify their verdict by adding thereto "without capital punishment," the following instruction was held erroneous: "Murder is of very frequent occurrence in this community, and when a jury has a case of murder which is clearly made out, the court believes it necessary for a jury to bring in an unqualified verdict, in order to deter others from crime." State v. Shields, 11 La. An. 395.

**296.** Where, on a trial for grand larceny, the prisoner not having put his character in issue, there was no evidence tending to show that he had committed other crimes, the following instruction was held erroneous: "It is but wise and judicious that you should inquire what manner of criminal he is. Is he young in crime as he is in years? Has he been seduced, and led into this crime? Or is he young in years and old in crime—well versed in all the cunning and shrewdness of an old criminal? If so, you owe a duty to society to remove from its midst a dangerous criminal." Barker v. State, 48 Ind. 163.

**297. Charging as to punishment.** The following charge to the jury, on a trial for robbery, was held no ground for a new trial: "A crime of this kind is generally perpetrated at night; but this was in broad daylight, at half-past ten o'clock, in one of our public thoroughfares; a child taken into an alley, knocked down, and robbed. If the prisoners are guilty, they deserve a severity of punishment greater than any imposed at this term on any person tried. There is some excuse at night when an attack of that kind is made, but it is a much graver offense, and requires graver consideration, where they are so desperate as to make it in broad daylight." McGrory v. People, 48 Barb. 466.

**298.** Where, on a trial for murder, the judge, after telling the jury that the gov-

ernor of New York had not issued any warrant of execution under the law of 1860, and that the Court of Appeals had advised that it was inexpedient, instructed them that "they had nothing to do with the question of punishment which followed their verdict of conviction of murder ; that that belonged to the law, and not to them, to decide," it was held there was no error. Done v. People, 5 Parker, 364.

**299. Referring jury to their personal experience.** It is not erroneous to charge the jury that in arriving at a correct verdict, they may consult their general knowledge and experience. Rosenbaum v. State, 33 Ala. 354. But it is not proper to charge them that they may rely upon their experience as proof. On a trial for keeping intoxicating liquors for illegal sale, it appeared that the complaint and warrant alleged that the liquors were kept and deposited in a certain south store, and the evidence tended to show they were found by the officer serving the warrant in the second story of the building. The judge charged the jury that they must be satisfied beyond a reasonable doubt that said second story was a part of said south store, and that they would judge from the evidence in the case, with their knowledge or experience as practical men, as to how rooms or stores on the ground floor, and rooms above in the second story are generally used by merchants—whether said second story was, in point of fact, a part of said south store. *Held*, that as the instruction might be construed as authorizing the jury to act on their own knowledge or experience as evidence, it was erroneous. State v. Bartlett, 47 Maine, 388.

**300. Calling attention to character of wound.** On a trial for mayhem of a slave, it was proved that the defendant shot the slave in the leg, rendering its amputation necessary, and that the shot seemed to go together, making a continuous wound. The court charged the jury that as there was no proof of the distance between the prisoner and the slave when the wound was inflicted, they might look to the character of the wound, for the purpose of determining whether the prisoner fired the gun with the view of striking and disabling the leg. Eskridge v. State, 25 Ala. 30.

**301. Charging erroneous legal propositions.** Where the court charged the jury that the words "knowingly and willfully" were the equivalents of "purposely and maliciously," and that if the defendant shot H. knowingly and willfully, with the intent and design to kill him, he was not only guilty of an assault and battery, but of an intent to murder, it was held error, as it excluded the idea that one may knowingly and willfully kill another in self-defense. Long v. State, 46 Ind. 582.

**302.** An instruction on a trial for rape which characterizes a statement made by the defendant the next morning after the occurrence, that he had sexual intercourse with the prosecutrix the night before, as a confession, is erroneous. Hogan v. State, 46 Miss. 274.

**303.** Where the court charged the jury that contradictory statements in dying declarations were not governed by the same rules of evidence as similar statements made by a witness in court, it was held error. McPherson v. State, 9 Yerg. 279.

**304.** Where the court charged the jury that a man who takes property, claiming it for himself or another, commits no larceny, it was held that the instruction was inaccurate, a mere false claim of property not being sufficient to negative the criminal intent. State v. Ware, 10 Ala. 814.

**305.** A charge of the court which may be divided into two propositions not necessarily connected, either of which, when so separated, is applicable to the evidence, is erroneous. Martin v. State, 47 Ala. 564.

**306. Where charge, though erroneous, can do no harm.** Where, on a trial for rape on a child less than ten years old, the court ruled that the jury were not at liberty to find the prisoner guilty of assault and battery, it was held that whether this ruling was correct or not, as it merely precluded the State from holding him for the minor, if it failed to establish against him the major offense, it was not a ground of exception. State v. Black, 63 Maine, 210.

**307. Charging as to presumptions.** The following instruction was held erroneous: "If you believe from the evidence that the defendant and J. S. were together the day before the larceny was committed, and kept together up to eight o'clock the night the horses were stolen, you have a right to infer the larceny was committed by them jointly." Hall v. State, 8 Ind. 439.

**308.** It is erroneous to charge the jury on a trial for receiving stolen goods, that the discovery of the goods in possession of the defendant shortly after they were missed, and his denial that he had them, is presumptive evidence that he received them knowing them to have been stolen. Sartorius v. State, 24 Miss. 602.

**309.** It is erroneous for the court to charge the jury that if the prisoner has omitted to avail himself of evidence within his reach, which might have explained that which was against him, it is a presumption that the charge is well founded. Doty v. State, 7 Blackf. 427.

**310.** Where an instruction proceeds upon the supposition that there were other facts in the case exculpatory in their character, and then states that the jury may regard the failure of the defendant to prove such facts as evidence of guilt, it is error. Clem v. State, 42 Ind. 420.

**311.** The following instruction was held erroneous, in being too broad, in not having added to it the words "unless corroborated:" "If the jury believe, from the evidence, that the defendant, or any other witness, has intentionally sworn falsely as to one matter, the jury may properly reject his whole statements as unworthy of belief." Peak v. People, 76 Ill. 289.

**312.** On the trial of an information for an aggravated assault, an instruction that if the authorities who were concerned in a former prosecution for the same offense got it up under the belief that a bench warrant had been issued for the arrest and trial of the defendants for the same offense for the purpose of screening them from punishment, the proceedings were fraudulent and void; was held erroneous, it not being intimated that there was any privity between the public authorities and the defendants, or any fraud on the part of the latter. State v. Reed, 26 Conn. 202.

**313. Instruction as to effect of proof of good character.** It is error to charge the jury that where the question is one of great and atrocious criminality, evidence of good character and of a man's habitual conduct under common circumstances, must be considered far inferior to what it is in accusations of a lower grade. The attending circumstances must determine the degree of force which evidence of good character should have; and it is not, in ordinary cases, affected by the grade of the offense. Cancemi v. People, 16 N. Y. 501.

**314. Instruction based on insufficient proof.** It is erroneous to instruct the jury to find the defendant guilty without determining whether the offense was committed within the county in which the indictment was found, and within the period of time covered by the indictment. Farrall v. State, 32 Ala. 557.

**315.** Where the evidence as set forth in the bill of exceptions did not show that the venue was proved, it was held that an instruction that if the jury believed the evidence, they must find the defendant guilty, was erroneous. Brown v. State, 27 Ala. 47; approved, Huffman v. State, 28 Ala. 48; Spaight v. State, 29 Ib. 32.

**316. Misleading jury.** Where the evidence against the accused is wholly circumstantial, charging the jury that "they are bound to acquit the defendant if there is a single link wanting in the chain of evidence," is calculated to confuse or mislead the jury, and for that reason should be refused. Tompkins v. State, 32 Ala. 569.

**317.** On a trial for murder, the following instruction was held improper, as calculated to mislead the jury, and induce them to believe that the facts and circumstances pointing to the defendant's guilt had been proved: "It matters not, that the evidence is circumstantial, or made up from facts and circumstances, provided the jury believe such facts and circumstances pointing to the defendant's guilt to have been proved beyond a reasonable doubt." Otmer v. People, 76 Ill. 149.

**318. Charging as to reasonable doubt.** It is not erroneous for the court to charge the jury that a reasonable doubt "is a doubt which a reasonable man of sound judgment, without bias, prejudice, or interest, after calmly, conscientiously, and deliberately weighing all the testimony, would entertain as to the guilt of the prisoner." State v. Reed, 62 Maine, 129.

**319.** It is erroneous to charge the jury that a reasonable doubt must be founded on irreconcilable evidence. Mackey v. People, 2 Col. 13.

**320.** It is erroneous to charge the jury on a trial for murder, that to warrant them in finding a verdict of guilty, there must be that degree of certainty in the case, that they would act on it in their own grave and important concerns. Jane v. Com. 2 Metc. Ky. 30.

**321.** It is improper to charge the jury that unless they believe from the evidence to a moral certainty that the defendant is guilty, they cannot convict him. McAlpine v. State, 47 Ala. 78.

**322. Referring question of law to jury.** Instructing the jury that "if the prisoner's confessions were extorted from him by any sort of fear or hope of favor, they must disregard such confessions," refers to the jury a question of law, and is improper. Bob v. State, 32 Ala 560.

**323. Requiring the jury to receive the law from the court.** In a case where the jury are judges of the law as well as the fact, it is not erroneous for the court to charge them that the safer and better way in ordinary criminal cases is to take the law from the court, and that they are always justified in doing so. State v. McDonnell, 32 Vt. 491.

**324.** Where the jury were charged that although they were the judges of the law, yet it was their duty to believe it as laid down by the court, it was held proper. Carter v. State, 2 Carter, 617.

**325.** The jury were instructed that it was their duty to apply the law as given by the court to the facts of the case, that they might determine the law for themselves, but that they ought to be well satisfied in their own minds of the incorrectness of the law as given by the court before assuming the responsibility of determining it for themselves. *Held* error, as the jury might be compelled to bring in a verdict not in accord with their own judgment of the law. Clem v. State, 31 Ind. 480.

**326. Charging as to the degree of guilt.** An instruction that the defendant and another person "might both be guilty of this murder," is erroneous, as it intimates that the offense is murder, which is a question of fact for the jury. Horne v. State, 1 Kansas, 42.

**327.** A judge concluded his charge to the jury as follows: "I would not be satisfied with a verdict of murder in the first degree, nor would I be satisfied with anything less than a verdict of murder in the second degree. If I were on the jury, I would bring in a verdict of murder in the second degree." *Held* a usurpation of the province of the jury. Warren v. State, 4 Cold. Tenn. 130.

**328.** The following charge was held erroneous in taking from the jury their right to decide for themselves: "The life or death of this man is in your hands. There is no middle course. He must be convicted of murder of the first degree or acquitted of everything. If your verdict is guilty of murder, you must state of the first degree. If not guilty, you say so and no more." Lane v. Com. 59 Penn. St. 371.

**329.** The judge, when asked by the defense to charge the jury as to the form of the verdict, in a case in which there is any doubt as to the guilt or grade of guilt, should not say in the hearing of the jury: "I can't conceive how the jury could find such a verdict upon such a state of facts, but if they request it I will instruct them." Stephens v. State, 47 Ala. 696.

**330. Judge improperly commenting on evidence.** In Missouri, it is error for the court to comment on the evidence, unless asked to do so by both parties. State v. Dunn, 18 Mo. 419.

**331.** In Tennessee, where the court charged the jury in respect to matters of fact in a criminal case, it was held to be a breach of

the prisoner's constitutional rights. Clayton v. State, 2 Humph. 181.

**332. Judge assuming the proof of facts.** A charge which assumes a fact to be proved without referring it to the jury is erroneous. Thompson v. State, 47 Ala. 37.

**333.** Where the judge not only charged the jury as to the law of the case, but expressed his opinion in regard to the facts, so that there was nothing left for the solution of the jury, it was held error. State v. Green, 5 Rich. N. S. 65.

**334.** A charge that the jury must find the defendant guilty, when the evidence consists of the testimony of a single witness, is erroneous. Huffman v. State, 29 Ala. 40.

**335.** Where the evidence is circumstantial and not inconsistent with the innocence of the accused, it is error to charge the jury that it is their duty to convict. Breen v. People, 4 Parker, 380.

**336.** It is erroneous to charge the jury that "the guilt of the defendant rests upon what is known as circumstantial evidence," thereby assuming the defendant's guilt. State v. Duffy, 6 Nev. 138.

**337.** It is error in the court to tell the jury that the evidence on the part of the prosecution is sufficient to convict, and that on the part of the defense insufficient to entitle the accused to an acquittal. Benedict v. State, 14 Wis. 423.

**338.** When the evidence is conflicting, a charge based upon the State's evidence, and indicating that the jury may look to it alone in passing on the guilt or innocence of the defendant, is improper. Dill v. State, 25 Ala. 15; Williams v. State, 47 Ib. 659.

**339.** It is error in the court to charge the jury that the evidence of an accomplice is corroborated, that being a question for the jury. Nolan v. State, 19 Ohio, 131.

**340.** An instruction is erroneous which assumes that confessions been proved to have been made by the defendant, thereby withdrawing from the jury the duty of determining whether any confessions had in fact been made by him. Cunningham v. Com. 9 Bush, Ky. 149.

**341.** Where on the trial of an indictment for defacing and marking a school-house, the court charged that the prosecution had proved all that was necessary with reference to the school district, it was held error. Houston v. State, 4 Greene, 437.

**342.** Where on a trial for rape the judge expressed indignation that persons within hearing did not rush to the rescue of the woman, and his wish for an opportunity to punish them for their cowardice, it was held that as he thereby intimated his opinion that the violence was committed, the prisoner was entitled to a new trial. State v. Brown, 67 N. C. 435.

**343.** On a trial for murder, the judge charged the jury that "in order to make a killing under such circumstances as have been proved, justifiable homicide, it must appear that the party killing had retreated as far as he safely could at the time, and in good faith declined further contest, and was compelled to kill his adversary in order to save himself from death or great bodily harm, which to a reasonable man would appear imminent." *Held* that as it assumed the proof of material facts, it was erroneous. State v. Kennedy, 7 Nev. 374.

**344. Court improperly determining weight of evidence.** When the evidence is conflicting, an instruction that if the jury believe the evidence, they must find the defendant guilty, is erroneous. Arnold v. State, 29 Ala. 46.

**345.** It is error in the court to single out one of several witnesses, and charge the jury that if they believe him, the homicide set forth in the indictment is murder. And it is error to compliment a witness. Pound v. State, 43 Ga. 88.

**346.** Where, on a trial for murder, the judge charged the jury that if they believed from all the evidence, that the defendant had knowingly sworn falsely in regard to any material point in the case, they *ought to* disregard his testimony on all material points, excepting so far as he was corroborated by other evidence in the case, it was held error, in usurping the province of the jury in determining the effect of the evidence. Otmer v. People, 76 Ill. 149.

**347.** Where the judge charged the jury that evidence of the good character of the

prisoner should have great weight in determining as to his guilt or innocence, "if the jury believed there was any doubt as to his guilt," it was held error, the qualification amounting to a declaration by the judge, that there was no doubt of the prisoner's guilt. Jupitz v. People, 34 Ill. 516.

**348.** The following instruction was held erroneous, as assuming that the defendants made an assault with intent to murder: "If the jury believe from the evidence that A. and B. were together, and acted in concert at the time the assault to murder was made, they should find them equally guilty." Bond v. People, 39 Ill. 26.

**349.** On a trial for an assault with intent to commit a rape, two witnesses testified that the defendant upon being asked previous to the occurrence if the prosecutrix was an unchaste woman, said that he did not know, "but he was going over to try her, and if it was all right, he would tell them." The defendant asked the court to charge the jury that if he used this language "in rant, fun, jest or badinage, the jury ought to disregard it as a circumstance tending to show his guilt." The court refused to give the instruction as asked, but gave it with the following addition after the word "guilt:" "but may be considered by the jury as evidence tending to show that the thought of criminal intercourse with the prosecuting witness was in the defendant's mind." *Held* that the words "criminal intercourse" in the instruction, were improper, and ground for a new trial. State v. Warner, 25 Iowa, 200.

**350.** An instruction that the evidence points to the existence of the acts and intent as charged in the indictment, beyond a reasonable doubt, is tantamount to a charge that it establishes the crime beyond a reasonable doubt, and a violation of the Constitution of Nevada (art. 6, § 12), under which the court has no right to charge the jury as to the weight of evidence. State v. McGinnis, 5 Nev. 337. See State v. Duffy, 6 Ib. 138.

**351.** The provision of the Constitution of California (art. 6, § 17), that "judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law," is violated whenever a judge so instructs as to force the jury to a particular conclusion upon the whole or any part of the case, or to take away their exclusive right to weigh the evidence. This was held to be the case where the court instructed the jury that if the dying declarations of the deceased were true, they should find the defendant guilty; the evidence connecting the defendant with the offense, being mainly circumstantial. People v. Ybarra, 17 Cal. 166.

**352.** An instruction on a trial for murder, that the dying declarations of the deceased with regard to the circumstances which produced his death, are to be received with the same degree of credit as the testimony of the deceased would be, if examined under oath as a witness, is erroneous; it being the province of the jury to determine the weight to be attached to them. State v. McCanon, 51 Mo. 160.

**353.** The court charged the jury that "the declarations of a dying man are worthy of more credence under such circumstances than if made under the sanctity of an oath duly administered according to law." And after stating the rules as to the admissibility of a dying declaration, the court added: "If these facts appear from the evidence, under the foregoing rules of law, it becomes the highest testimony known, and must receive full faith and credit by the jury." *Held* erroneous; it being the province of the jury alone to say what credit shall be given to such a declaration. Walker v. State, 37 Texas, 366.

**354.** After the jury on a trial for murder had been out several hours, they returned into court for further instructions. The judge told them that if they believed the witnesses, they should convict of manslaughter, but it was for them to say in what degree. *Held* error; it being a question of fact for the jury as to whether manslaughter had been proved. Pfomer v. People, 4 Parker, 558.

**355.** It is error to charge that "to reduce a homicide upon provocation, it is essential that the fatal blow shall have been given

immediately upon the provocation given; for if there be time sufficient for the passion to subside, and the person provoked kill the other, this will be murder, and not manslaughter." It should be left to the jury to determine whether the passions had actually been quieted. Ferguson v. State, 49 Ind. 33.

356. On a trial for murder, according to prisoner's testimony the deceased had persisted in following the prisoner from street to street in the night, with threats and abusive language, and finally seized him by the throat, choked him almost to suffocation, and refused to let go after being warned. The judge charged that the homicide was not justifiable even if the jury believed that the facts and circumstances at the time and before the fatal shot were as stated by the prisoner. *Held* error, as it withdrew the question from the jury. Burdick v. People, 58 Barb. 51.

357. On the trial of a boy twelve years of age for murder, the court charged as follows: "If the shooting took place under circumstances showing that the defendant, from his youth, was incapable of cool reflection; that his mind was agitated so as to preclude the idea that he was aware of the enormity of his rash act, and the serious consequences thereof, then his crime is manslaughter. *Held* erroneous in withdrawing from the jury the question of responsibility, excepting so far as it tended to reduce murder to manslaughter. *Held*, further, that that there was error in another part of the charge which placed the responsibility of the defendant on the fact that his capacity was as good as that of boys generally of his age, without proof that such boys had sufficient discretion to understand the nature of the act with which the defendant was charged. Wusing v. State, 33 Texas, 651.

358. It is erroneous to charge the jury on a trial for murder that if they believe that the accused voluntarily confessed his agency in the murder, they ought to find him guilty, the jury being the judges, from all the facts, as to whether the confession is true. Butler v. Com. 2 Duvall, 435.

359. Where the issue is as to the sanity of the prisoner, it is erroneous to charge the jury that they are to determine whether the prisoner knew right from wrong, and if he did, he is to be considered sane. Freeman v. People, 4 Denio, 9.

360. The following charge of the judge to the jury was held ground for a new trial: "It is my opinion that you can infer from the defendant's admission that the pistol which he shot had a ball in it, inasmuch as he undertook to point out the place where the ball struck, whether that was the place or not." Grant v. State, 45 Ga. 477.

361. An instruction on a trial for assault and battery that a certain instrument is a dangerous weapon, is erroneous, whether or not it was such, being a question of fact for the jury. Doering v. State, 49 Ind. 56. On a trial for murder by stabbing, it was held that an instruction was erroneous which assumed as proved that the knife used was a dangerous weapon, and that it was concealed from the deceased. Berry v. Com. 10 Bush, 15.

362. An instruction, on the trial of an information against a county treasurer for embezzling public funds in the county treasury, that when it has been proved that the funds reached the hands of the officer, and that the same were not forthcoming when demanded, the law presumes the illegal conversion of such funds, and the burden of proving the contrary is on the officer, is erroneous, for the reason that it usurps the province of the jury, who are to determine from the facts whether or not the accused converted the funds to his own use. State v. Smith, 13 Kansas, 274; State v. Graham, Ib. 299.

363. An indictment for murder contained but one count, which alleged that the killing was effected by shooting the deceased with a pistol in the head. The proof tended to show that the plaintiff in error fired the pistol two or three times at the deceased, inflicting thereby two wounds, one upon the head and one upon the body, either of which would have been mortal, but failed to show which was first inflicted, or which actually caused the death. It was held no error in the refusal of the judge to charge the jury

that if the proof failed to show which wound it was that actually caused the death, the case was not made out according to the indictment. Real v. People, 42 N. Y. 270.

**364. Charging as to character of evidence.** The court charged the jury that "an *alibi* is a species of defense often set up in criminal cases, and one which seems to figure somewhat in this." *Held* error, the language used being calculated to convey to the minds of the jury the impression that the court regarded that particular defense as a pretense. Walker v. State, 37 Texas, 366.

**365.** In Massachusetts, the judge in charging the jury told them that in many of the cases which had been tried at that term of court, "policemen had been the principal witnesses, and he thought the jury would agree with him in the opinion that in all these cases they had manifested great intelligence, and testified with apparent candor and impartiality." *Held* a violation of the statute (Genl. Stats. ch. 115, § 5), and that the verdict must be set aside. Com. v. Barry, 9 Allen, 276.

**366.** It is proper for the court to caution the jury to take care that no pretended case of insanity be permitted to shield the defendant from the ordinary consequences of his act. People v. Bumberger, 45 Cal. 650.

**367. Judge qualifying his remarks as to character of evidence.** The court, in charging the jury, spoke of certain things relied on for the defense as "little matters" (as had also been done by the prisoner's counsel in his argument to the jury). But the judge added that in using the expression "it was far from the intention of the court to characterize them as small or insufficient, or to indicate in what light they were to be considered and weighed by the jury." *Held* no ground for reversal of the judgment. Rosenbaum v. State, 33 Ala. 354.

**368.** On a trial for forging a check on a bank, the recorder charged the jury in substance that the evidence of the prisoner's guilt was irresistible to his mind, laying out of view the evidence of the prisoner in his own behalf, but that his opinion had nothing to do with their deliberations, and they must judge for themselves, irrespective of his opinion. *Held*, that although it would have been better for the recorder to have omitted the expression of an opinion, yet, that the whole subject was so submitted, the jury must have decided the case independently. Watson v. People, 64 Barb. 130.

**369. Calling attention of jury to contradiction in testimony.** Improbabilities in the testimony of witnesses, or their contradictory statements, are matters for the jury to consider, and it is improper for the court to comment upon them. State v. Breeden, 58 Mo. 507.

**370.** But when a witness has sworn differently upon the same point on a former occasion, his testimony should be left to the jury, under such prudential instructions as may be given by the court. Where the court called the attention of the jury to the self-contradiction of the principal witness, and said that it was a strong circumstance tending to discredit her testimony on that trial, but that the amount of credit due to that testimony was a question for them to determine, adding, that if a reasonable doubt arose in their minds, it was their duty to acquit, it was held that the charge was right. Dunn v. People, 29 N. Y. 523.

**371. Charging as to construction of evidence.** Where a physician testified that he made a professional examination of a wound in the prosecutor's hand, but did not "*examine*" *another* wound in his side, it was held that an instruction, that the jury might consider "whether the witness, in saying that he did not *examine* the wound in the side, meant that he did not examine it as a physician, or that he did not see or look at it at all," was not erroneous. Rosenbaum v. State, 33 Ala. 354.

**372. Instruction as to conclusiveness of proof.** Where the proof is wholly positive, is not error in the court to charge the jury that if they believe the witnesses, it is their duty to find a verdict of guilty. Duffy v. People, 5 Parker, 321; affi'd 26 N. Y. 588.

**373.** It is the duty of the court to state the legal effect of a record which is offered to sustain the plea of *autrefois acquit* or

discontinuance, and the record itself cannot be impugned by parol evidence; and the court may instruct the jury that the pleas are not sustained by the proof, if it is the fact. Martha v. State, 26 Ala. 72.

**374. Charging jury how to interpret instructions.** It is error to instruct the jury that if they find that there is a conflict between the special instructions asked for by the defendant and given, and the main charge, the latter must prevail. If such a conflict exist, the court should either withdraw that portion of the main charge which conflicts with the special charge asked or refuse the special charge. Spivey v. State, 26 Ala. 90.

**375. Charging jury as to their duty.** The following instruction on a trial for murder, was held erroneous: "Do simply that duty which naturally presents itself as you act under your oath, and the law and the testimony before you, and you cannot greatly err, whatever your verdict." State v. Ah Tong, 7 Nev. 148.

**376.** It is erroneous for the court to charge the jury that it is their duty to find an unqualified verdict, if the case is clear; for the reason that if the case is not clear they cannot find any verdict against the prisoner. State v. Obregon, 10 La. An. 799.

**377.** It is error to charge the jury that if any one or more of them differed from the majority, as to the guilt or innocence of the prisoner, they might properly waive their convictions and agree with the majority, but were not obliged to do so. Swallow v. State, 20 Ala. 30.

**378. Correction of charge.** An erroneous instruction is not cured by a correct instruction on the same point. Mackey v. People, 2 Col. 13. Where however, the judge in his charge to the jury lays down erroneous propositions, but afterward, upon his attention being called to them, lays down the correct rule, no error is presented for review. Eggler v. People, 56 N. Y. 642. On a trial for murder, the judge in the course of his charge twice alluded to the fact that the accused was not sworn as a witness in his own behalf—once in connection with the question of identity, and the narration of the incidents of the homicide, and again, in connection with the circumstances claimed to be suspicious. The judge afterward told the jury that the prisoner was not bound to be sworn, and that the prosecution must make out their case; but he did not say that the prisoner's omission to be a witness should not create any presumption against him. The judge however, upon his attention being called to his previous remarks, told the jury that there was no law requiring the prisoner to be sworn, and that no inference was to be drawn against him from the fact of his not being sworn. *Held* that the error was cured by the subsequent explanation. Ruloff v. People, 45 N. Y. 213.

**379.** An erroneous instruction cannot be corrected by another instruction which states the law accurately, unless the erroneous instruction be thereby plainly withdrawn from the jury. Bradley v. State, 31 Ind. 492; Kingen v. State, 45 Ib. 519. See Clarke v. State, 52 Ib. 67.

**380. Waiver of objection to charge.** When the prisoner asks the court to charge the jury upon a point of law, he cannot afterward object to the court's charging them on that point, although the instruction is unfavorable to him. State v. Madison, 33 Maine, 267.

**381. Presumption in favor of charge.** When an affirmative instruction is given which states a correct abstract proposition of law, it will be presumed on error or appeal, to have been justified by the proof, unless the evidence is set out in the bill of of exceptions. Morris v. State, 25 Ala. 57.

**382. Time of excepting to charge.** Exceptions to the judge's charge must be taken at the close of the charge, and before the jury retire. State v. Clark, 37 Vt. 471.

### 5. Proceedings subsequent to submitting case to jury.

**383. Jury in retiring to deliberate taking with them, or sending for, books.** As a rule, the jury should not be permitted to take with them a law book when they retire, but they may be permitted to do so when the paragraph applying to the case is sepa-

rately marked out, as in the case of a statute. Hardy v. State, 7 Mo. 607.

**384.** Where the judge declined to allow the jury to take with them to their room the Revised Statutes, and the requests for instructions by the defendant (such requested instructions not having been given any further than the same were embraced in the general charge), it was held proper. State v. Kimball, 50 Maine, 409.

**385.** Where after the conviction of the defendant on the trial of an indictment for the violation of a statute, it appeared that the jury after retiring to deliberate procured through an officer in attendance upon them a copy of the Revised Statutes, without the knowledge or consent of the court or counsel, or of the defendant, it was held ground for a new trial. State v. Smith, 6 R. I. 33.

**386.** After the jury had retired to deliberate on their verdict, they applied to the officer in charge of them to furnish them with several directories of the city of New York, which he did. The circumstance being made known to the court, the jury were recalled and directed by the court to retire to their room and banish from their minds any information they might have obtained from the books, and to disregard such information in arriving at their verdict. *Held* that the irregularity was not ground for a new trial. U. S. v. Horn, 5 Blatch. 102.

**387. Jury taking out with them documentary and other evidence.** The jury should not be permitted to take with them any portion of the written evidence when they retire to deliberate, unless the whole of it is given to them. Rainforth v. People, 61 Ill. 365.

**388.** Where the jury when they retire to deliberate improperly take out with them a paper, it will not be ground for a new trial unless it appear that they were thereby improperly influenced. State v. Bradley, 6 La An. 554.

**389.** The fact that the jury on a trial for assault and battery took with them when they retired to deliberate on their verdict the papers in the case, held not a ground for the reversal of the judgment, when it was not shown that any of the jurors examined the papers, or that the defendant was thereby prejudiced. State v. Gibson, 29 Iowa, 295.

**390.** It is not error to permit the jury on a trial for murder, after their return into into court for further instructions, to take out with them, at their own request, papers which had been proved and commented on at the trial. Udderzook v. Com. 76 Penn. St. 340.

**391.** Where on a trial for murder, a diagram of the relative situation and distances from each other of several places near the scene of the homicide was introduced, it was held not improper for the court to permit the jury to take it with them in their retirement. Campbell v. State, 23 Ala. 44.

**392.** On the trial of an indictment which charged several with feloniously taking an iron safe belonging to an express company from the cars of the New York and New Haven Railroad Company, with bank bills and other valuables contained in it, the prosecution produced a dark wooden box made to resemble the safe, with counterfeit bank bills concealed in it, and claimed to have been used in the perpetration of the theft. After the judge had charged the jury, this box was by his order delivered to them, and taken by them to their room when they retired to deliberate. *Held* proper. State v. Stebbins, 29 Conn. 463.

**393.** Where the judge allowed the jury to take to their room a bottle of liquor which was introduced in evidence, not as the liquor seized, but as manufactured and sold by the same person under the same name, coupled with the instruction not to consider the qualities of such liquor, unless they should find from the evidence in the case that it was the same kind as that seized, it was held not improper. State v. McCafferty, 63 Maine, 223.

**394. Jury taking out with them or sending for proof which was not given on the trial.** After conviction of murder, it appeared that while the jury were deliberating on their verdict, the testimony which was given on the coroner's inquest, and which was not offered in evidence on the trial, was accidentally taken by the jury to their room.

*Held* not a ground for a new trial. State v. Tindall, 10 Rich. 212.

395. On a trial for murder, the prisoner was defended upon the theory that the deceased shot himself with a pistol. After the jury had retired to deliberate, a pistol was sent to them, without the knowledge of the prisoner, his counsel or the court, as being the same pistol with which the killing had been done, though it had not been fully identified as the one which was found near the deceased, and which it had been proved belonged to the prisoner. With this pistol the jury experimented, which resulted in their finding a verdict of guilty, they having been up to that time equally divided. *Held* ground for a new trial. Yates v. People, 38 Ill. 527.

396. **Jury procuring a copy of the instructions.** Where, after the jury had retired to deliberate, they sent for the judge's charge, a copy of which was sent to them with one word omitted, it was held error. Holton v. State, 2 Fla. 476.

397. **Officer in jury room.** There is no rule which prohibits the constables sworn to attend the jury, from being present with the jury in the jury room during their deliberation, though the practice is not to be commended. People v. Hartung, 4 Parker, 256, per Harris, J.

398. **Judge communicating with jury privately.** After the jury have retired to deliberate, the judge has no more right to communicate with them than any other person, except in open court, in the presence of, or after due notice to the prosecuting attorney, and the prisoner, or his counsel. Hoberg v. State, 3 Minn. 262.

399. In Vermont, it has been held that all communications between judge and jury after a case has been submitted, and while the jury have it under consideration, must be in open court; and it is error for the court to furnish them a copy of the statutes. State v. Patterson, 45 Vt. 308.

400. In Ohio, it was held not improper for the judge on a trial for murder to send to the jury at their request, the statutes of the State with a reference to certain sections which he had just previously read to them. Gandolfo v. State, 11 Ohio, N. S. 114.

401. A written communication from the court to the jury may be justified by the consent of the prisoner's counsel that the jury may ask instructions "respecting the law, or any evidence given in court." State v. Bullard, 16 New Hamp. 139.

402. Where the judge, through the bailiff, in the absence of the defendant and his counsel during a recess of the court, withdrew erroneous instructions which had been submitted to the jury in writing, and taken by them to their room, it was held improper. Hall v. State, 8 Ind. 439.

403. **Jury returning into court for information.** It is not proper for the court to permit any one of the jurors while they are deliberating to leave the jury room and come into court and hold a conversation with the court; but the jury should be brought into court in a body. Fisher v. People, 23 Ill. 283.

404. The court has no right in the absence of the prisoner, and without the consent of his counsel, to call the jury to the court room after they have retired to deliberate, and read over to them the written testimony as taken down by the court. Wade v. State, 12 Ga. 25.

405. Where the jury after retiring to deliberate, are called back into court to be further instructed, the defendant is entitled to the presence of his counsel, and if the instruction be given in the absence of such counsel, it will be ground for a new trial. Martin v. State, 51 Ga. 567.

406. Where after argument of counsel on a trial for arson, and charge by the court, the jury retired to deliberate, but subsequently came into court, and asked for further instructions, which were given in the absence of the defendant's counsel, the defendant being present, it was held that the error was fatal. People v. Trim, 37 Cal. 274.

407. In Alabama, it was held that the fact that the presiding judge left the bench while the jury were deliberating on their verdict; that the counsel engaged in the case left the court room under an agreement that the clerk

might receive the verdict of the jury; and that the court on the request of the jury for further instructions, afterward gave them an additional charge in the presence of the prisoner, but in the absence of his counsel, and without the knowledge or consent of said counsel, was not a ground for the reversal of the judgment. Collins v. State, 33 Ala. 434.

**408.** When the jury, after retiring to deliberate, return into court and ask the judge as to a fact, it is within the discretion of the court to admit testimony respecting the matter of such inquiry. Com. v. Ricketson, 5 Metc. 412.

**409.** On the trial of an indictment for retailing intoxicating liquors, after the jury had deliberated on their verdict four hours and a half, they came into court and stated that they could not understand alike the testimony. The judge then sent for a witness and told the jury to examine him. The witness thereupon repeated his testimony as near as he could. The judge would not allow counsel to interrogate the witness, ruling that it was for the jury alone to do so. The counsel then became involved in a dispute about the testimony of the witness, whereupon the judge stated that the witness had before sworn that it was within the year that the liquor was sold, and that it was so down on his minutes. *Held* that there was no error. Herring v. State, 1 Iowa, 205.

**410. Persons talking to jurors.** Where on the trial of an indictment for rape, the jury while deliberating on their verdict, were taken by the officer who had them in charge to a hotel for dinner, and while there the proprietor of the hotel told some of the jurors to convict the defendant, it was held that as this was a mere passing remark of the proprietor of the hotel, it did not constitute misconduct of the jury entitling the defendant to a new trial. People v. Brannigan, 21 Cal. 337.

**411.** The fact that on a trial for murder the officer having charge of the jury was absent some minutes from the room in which he had placed them, it not appearing that they were allowed to separate; that some person outside the jury room spoke to a juror, and that some of the jurors spoke to two persons outside, it not appearing what was said, or that it had any reference to the trial; and that after the jury had agreed on their verdict, and were brought into the court room, they were allowed to remain there in the presence of other persons while the officer went to the porch in front of the court room, and waited some minutes for the judge, it not appearing that any communication was had with the jury in the mean time, are not sufficient grounds for a new trial. People v. Boggs, 20 Cal. 432. See People v. Symonds, 22 Ib. 348.

**412. Improper separation of jury.** When the jury after retiring to deliberate, separate without leave of the court, the prisoner will be entitled to a new trial unless it be affirmatively shown by the prosecution that he was not thereby prejudiced. People v. Brannigan, 21 Cal. 337; People v. Symonds, *supra*.

**413.** In New York, where the jury separated without being legally discharged, after the cause was committed to them, and before rendering or agreeing upon a verdict, it was held that the court properly discharged them. People v. Reagle, 60 Barb. 527.

**414. Consent of parties to separation of jury, when presumed.** Where the court directs the jury to bring in a sealed verdict, and gives them permission to separate after agreeing upon the same, the parties will be deemed to have consented to such permission, if no objection be made. Friar v. State, 3 How. Miss. 422.

**415. Right of court to discharge jury.** When the jury have deliberated so long without finding a verdict as to preclude a reasonable expectation that they will agree, unless compelled to do so by famine or exhaustion, they may be discharged, and the prisoner be tried by another jury. People v. Goodwin, 18 Johns. 187; People v. Olcott, 2 Johns. Cas. 301; U. S. v. Coolidge, 2 Gallison, 364; Com. v. Roby, 12 Pick. 496. In all such cases, the facts upon which the court exercised its discretion in discharging the jury, should be spread upon the record; otherwise a court of review will pre-

sume that the inferior court performed its duty. State v. Waterhouse, 1 Mart. & Yerg. 278.

**416.** Courts have a discretionary power in all cases, to discharge the jury after they have deliberated so long without coming to an agreement as to satisfy the court that further attempts to agree will be unavailing. Com. v. Townsend, 5 Allen, 216.

**417.** Where the jury, on a trial for murder, had been kept together nine days without agreeing, and the health of one of the jurors was suffering from confinement, while the personal attendance of another juror was required by the illness of his wife, and the court discharged them, it was held proper. Fell's Case, 9 Leigh, 613.

**418.** Where on a trial for grand larceny, the jury were not able to agree up to the last moment of the term of the court, it was held that they might be discharged, and the prisoner be remanded to jail for trial at the next term. State v. Moor, Walker, 134. And see State v. Brooks, 3 Humph. 70.

**419.** It has been held that in misdemeanor, the court may discharge the jury without the consent of the defendant. People v. Denton, 2 Johns. Cas. 275; State v. Morrison, 3 Dev. & Batt. 115; Dye v. Com. 7 Gratt. 662; State v. Weaver, 13 Ired. 203; People v. Ellis, 15 Wend. 371.

**420. Improper discharge of jury.** Where a person has been given in charge, on a legal indictment, to a regular jury, and that jury unnecessarily discharged, he has been once put in jeopardy, and the discharge is equivalent to a verdict of acquittal. Wright v. State, 5 Ind. 290; Miller v. State, 8 Ib. 325; State v. Wamire, 16 Ib. 357; State v. Callendine, 8 Iowa, 288.

**421.** In Ohio, it has been held that where the jury is discharged without the consent of the defendant, unless the record shows the necessity for such discharge, the defendant will be exonerated from liability to further answer to the indictment. Hines v. State, 24 Ohio, N. S. 134.

**422.** The fact that the jury after twelve hours' consultation, report that they cannot agree, does not constitute such a necessity as justifies their discharge. Miller v. State, *supra*. See Reese v. State, 8 Ind. 416; State v. Walker, 26 Ib. 346.

**423.** On a trial for murder, the case was committed to the jury on Saturday evening of the first week of the term, and the jury being unable to agree, were discharged the Monday evening following, after a deliberation of about forty-five hours. *Held* that the prisoner could not be tried again. State v. Alman, 64 N. C. 364.

**424.** On a trial for forgery, the judge received a note from some one, it did not appear whom, saying that the jury could not agree, and that one of them whose name was not given, was not a citizen. They were thereupon brought into court, and without being asked whether they had agreed or could agree, or whether any of them lacked the necessary qualifications, and without any statement by them to the court, they were discharged. *Held* tantamount to an acquittal. Poage v. State, 3 Ohio, N. S. 229.

**425. Discharging jury.** On a trial for murder, the case having been given to the jury on Tuesday, the judge went home, instructing the clerk to inform him by telegraph of the agreement or failure to agree of the jury. On the Saturday night following, the clerk telegraphed to the judge that the jury could not agree, and he instructed the clerk by telegraph to discharge the jury and remand the prisoner. *Held* error, and that the prisoner must be discharged. State v. Jefferson, 66 N. C. 309.

**426.** In New York, the presiding justice has no authority to discharge the jury in the absence of his associates, whose presence is necessary to constitute a court of Oyer and Terminer; the only thing he has power to do in the absence of his associates touching the business of the court being to take recognizances and bail. People v. Reagle, 60 Barb. 527.

**427. Discharge of jury in absence of prisoner.** In Indiana, where the jury, being unable to agree, are discharged in the absence of the prisoner, such discharge operates as an acquittal. State v. Wilson, 50 Ind. 487.

**428.** In Iowa, on a trial for forgery, the

court being satisfied that the jury could not agree, discharged them. The defendant was at the time confined in jail, and had no knowledge of the proceedings until after the jury were discharged. His counsel was present, but otherwise engaged, and did not know what was being done. The defendant moved to be released, on the ground that he had been "once in jeopardy." *Held* that his motion was properly overruled. State v. Vaughan, 29 Iowa, 286.

**429. Expiration of term of court before verdict.** When the jury fail to return a verdict in consequence of the expiration of the term of the court, the prosecuting attorney may, without special leave of the court, cause a capias to be issued, and the prisoner to be again put upon his trial. State v. Tilletson, 7 Jones, 114.

**430. The prisoner to be present when the verdict is rendered.** At common law, in capital cases, the verdict must be received in open court, and in the presence of the prisoner. Holliday v. People, 4 Gilman, 111; People v. Perkins, 1 Wend. 91.

**431.** Where the court, at a recess, gave additional instructions to the jury, received their verdict, and discharged them in the absence of the prisoner's counsel, it was held error if no attempt to give them notice was made, but that it would be sufficient notice to call them at the court house door or other place as witnesses and other persons are usually called. McNeil v. State, 47 Ala. 498.

**432.** On a trial for felony, it is error for the clerk to receive the verdict, during a recess of the court, in the absence of the prisoner, even though it be done with the consent of his counsel; and it is also error to allow an amendment of the verdict, unless the record affirmatively shows that the prisoner was present in the court at the time. Waller v. State, 40 Ala. 325.

**433.** When the prisoner will not come into court to hear the verdict, the court may order a mistrial. State v. Battle, 7 Ala. 259.

**434.** If the verdict is received and read aloud in open court when the prisoner is absent, and the jury discharged, the court may recall them before they have left the bar, and if this is done immediately upon the discovery of the absence of the prisoner, and the papers in the case handed back to them, the prisoner cannot complain on error of the action of the court. Brister v. State, 26 Ala. 107.

**435.** In Mississippi, it has been held that although a person on trial for felony has a right to the rendition of the verdict in open court, in his presence, yet if he is not held in custody and voluntarily absents himself when the verdict is rendered, he cannot complain. Price v. State, 35 Miss. 531.

**436.** In California, on the trial of an indictment for grand larceny, the prisoner was absent when the jury came into court and announced their verdict, and while the same was being recorded by the court, but returned before the jury were discharged, knew what the verdict was, and had an opportunity to demand the polling of the jury. *Held* not a ground for setting aside the verdict. People v. Miller, 33 Cal. 99.

**437. Refusal of court to interrogate jury.** After verdict of guilty on a trial for murder, the omission of the judge to ask the jury if they found the name of the person killed as alleged in the indictment, when requested to do so, is not a ground of exception. State v. Conley, 39 Maine, 78.

**438. Polling jury.** In Massachusetts, the prisoner's counsel is not permitted to poll the jury. Com. v. Roby, 12 Pick. 496. In that State it has never been the right of a party in any case to have the jury polled. Com. v. Costley, 118 Mass. 1.

**439. Verdict must be freely and unanimously rendered.** The court should refuse to receive a verdict not freely and unanimously concurred in. Where one of the jury entertained doubts of the defendant's guilt, and made the fact known to the court when the jury were polled, but after some conversation with the court was induced to assent to the verdict, it was held ground for a new trial. State v. Austin, 6 Wis. 205. And see Rothbauer v. State, 22 Ib. 468.

**440.** Upon the trial of an indictment for an affray, after the jury had come into court,

before announcing their verdict they intimated that they intended to acquit one of the defendants. The court told them that if they believed the evidence, both of the defendants were guilty. The attorney for the prosecution directed the clerk to enter a verdict of guilty as to both, which was done, and the jury being asked if that was their verdict, made no direct assent, but by a nod from each of them. *Held* that there must be a new trial. State v. Anthony, 10 Ired. 153.

**441. Reconsideration of verdict.** The court has a right to direct the jury to reconsider their verdict before it is recorded, and it is its duty to do so, when satisfied that there has been a palpable mistake. People v. Bush, 3 Parker, 552.

**442.** Where on a trial for grand larceny, the jury have rendered a verdict of guilty, they may, before they have left their seats, with the consent of both sides, hear additional testimony and reconsider their verdict. People v. Smith, 1 Wheeler's Crim. Cas. 119.

**443.** A consent of counsel for the prisoner that the jury may return their verdict to the clerk, implies a consent that they may disperse after having done so; and if their verdict is for manslaughter, not specifying the grade, it is not error in the court to reassemble them, and submit the verdict to them again, in order that they may specify the grade of manslaughter, unless the prisoner can show that his case has in some way been prejudiced by the dispersion. Jackson v. State, 45 Ga. 198.

**444. Amendment of verdict.** When the verdict is informal, the jury may, on the motion of the prosecuting attorney, with the consent of the court, amend it so as to give it the form of a general verdict of guilty. McGregg v. State, 4 Blackf. 101; Nelson v. People, 5 Parker, 39.

**445.** On the trial of an indictment for feloniously removing a dead body from the grave for the purpose of dissection or sale, the jury rendered the following verdict: "We find the prisoner guilty of receiving and dissecting," which was entered by the clerk. Upon a suggestion of the district attorney that the verdict was informal, the clerk, by direction of the court, changed the form of the verdict to that of guilty under the fourth count. The jury upon being polled, disagreed. They then retired again by direction of the court, and returned with a verdict of "guilty under the fourth count." *Held* that there was no error. People v. Graves, 5 Parker, 134.

**446. When too late to change verdict.** When a jury is asked if they have agreed on their verdict, and they reply that they have, and the same is recorded, and the whole panel being called upon to hearken to it as the court hath recorded it, and no objection is made, either by any of the jury or the counsel, it is too late for the jury to alter or amend it, and also too late to poll the panel. Ford v. State, 12 Md. 514.

**447.** An addition made to the verdict by the court after the discharge of the jury, is irregular, and will be disregarded. Guenther v. People, 24 N. Y. 100.

**448.** Where the jury on a trial for larceny under an agreement of counsel that they might seal their verdict, place it in the hands of the officer having them in charge, and separate, returned a sealed verdict which was defective in not finding the value of the property stolen, and the court thereupon directed the sheriff to recall the jury and require them to come into court and amend their verdict, which they did three days after they had separated, it was held error. Williams v. People, 44 Ill. 478.

**449.** On the trial of an indictment for threatening to accuse another of crime, the jury upon retiring, were told by the court that they might bring in a sealed verdict. On coming into court the next morning, it transpired that they had agreed on a verdict and separated during the night, but had not put their verdict in writing. The judge thereupon directed them to retire and reduce their verdict to writing and return it as agreed upon the night before, without further deliberation. *Held* that the verdict was void. Com. v. Dorus, 108 Mass. 488.

### 6. Record of conviction.

**450. What it ought to contain.** After

the caption stating the time and place of holding the court, the record should consist of the indictment properly indorsed, as found by the grand jury; the arraignment of the prisoner and his plea; the impaneling of the jury; the verdict and the judgment. Harriman v. State, 2 Iowa, 270; McKinney v. People, 2 Gilman, 541.

**451.** The record of an indictment should show not only that the court was held for the proper county, but that it was held at the proper place in the county. Carpenter v. State, 4 How. Miss. 163; Clark v. State, 1 Smith, 161; s. c. 1 Carter, 253. In New Jersey, the record of conviction need not state where the trial was had, but it will be presumed to have been at the place designated by law. West v. State, 2 Zabr. 212.

**452.** A conviction will not be sustained when the record does not show that a grand jury was impaneled, and returned the indictment into court according to law. Conner v. State, 19 Ind. 98; 18 Ib. 428; Springer v. State, 19 Ib. 180. But the court may, during the term at which the trial is had, make the entry of record necessary to show such facts. Bodkin v. State, 20 Ind. 281; Jackson v. State, 21 Ib. 79; Hale v. State, Ib. 268.

*See* BILL OF EXCEPTIONS; CERTIORARI; CONTEMPT; CONTINUANCE; EVIDENCE; FORMER ACQUITTAL OR CONVICTION; INDICTMENT; JUDGMENT; JURISDICTION; JURY; NEW TRIAL; NOLLE PROSEQUI; SENTENCE; VENUE, CHANGE OF; VERDICT; WITNESS; WRIT OF ERROR.

# Unwholesome Provisions, Sale of.

1. WHEN SELLER LIABLE.
2. INDICTMENT.
3. EVIDENCE.

## 1. WHEN SELLER LIABLE.

**1. What constitutes the offense.** In North Carolina, it has been held that to sustain an indictment for knowingly selling unwholesome provisions, the provisions sold must be in such a condition as that if eaten they would by their unwholesome and deleterious qualities have injured the health of those who were to have used them. State v. Norton, 2 Ired. 40.

**2.** But in New York, on the trial of an indictment for selling unwholesome provisions, it was held correct to charge that the accused was guilty if the animal sold was diseased, the disease known to the accused, and the nature and tendency of it such as to taint the flesh of the entire animal in any degree, although the taint was imperceptible to the senses, and the eating of the flesh produced no apparent injury. Goodrich v. People, 19 N. Y. 574; affi'g s. c. 3 Parker, 622.

**3.** In Tennessee, it has been held that if a person sell unsound meat when he might have known of its unsoundness by ordinary care and diligence, he will be liable to indictment. Hunter v. State, 1 Head, 160.

**4.** The sale of unwholesome beef for the food of men to a wholesale dealer in the market, the vendor knowing it to be such, is indictable. It is not error therefore in the judge to refuse to charge the jury that the indictment could not be sustained if they should find or believe that the beef was purchased as an article of merchandise and not for domestic consumption. People v. Parker, 38 N. Y. 85.

## 2. INDICTMENT.

**5. Averment of sale.** An indictment for selling unwholesome provisions which alleges that the accused "sold to divers citizens five hundred pounds of beef as good and wholesome beef and food," and that it was unwholesome and not fit to be eaten by man, sufficiently avers a sale of the beef to the citizens to be eaten by them. Goodrich v. People, *supra.*

**6.** An indictment which charges that the defendant "did unlawfully keep, offer for sale and sell" adulterated milk, is not bad for duplicity. Com. v. Nichols, 10 Allen, 199.

**7. Averment of guilty knowledge.** Where the gist of the offense under a statute (R. S. of Mass. ch. 131, § 1), was the guilty knowledge of a party in selling meat

unfit for food, it was held that the indictment must aver that the defendant at the time of the alleged sale knew that the meat sold by him was diseased. Com. v. Boynton, 12 Cush. 499.

3. Evidence.

**8. Proof of sale in the market sufficient.** Under an indictment charging the sale of diseased meat without making the same known to the buyer, it is sufficient for the prosecution to show that the defendant knowingly sold the meat in the market, and the burden is on the defense to prove that the condition of the meat was disclosed to the buyer at the time of the sale. Seabright v. State, 2 West Va. 591.

**9. Proof of possession for sale by servant.** On the trial of an indictment for selling adulterated milk, in order to charge the master where the milk is found in the possession of a servant, in addition to the proof of possession for sale or exchange by the servant, there should be evidence that the servant in having it so for sale or exchange was acting for and in pursuance of the will of the master. State v. Smith, 10 R. I. 258.

**10. Proof of sale to wife.** Where an indictment alleged that the defendant sold adulterated milk to a woman named, and it was proved that in making the purchase she acted as the agent of her husband, but that the defendant had no notice that she acted as the agent of any person, it was held that the variance was not material. Com. v. Farren, 9 Allen, 489.

**11. Testimony of experts.** On the trial of an indictment for selling unwholesome beef, the prosecution may prove by physicians that the eating of diseased meat does not always cause apparent sickness, and show by them from the account given of the condition of the animal by other witnesses the nature of the disease, that it would cause a fever, and render the flesh of the animal unwholesome. Goodrich v. People, 3 Parker, 622; affi'd 19 N. Y. 574.

12. Where on the trial of an indictment for selling adulterated milk a witness was allowed to testify that he had had much experience with a lactometer in testing milk, and that he had thus tested the milk sold by the defendant, and to state the result, it was held proper, the value of the test being a question for the jury. Com. v. Nichols, 10 Allen, 199.

**13. Proof that the defendant knew that the provisions were unwholesome.** In order to convict a person for selling diseased meat, the accused need not be shown to be a person of skill in order to have a guilty knowledge that the disease which the animal had would render its flesh unwholesome for food. Goodrich v. People, *supra.*

14. On the trial of an indictment for selling unwholesome beef, what the defendant's wife said to him about the unwholesomeness of the meat is competent evidence on the question whether the defendant knew or believed the meat was bad when he disposed of it. Ibid.

15. The statute of New York (of 1862), entitled "An act to prevent the adulteration of milk, and to prevent the traffic in impure and unwholesome milk," does not prevent any one from mixing milk and water, unless it is done with the intent of offering it for sale or exchange. Such intent may be inferred from the quantity of milk, the mode of carrying it, the employment of the prisoner, or his declarations; but there must be some evidence both of adulteration and of the purpose of the prisoner as to the sale of the adulterated article before he can be convicted. People v. Fauerback, 5 Parker, 311.

16. In Massachusetts, under an indictment for selling adulterated milk in violation of the statute (of 1864, ch. 122, § 4), it need not be proved that the defendant knew that the milk was adulterated; and if such knowledge be averred in the indictment, it may be rejected as surplusage; nor need it be alleged or proved that the milk was cow's milk. Com. v. Farren, 9 Allen, 489. Approved in Com. v. Nichols, 10 Ib. 199, and in State v. Smith, 10 R. I. 258. Such statute is constitutional. Com. v. Waite, 11 Allen, 264.

## Usury.

**1. Offense when committed.** In New York, to constitute usury there must be either a payment or an agreement by which the party taking it is entitled to receive more than seven per cent. If the payment is conditional, and the condition is within the power of the debtor to perform, so that the creditor may by the debtor's act, be deprived of any extra payment, it is not usurious. Sumner v. People, 29 N. Y. 337.

**2.** The gist of the offense of usury under the statute of Tennessee, is the reception of the money; the mere agreement for the payment of more than the legal rate of interest not being of itself while unexecuted the subject of a criminal prosecution. Where, therefore, the contract was made in Kentucky, and the money paid in Tennessee, it was held indictable in the latter. But when a *bona fide* contract for the payment of money is entered into in another State, the rate of interest will be governed by the law of that State, and the payment of the money in Tennessee will not be usury, though the rate of interest exceed that allowed by the law of Tennessee. Murphy v. State, 3 Head, 249.

**3. Distinct offenses.** Whether a bargain for illegal interest, and a subsequent receiving of the interest thus bargained for, constitute distinct offenses, so that a prosecution barred as to the one will lie for the other—*query*. Swinney v. State, 14 Ind. 315.

**4. Description of contract.** In New Hampshire, an information under the statute for making a usurious contract, is sufficient which sets forth the corrupt bargain generally; and it need not state how much of the money alleged to have been received was over and above the lawful interest. State v. Tappan, 15 New Hamp. 91. In Tennessee, the usurious contract need not be particularly described in the indictment. Gillespie v. State, 6 Humph. 164.

**5. Averment of place.** An indictment for usury in receiving more than legal interest on a note which does not allege the place where the note was made, is fatally defective. State v. Williams, 4 Ind. 234.

**6. Averment of intent.** An information for usury must charge a corrupt intent. Brock v. State, 14 Ind. 425.

**7. Proof of time of agreement.** In New Hampshire, it has been held that to sustain an indictment for usury, it need not be proved that the corrupt agreement was entered into at the time of executing the contract. State v. Tappan, *supra*.

## Vagrant.

**1. Who deemed.** A common prostitute is not a vagrant within the statute of New York, merely because she is an idle person: but it is otherwise if she have no lawful means of support. People v. Forbes, 4 Parker, 611.

**2.** In Massachusetts, on the trial of a complaint under the statute (Gen. Sts. ch. 165, § 23), for being an idle and disorderly person, it was held that it was correct to charge the jury that if the defendant was under a necessity to work for the support of himself or persons dependent upon him, and though able, and having opportunities to work, neglected all lawful business, and habitually frequented houses of ill-fame, gaming houses, and tippling shops, he might be convicted, and that the court need not explain to the jury what constituted a misspending of his time. Com. v. Sullivan; Same v. Daniels, 5 Allen, 511.

**3. Indictment.** In North Carolina, an indictment for vagrancy under the statute, must allege that the defendant was able to work, and neglected to devote himself to any honest pursuit; and where it is charged that he was trying to support himself by unlawful means, the unlawful means must be specified. State v. Custer, 65 N. C. 339.

**4.** In Alabama, an indictment for vagrancy under the statute (Rev. Code, § 3630), which alleges that the defendant "having a family, abandoned and left them in danger of becoming a burden to the public," should also allege the ability of the defendant to contribute to the support of his family, by his means, or being an able bodied person by his industry. Boulo v. State, 49 Ala. 22.

5. A. was arrested as a vagrant, in pursuance of a city ordinance, and released upon his promise to leave the city within a stipulated time, which promise he violated, and his rearrest was ordered by the city marshal. In attempting to rearrest him without warrant, B., a policeman, was killed, and A. was committed for murder. *Held* that it was not necessary to allege in the indictment that A. was a vagrant, or that B. was a police officer, as it would have been if the indictment had been for resisting an officer in the discharge of his duty. State v. Roberts, 15 Miss. 28.

**6. Record of conviction.** Where there is a commitment in case of vagrancy, the record and commitment must state the grounds on which the charge was based. People v. Forbes, 4 Parker, 611; *contra*, People v. Gray, Ib. 616.

7. The statute of New York (Laws of 1833, p. 353, § 1), authorizing a general form for a record of conviction in case of vagrancy is constitutional. Morris v. People, 1 Parker, 441.

**8. Inquiry on habeas corpus.** Where a person committed as a vagrant is brought up on *habeas corpus*, the only inquiry should be whether the justice had jurisdiction of the prisoner and committed him for an offense defined in the statute. People v. Gray, *supra*.

## Venue, Change of.

**1. Grounds for.** That a fair and impartial trial cannot be had in the county, is sufficient cause for a change of venue. People v. Long Island R. R. Co. 4 Parker, 602.

2. But the affidavit of the accused that he cannot have an impartial trial in the county where he is indicted, is not alone sufficient to authorize a change of the place of trial; nor the fact that thirty or forty persons upon being solicited have contributed small sums to defray the cost of employing counsel to assist the prosecuting attorney. People v. Graham, 21 Cal. 261; People v. Lee, 6 Ib. 353, *questioned*.

3. It is the right of the prosecution as well as the prisoner to have the trial take place in the county where the crime is alleged to have been committed. To entitle an accused person to change the place of trial, he must show that by reason of popular passion or prejudice, he cannot have a fair trial in the county where the venue is laid. The belief that a fair trial cannot be obtained, is not sufficient; facts and circumstances must be shown. Where the facts established were that great excitement existed in the county, and that the newspapers had contained articles more or less expressing the popular passion, but it was not shown that any passion or prejudice existed as to the guilt of any particular person, it was held that no sufficient case was made out to change the place of trial. People v. Sammis, 6 N. Y. Supm. N. S. 328.

4. Prejudice of the judge is not a proper ground for a change of the place of trial. People v. Mahoney, 18 Cal. 185; People v. Williams, 24 Ib. 33; People v. Shuler, 28 Ib. 490.

5. The venue cannot be changed to another county against the defendant's objection, on the ground that the presiding judge has been of counsel for the prosecution. But notwithstanding such order of transfer is void, if the cause is taken from the docket in consequence of it, and kept off for several years, the prosecution is thereby discontinued. *Ex parte* Rivers, 40 Ala. 712.

**6. Defendant entitled to.** In Arkansas, when the prisoner's application for a change of venue is in conformity with the statute, he is entitled to it as a matter of right, and it is the duty of the court to grant it without inquiring as to the truth of the cause assigned or any consideration as to its expediency. Edwards v. State, 25 Ark. 444.

**7. In case of several defendants.** Where two or more are jointly indicted, the trial of one may be removed to another court on his application, without removing the trial of the others. State v. Martin, 2 Ired. 101. In such case, he must be tried on a copy of the indictment, the original remaining in the court below. John v. State, 2 Ala. 290.

8. In Illinois, where an indictment was found in one county against several jointly, and the venue changed to another county on motion of one of the defendants, without

the consent of the others, where he was tried, and afterward the indictment was sent back to the original county where the others were tried, it was held proper. Hunter v. People, 1 Scam. 453.

9. In case of several defendants, the place of trial may be changed as to all upon enough being shown to make a change proper as to one, notwithstanding it is a case in which each defendant is entitled to a separate trial. People v. Baker, 3 Parker, 181.

10. And if in such case, the defendants have a large number of witnesses who are poor, and the defendants themselves are destitute, the district attorney will be compelled to make an arrangement for the payment by the county from which the indictment is removed, of the necessary expenses of the defendants' indigent witnesses attending at any court where the trial shall not be postponed at their instance. Ib.

**11. May be ordered by court to which indictment is removed.** In New York, where an indictment is removed by *certiorari* from the Oyer and Terminer to the Supreme Court, the latter may, at special term, order the trial to be had in some other county, for the reason that a fair trial cannot be had in the county in which the indictment was found. People v. Baker, *supra*.

**12. Place to which the trial should be changed.** Ordinarily, where the place of trial is changed, an adjoining county should be selected. But if the necessity which may require any change should call for a more remote county, that should be selected. Ibid.

**13. Order of court.** It is no objection that an order to transmit a criminal case from Baltimore City Court to Howard district, says to Howard District Court, instead of the Howard District of Anne Arundel County. Rawlings v. State, 1 Md. 127.

14. It is not ground of reversal, that the order for a change of venue does not follow the statute. If there be cause of objection to such order, it must be stated in the court below. Brown v. State, 8 Eng. 96.

**15. Entry of record.** Where the venue is changed upon its appearing that an impartial trial cannot be had in the county where the offense is laid, the court will order a suggestion of this fact to be entered on the record, and a venue is then awarded to the sheriff of another county. People v. Vermilyea, 7 Cow. 108.

**16. When change of venue will be presumed.** Where an indictment is tried in a different county from the one in which it was found, but the record does not show a change of venue, such change will be presumed. Doty v. State, 6 Blackf. 529.

**17. Order changing venue presumed regular.** An order changing the venue of an indictment will be conclusive of its own regularity, unless the record shows the contrary. McCauley v. U. S. 1 Morris, 486.

**18. Presumption as to regularity of proceedings in court below.** The court into which a cause is removed will presume that all things were regular before the change of venue was ordered, and it is incumbent on the prisoner to show the contrary. State v. Williams, 3 Stewart, 454.

**19. Transcript of record.** Where the indictment is removed to an adjoining county for trial, a transcript of the record must be sent to the court to which it is removed. Price v. State, 8 Gill, 295.

20. Where the venue is changed, the original indictment should remain in the office of the clerk in the county in which it is found. A copy only should be included in the transcript of the record and proceedings. Ruby v. State, 7 Mo. 206.

21. The failure of the clerk, after a change of venue is ordered, to send a transcript to the clerk of the court to which the trial is removed, and the neglect of the latter to have the cause entered on the docket at the next term after the order of removal, is not a discontinuance. Harrall v. State, 26 Ala. 52.

22. In Alabama, when the venue is changed on the defendant's application (Code, § 3615), a certified copy of the indictment becomes so far an original in the court to which the trial is removed that where a copy of it is delivered to the prisoner it will be a sufficient compliance with the statute. Brister v. State, 26 Ala. 107.

**23. Verification of clerk's certificate.** In Alabama, on a change of venue (Code, § 3613), it is not necessary that each paper, order, etc., found in the transcript should be verified by name in the clerk's certificate. If his certificate states "that the foregoing pages contain a full, true, and complete transcript of the indictment and all papers on file in his office, and of all the entries relating to the case as found in his office," it is sufficient. Ward v. State, 28 Ala. 53.

**24. Presumption from clerk's certificate.** When papers are sent from one county to another by a change of venue, it will be presumed from the clerk's certificate, in the absence of objection raised in the court below, that the clerk has transmitted the proper papers. State v. Greenwood, 5 Porter, 474.

**25. Certiorari.** Where, in a case of change of venue, the transcript sent is imperfect, the circuit attorney should suggest a diminution of the record, and move for a writ of certiorari directed to the court of the county from which the venue was taken, to send up the record. Laport v. State, 6 Mo. 208.

**26.** In Alabama, under the code (§ 3615), the court to which the trial is removed may issue a *certiorari* to the clerk of the court in which the indictment was found, requiring him to transmit certified copies of any and all papers and entries in the cause, and may order the original papers to be returned to him. Harrall v. State, 26 Ala. 52.

**27. Jurisdiction of court how shown.** In case of a change of venue, the jurisdiction of the court that tries the case must be shown by a statement in the nature of a caption to its proceedings, that the indictment is there filed, and that the prisoner was tried upon it, and the indictment must constitute a part of the record of the court. Doty v. State, 7 Blackf. 427.

**28. Trial to be had on transcript.** In Alabama, under the code (§ 3613), when the transcript furnished by the clerk on change of venue has been duly certified by him to contain a copy of the indictment, with all the indorsements thereon, and all the entries and orders made in relation to the cause, including the order for the removal of the trial, the defendants may be tried on such transcript. Brister v. State, 26 Ala. 107.

**29. Prisoner need not be arraigned.** Where the venue has been changed after arraignment and plea, the prisoner need not be again arraigned, nor required to plead anew. Vance v. Com. 2 Va. Cas. 162.

**30. Disposal of indictment.** Upon a change of venue, the indictment need not be recorded in the court where it was found. Beauchamp v. State, 6 Blackf. 299.

**31. Remedy for denial of motion.** In Indiana, it has been held that the refusal to change the venue cannot be assigned for error. Findley v. State, 5 Blackf. 576; Spence v. State, 8 Ib. 281. Formerly in Alabama, the granting of an application for a change of venue in a criminal case (Code, §§ 3608, 3609), is discretionary with the court to which the application is made. *Ex parte* Banks, 28 Ala. 28. But now it seems, if the motion is denied in a proper case, it is error for which, after conviction, the judgment will be reversed, or before trial the defendant may obtain the benefit of his application by *mandamus*. Birdsong v. State, 47 Ala. 68; s. c. 1 Green's Crim. Reps. 728.

*See* INDICTMENT, tit. 3; JURISDICTION, tit. 2.

# Verdict.

1. RIGHT AND DUTY OF JURY IN DETERMINING.
2. NATURE AND REQUISITES.
   (*a*) *General verdict.*
   (*b*) *Special verdict.*
3. HOW REGARDED.
4. VALIDITY.
5. WHEN EVIDENCE.

## 1. RIGHT AND DUTY OF JURY IN DETERMINING.

**1. Jury to decide as to credibility of witness.** The credit to be given to a witness whose general reputation for truth has been proved to be bad is to be determined by the jury. Com. v. Bosworth, 22 Pick. 397.

2. A telegraphic message being material to the issue, the operator testified to receiving the telegram, and of having a faint recollection of delivering it to the defendant. *Held* that the degree of credit to be given to the operator's memory was a question for the jury. State v. Litchfield, 58 Maine, 267.

**3. Questions of fact to be determined by jury.** Whether two names are sounded alike is a question of fact for the jury, and leaving it to them to suppose that the difference between the names is to be entirely disregarded by them is ground for a new trial. Com. v. Mehan, 11 Gray, 321; Com. v. Gill, 14 Ib. 400; Com. v. Donovan, 13 Allen, 571.

4. On a trial for murder, it is competent for the jury to determine whether spots testified to by witnesses are blood, although there has been no chemical test or microscopic examination. Gaines v. Com. 50 Penn. St. 319.

**5. Jury must decide without reference to their private knowledge.** Although the weight and credit to be given to the evidence should be judged of by the jury in the light of their own experience, yet that should be done without any addition to or modification of it arising out of the peculiar scientific acquirements or knowledge of the facts in controversy by any one or more of their number. People v. Zeiger, 6 Parker, 355.

**6. How far jury judges of the law.** In Maine, the jury are bound by the instructions of the court in matters of law to the same extent in criminal as in civil cases. State v. Wright, 53 Me. 328; State v. Stevens, Ib. 548; *contra*, State v. Snow, 18 Ib. 346. In Vermont, the jury are the judges of the law as well as the fact in criminal cases. State v. Croteau, 23 Vt. 14. The same seems to have been held in Alabama. State v. Jones, 5 Ala. 666, but afterward denied. Batre v. State, 18 Ib. 119. But although in Vermont the jury in criminal cases are the judges of the law, yet it is the duty of the court to instruct them as to the law, and if in rendering a verdict against the accused they disregard the instructions or mistake the law, the court may set the verdict aside. State v. Barron, 37 Vt. 57. In New Hampshire, the jury are bound to adopt the instructions of the court as to the law. Lord v. State, 16 New Hamp. 325. In Massachusetts, the jury are to decide all points of law involved in the question of the guilt or innocence of the prisoner, but not other questions of law arising in the progress of the trial. Com. v. Knapp, 10 Pick. 477. The Legislature cannot constitutionally give to juries in criminal cases authority to determine questions of law. Com. v. Anthes, 5 Gray, 185.

7. In New York, the jury in criminal cases have a right to determine both the law and the facts, and they may disregard the instruction of the court upon questions of law, especially in favor of life. People v. Thayer, 1 Parker, 596; People v. Videto, Ib. 603; *contra*, Carpenter v. People, 8 Barb. 603. And see People v. Pine, 2 Ib. 566; Safford v. People, 1 Parker, 474. But it is the duty of the jury to be governed by the instructions of the court upon questions of law. Duffy v. People, 26 N. Y. 588.

8. In South Carolina, in the trial of capital felonies, the jury are not the judges of the law. State v. Drawdy, 14 Rich. 87. In Missouri, the jury must take the law from the court. Hardy v. State, 7 Mo. 607. In Georgia, the jury are bound by the law as it is expounded to them by the court. Smith v. State, 49 Ga. 482. But in the latter State it has been held that the jury may acquit the prisoner, notwithstanding the judge tells them if they find certain facts to be proved he is guilty, and although they find such facts to be proved. McGuffie v. State, 17 Ga. 497; McPherson v. State, 22 Ib. 478; McDaniel v. State, 30 Ib. 853.

9. In Indiana, it has been held that the court instructs juries, in criminal cases, not to bind their consciences, but to inform their judgments, and that while great deference should be paid by the jury to the opinion of the court, they are not bound to adopt it. Lynch v. State, 9 Ind. 541, *approving* Stocking v. State, 7 Ib. 326, and *doubting* Carter v. State, 2 Ib. 617. But see Townsend v. State, 2 Blackf. 151.

10. In Illinois the jury may disregard the

instructions of the court; and it is erroneous to charge them that if they do so it will be the duty of the court to set aside their verdict. Falk v. People, 42 Ill. 332. See Schnier v. People, 23 Ib. 17; Adams v. People, 47 Ib. 376.

**11.** In Michigan the jury are the judges of the law in a restricted sense. Hamilton v. People, 29 Mich. 173. In Louisiana the jury are judges of the law in criminal cases, in a limited sense, but have the power to disregard the law as laid down by the court. State v. Ballerio, 11 La. An. 81; State v. Scott, Ib. 429; 12 Ib. 386. But see State v. Saliba, 18 Ib. 35; State v. Tally, 23 Ib. 677. In the United States courts the jury are not the judges of the law in criminal trials. U. S. v. Morris, 1 Curtis C. C. 23.

**12. When court to direct verdict.** After the trial has been commenced, the court cannot grant a motion to discharge the prisoner on the ground that the *corpus delicti* has not been proved; but the court may direct as to the verdict. Where a question of law only is presented, the court may instruct the jury to acquit; and a refusal to give such instruction in a proper case, is error. People v. Bennett, 49 N. Y. 137.

**13.** The court has the power, and it is its duty, to direct a verdict of guilty whenever the facts constituting guilt are not disputed. U. S. v. Anthony, 11 Blatch. 200; *contra*, Howell v. People, 13 N. Y. Supm. N. S. 620.

**14. Determining verdict by experiment.** The jury cannot lawfully arrive at their verdict by experiments, such as sending the constable out of the room, closing the door, and then talking, with a view to learn whether their voices can be heard outside; or running, with a view to ascertain whether their tracks will be longer or shorter than when walking, and the like. Jim v. State, 4 Humph. 289.

**15. Jury entertaining doubt.** A doubt to justify an acquittal, must be reasonable, and arise from a candid and impartial investigation of all the evidence in the case. Unless it is such that were the same kind of doubt interposed in the graver transactions of life, it would cause a reasonable and prudent man to hesitate, it is insufficient to authorize a verdict of not guilty. Miller v. People, 39 Ill. 457; May v. People, 60 Ib. 119.

### 2. Nature and requisites.

#### (a) *General verdict.*

**16. Must respond to charge.** No finding of the jury can enlarge the offense charged in the indictment. By finding the prisoner "guilty as he stands indicted," the jury make the indictment a part of the verdict, and it is the same as finding a special verdict stating the facts as set forth in the indictment. State v. Cleveland, 58 Maine, 564; Fitzgerald v. People, 49 Barb. 122.

**17.** If the prosecution is able to prove the defendant guilty of a criminal offense plainly charged in the indictment, he should be convicted of that offense, though other facts are stated which, if proved, would show him guilty of an offense of a different, or even of a higher grade. White v. People, 32 N. Y. 465. See Henley v. State, 6 Ohio, 400.

**18.** On the trial of an indictment for assault and battery with intent to kill and murder, the verdict was guilty of assault with intent to commit manslaughter. *Held*, that the variance was fatal. Morman v. State, 24 Miss. 54.

**19.** On the trial of an indictment for breaking open a storehouse and stealing therefrom goods to the value of four dollars, the defendant was found guilty of grand larceny. *Held* that no judgment could be entered on the verdict. Com. v. Smith, 2 Va. Cas. 327.

**20.** A general verdict of guilty in prosecutions where value constitutes an essential element in the definition of the crime, and the mode of punishment, is a finding upon the whole indictment, including the averment of value. State v. White, 25 Wis. 369.

**21.** To authorize a conviction under part of an indictment for felony, the part of which the prisoner is found guilty must of itself constitute a felony. Com. v. Newell, 7 Mass. 245.

**22. Under indictment charging distinct offenses.** A general verdict of guilty under an indictment charging two offenses, properly joined in different counts, will au-

thorize a verdict and sentence for the punishment prescribed for one of the offenses. Cawley v. State, 37 Ala. 152.

23. When the indictment charges distinct offenses in separate counts, the jury must pass upon each count separately, and apply to it the evidence bearing upon the defendant's guilt of the offense therein charged; and if they fail to do so, their verdict cannot be sustained. Com. v. Carey, 103 Mass. 214.

24. In Ohio, it has been held that when the indictment charges distinct offenses, subject to different degrees of punishment, the verdict must affirm or negative each charge. Wilson v. State, 20 Ohio, 26.

25. In Illinois, where an indictment charges a burglary in one count and a larceny in another count, and the defendant is found guilty generally, and a punishment is imposed which is by law authorized to be inflicted for the offense charged in either count, the verdict will be sustained. Lyons v. People, 68 Ill. 271.

**26. For part of offense.** In Maine, the defendant may, by the statute (ch. 166, § 7), be acquitted of a part of the offense for which he is indicted, and found guilty of the residue. State v. Payson, 37 Maine, 361.

**27. For offense consisting of different degrees.** Where one and the same crime is charged in different counts, alleging the commission of different grades of the same offense, a general verdict of guilty will be held to apply to the offense of the highest grade. State v. Hood, 51 Maine, 363; Curtis v. State, 26 Ark. 439.

28. Where the offense described in the indictment comprehends various circumstances, each of which is an offense, a defendant charged with a greater offense thus described may be convicted of one of lesser degree contained in it. Swinney v. State, 8 Smed. & Marsh. 576. Under an indictment for assaulting and obstructing an officer in the service of civil process, the defendant may be convicted of assault and battery. State v. Webster, 39 New Hamp. 98.

29. Where the evidence creates a doubt in the minds of the jury as to the degree of murder of which the prisoner is guilty, it is their duty to find a verdict for the lesser degree. People v. Lamb, 2 Keyes, 360, per Smith, J.; affi'g 54 Barb. 342.

30. The defendant was charged with an assault and battery, with the additional averment that "the said assault and battery was not committed with intent to commit any other offense, nor with a weapon dangerous to life." It was, however, proved that the assault was committed with a weapon dangerous to life. *Held*, after conviction of simple assault, that the defendant had no ground of exception. Com. v. Burke, 14 Gray, 100.

31. When the act for which the accused is indicted is the same for which he is convicted, the conviction of a lower degree is proper, although the indictment contains averments constituting the offense of the highest degree of the species of crime, and omits to state the particular intent and circumstances characterizing a lower degree of the same crime. Keefe v. People, 40 N. Y. 348; People v. Thompson, 41 Ib. 1.

32. On the trial of an indictment for forging a note, the jury found the defendant guilty of attempting to pass the note, knowing that it was forged. *Held* that the verdict was good. State v. Fuller, 1 Bay, 245.

33. J. S. was indicted for maiming J. E., under a statute making it felony, but providing that where the parties fought by mutual agreement it should be a less offense. The verdict was: "We, the jury, do find the within named J. S. not guilty as charged in the within indictment, but find that he and the within named J. E. fought by mutual agreement. *Held* that although the verdict ought to have stated more explicitly that the accused was not guilty as charged, but that he and J. E. fought by mutual agreement, whereby the latter was maimed, yet that as it would bear that construction, it was sufficient. Strawn v. State, 14 Ark. 549.

34. Under an indictment for a felony, the accused may be convicted of a misdemeanor when both offenses belong to the same generic class, and the indictment for the higher offense contains all the averments necessary to let in proof of the misdemeanor. Cameron v. State, 8 Eng. 712.

35. In North Carolina, the rule of the common law prevails, that under an indictment for a felony there cannot be a conviction of a minor offense included in it, if such minor offense be a misdemeanor. State v. Durham, 72 N. C. 447.

36. In Iowa, it has been held that when the accused is prosecuted for a higher offense than he can be convicted for under the indictment, he cannot be legally convicted of a lower grade of the offense, notwithstanding the indictment is good as to the latter. State v. Boyle, 28 Iowa, 522; approving State v. Tweedy, 11 Ib. 350, Williams, J., *dissenting;* State v. Knouse, 29 Ib. 118; State v. McNally, 32 Ib. 580.

37. **Under indictment containing several counts.** There may be a general verdict of guilty where the evidence is applicable to either count of the indictment. Bennett v. State, 8 Humph. 118; and one good count is sufficient. Com. v. Hawkins, 3 Gray, 463; State v. Burke, 38 Maine, 574; State v. Maybery, 48 Ib. 218; Guenther v. People, 24 N. Y. 100.

38. Where an indictment contains good and bad counts, a general verdict will be referred to the former. West v. State, 2 Ala. 212; Shaw v. State, 18 Ala. 547; Brown v. State, 5 Eng. 607; Turk v. State, 7 Ohio, 240; State v. Jennings, 18 Mo. 435; Curtis v. People, Breese, 197; Harris v. Purdy, 1 Stewart, 231; State v. Hooker, 17 Vt. 658; Bently v. State, 13 Ib. 468; Wash v. State, 14 Smed. & Marsh. 120; Frazier v. State, 5 Mo. 536; Roberts v. State, 14 Ga. 8; Baron v. People, 1 Parker, 246; People v. Wiley, 3 Hill, 194; State v. Anderson, 1 Strobh. 455; State v. Sutton, 3 Gill, 194; People v. Davis, 45 Barb. 494.

39. When all the counts of an indictment are substantially for the same offense, and differ only in the description of the means used to accomplish it, a general verdict may be rendered. State v. Wright, 53 Maine, 328. And the judge is not bound to direct the jury to bring in separate findings. State v. Lang, 63 Ib. 215. But the defendant is entitled to a verdict upon each and all the substantive charges in the indictment, and it is the duty of the court to require the jury to respond distinctly to the several counts contained therein. When the verdict is guilty on one of several counts, and silent as to the rest, it is tantamount to an acquittal as to the latter. State v. Phinney, 42 Ib. 384; State v. Watson, 63 Ib. 128; Martin v. State, 28 Ala. 71.

40. On the trial of an indictment containing twenty counts, the verdict was: "We, the jury, find the defendant guilty on ten counts," on which the court rendered judgment. *Held* error. The verdict should have specified the counts on which the jury found the defendant guilty. Day v. People, 76 Ill. 380.

41. **Under indictment against several.** Where the indictment charges several with a joint offense, they cannot be found guilty separately of separate parts of the charge. Hall v. State, 8 Ind. 439.

42. Though several concerned in the same offense may be jointly indicted and tried, yet the verdict and judgment should be several. Straughan v. State, 16 Ark. 37.

43. Where the indictment is against two or more, the charge is several as well as joint, so that if one is found guilty verdict and judgment may be rendered against him. The exceptions to the rule are where the agency of two or more is of the essence of the offense, as in conspiracy and riot, and perhaps in some other cases. Com. v. Griffin, 3 Cush. 523.

44. Although several are jointly indicted for distinct offenses, which are not susceptible of being committed by more than one person, yet if the defendant on trial is charged with committing an offense, he may convicted. Weatherford v. Com. 10 Bush, Ky. 196.

45. Except in indictments for offenses necessarily joint, joint defendants may be convicted of different degrees of criminality in the same offense. Where therefore two are jointly indicted for the same larceny, one of them may be convicted of an attempt to commit it and the other of the full crime. Klein v. People, 31 N. Y. 229. Or some of the defendants may be convicted and others acquitted, except in cases where the conviction is of an offense to constitute

which all must have participated. People v. White, 55 Barb. 606.

**46.** Where several are jointly indicted and tried for murder, the court, upon the conclusion of the evidence for the prosecution may, in the exercise of its discretion, submit to the jury the cases of any of the prisoners, and if the evidence against them be slight may advise the jury to acquit, and if the jury concur with the court in this opinion, they may at once return a verdict of not guilty. But this is a matter resting wholly in the discretion of the court. State v. O'Brien, 7 R. I. 336.

**47. Need not find malice.** Where an offense consists in doing acts prohibited by a statute, the jury need not find that the defendant was actuated by express malice, but only that he was guilty of the act. People v. Reed, 47 Barb. 235.

**48. Must be oral.** A written verdict, unless directed by the court, is irregular and may be rejected. Lord v. State, 16 New Hamp. 325.

**49. Sealed verdict.** If the jury separate after being sent out, the fact that they agreed before they separated must be shown by a verdict sealed up and brought into court, where it must be opened and read, and their verdict after such separation cannot be otherwise received. Com. v. Durfee, 100 Mass. 146. See Com. v. Dorus, 108 Mass. 488.

**50.** The jury on a trial for larceny were told that if they agreed they might bring in a sealed verdict, and the following form was handed to them: "In case of Commonwealth v. ———, the jury find defendant guilty or not guilty, as the case may be." The foreman of the jury upon their agreeing added the word "guilty" to the foregoing, and signed his name. Afterward when their verdict sealed up was brought by them into court it was handed by the foreman to the clerk, and opened by the latter and read to the jury, and they were then asked if their verdict was that the defendant was guilty, to which they replied in the affirmative. The court thereupon ordered the paper to be filed as a verdict, and the clerk to record a verdict of guilty. *Held* proper. Com. v. Carrington, 116 Mass. 37.

**51. Recommending to mercy.** A recommendation of the prisoner to mercy is addressed exclusively to the court, and is no part of the verdict. People v. Lee, 17 Cal. 76.

(*b*) *Special verdict.*

**52. Must be definite.** Where a special verdict does not state that the jury find in one way or another according to the law as determined by the court, it will be insufficient, and there will have to be a new trial. State v. Wallace, 3 Ired. 195.

**53. Must ascertain facts.** A special verdict must find facts, and not merely the evidence from which they may be inferred. State v. Watts, 10 Ired. 369. And the facts found must be of an unequivocal character, otherwise the court cannot determine the guilt or innocence of the defendant as a question of law. State v. Curtis, 71 N. C. 56; s. c. 2 Green's Crim. Reps. 748.

**54. Must find that offense was committed in county.** A special verdict which finds the defendant guilty of the acts charged, but not finding that they were committed in the county where the venue is laid, is bad. Com. v. Call, 21 Pick. 509.

**55. Consequences of being set aside.** Where a special verdict is set aside, the court cannot enter a general verdict, but the case must be sent to a new jury. State v. Moore, 7 Ired. 228.

3. How recorded.

**56. Must be in English.** In Louisiana, the verdict must be recorded in the English language, and where it is in French the court cannot, after the jury are discharged, order it to be translated into English. State v. Walters, 15 La. An. 648.

4. Validity.

**57. Must be delivered.** A verdict has no validity until delivered by the jury in court. State v. Mills, 19 Ark. 476.

**58. Must have been arraignment and plea.** A verdict where there has been neither arraignment or plea is a nullity, and

the defect is not cured by the defendant's moving for a separate trial, or the introduction of witnesses by him, or by the argument on his behalf to the jury. People v. Corbett, 28 Cal. 328.

**59. Inaccuracies.** A name so badly spelled as to change the sound, will not vitiate a verdict. State v. Florez, 5 La. An. 429.

**60.** An indictment for murder charged the accused by the name of James B. Boggs. The verdict was as follows: "We find the defendant, J. M. Boggs, guilty of manslaughter." *Held* that the verdict was sufficient, the words "J. M. Boggs," being surplusage. People v. Boggs, 20 Cal. 432. See People v. Ah Kim, 34 Ib. 189.

**61. Misconduct of jury.** In Virginia, it has been held that the use by the jury of ardent spirits in moderation is not such an irregularity as will vitiate the verdict. Thompson v. Com. 8 Gratt. 637.

**62.** The misconduct of jurors being established, it imposes on the prosecution the necessity of removing suspicion by showing that the offending jurors were not influenced adversely to the defendant, or in any respect rendered less capable of discharging their duties. Creek v. State, 24 Ind. 151.

**63. Jurors not permitted to impeach verdict.** The testimony of jurors is not admissible to explain the grounds of their decision, or to impeach the validity of their finding. Com. v. Skeggs, 3 Bush, 19; People v. Hartung, 4 Parker, 256; Reins v. People, 30 Ill. 256; State v. McLeod, 1 Hawks, 344; Bishop v. State, 9 Ga. 121. *Contra*, State v. Freeman, 5 Conn. 348.

**64.** After a conviction for murder, a juror stated that "he did not agree to the verdict, but suffered it to be brought in, because he could not control the rest of the jury." *Held* that he could not be allowed in this way to impeach his verdict. Mercer v. State, 17 Ga. 146.

**65. Testimony of jurors to sustain verdict.** The affidavits of the jurors themselves in answer to a charge of irregularity or abuse, are usually received, though not regarded as entitled to a great deal of weight. Eastwood v. People, 3 Parker, 25.

**66.** The affidavits of the jurors are competent evidence to prove that they did not read or hear read any papers before their verdict. State v. Hascall, 6 N. Hamp. 352.

5. When evidence.

**67. Under plea of former acquittal.** On a plea of former acquittal, the former verdict may be given in evidence without judgment thereon. West v. State, 2 Ala. 212.

**68. On trial of principal in second degree.** The indictment, judgment, and verdict against the principal in the first degree, may be given in evidence on the trial of the principal in the second degree. Studstill v. State, 7 Ga. 2.

*See* Judgment; Trial. *As to setting aside verdict, see* New trial. *For verdict in the several offenses, see the titles of those offenses.*

# Vessel.

**1. Adding to equipment.** Adding to the number or size of the guns of a belligerent vessel which was armed when she arrived at the United States, or adding to her any warlike equipment, was held indictable under the fourth section of the act of Congress of June 5th, 1794. U. S. v. Grassin, 3 Wash. C. C. 65.

**2. Destruction.** On the trial of an indictment for casting away and destroying a vessel with the intention of injuring the underwriters, the prosecution must prove a valid insurance. U. S. v. Johns, 1 Wash. C. C. 363.

# Voting.

1. Disfranchisement of citizen.
2. Illegal voting.
   (*a*) *Offense in general.*
   (*b*) *Indictment.*
   (*c*) *Evidence.*
3. Betting at election.

1. Disfranchisement of citizen.

**1. On account of desertion.** A citizen of

the State cannot be deprived of the right of suffrage, or any right of citizenship under the act of Congress (ch. 79, § 21, approved March 2d, 1865), on the ground of desertion, until after trial, conviction and sentence by a court martial, and the approval of the same by the proper authority. State v. Symonds, 57 Maine, 148.

**2. By striking name from list of voters.** In New Hampshire, where selectmen in the honest and diligent discharge of their duties, erased the name of a legal voter from the list, and refused to insert it, it was held that they were not liable. State v. Smith, 18 New Hamp. 91.

2. Illegal voting.

(*a*) *Offense in general.*

**3. How regarded.** Voting more than once at the same election is an indictable offense at common law. Com. v. Silsbee, 9 Mass. 417.

**4. What constitutes.** When a person votes knowing at the time the existence of facts which disqualify him in point of law, he is guilty of a misdemeanor. McGuire v. State, 7 Humph. 54. But to make a person voting or attempting to vote, liable, he must know at the time that he is not a qualified voter. Com. v. Aglar, Thach. Crim. Cas. 412. Such knowledge will generally be presumed. Com. v. Wallace, Ib. 592; Com. v. Bradford, 9 Metc. 268.

**5. Voting at illegal election.** It is not a defense to an indictment for illegal voting that the election was conducted illegally. State v. Cohoon, 12 Ired. 178.

**6.** If a supervisor acting as a member of the board, knowingly, corruptly, unlawfully and partially, votes that an account presented against the county as a county charge be allowed and made a charge against the county, he is guilty of a misdemeanor; and it is no defense that the board acted without jurisdiction. People v. Stocking, 6 Parker, 263.

**7. Aiding and abetting illegal voting.** To make a person a willful aider and abettor in illegal voting under the statute of Massachusetts, he must know at the time that the person was disqualified as a voter, and he must have done or said something which was designed and calculated to encourage the party to vote. Com. v. Aglar, Thach. Crim. Cas. 412.

**8.** Where a son resisted by threats a demand made upon his father by the judges of an election to answer certain questions which the judges had no right to ask, he was held not liable to an indictment under the election law of Pennsylvania. Com. v. Gibbs, 4 Dall. 253.

**9. Preventing persons from voting.** On the trial of an indictment for preventing voters from exercising the right of suffrage it was proved that whilst the room at which the election was held was well filled with colored voters, waiting for an opportunity to cast their ballots, a violent attack was made upon them by the defendant and others, driving them forcibly from the room into the street and closing or attempting to close the door against them, but that they subsequently went back and voted. *Held* sufficient to sustain a conviction under the act of Congress of May 31, 1870, § 19 (16 Stats. at Large, 144). U. S. v. Souders, 2 Abb. 456.

(*b*) *Indictment.*

**10. Must aver the grounds of the defendant's disability.** Where a person is charged with voting at an election without being qualified, the indictment must show the grounds of his disqualification. People v. Standish, 6 Parker, 111; State v. Moore, 3 Dutch. 105; State v. Tweed, Ib. 111; Quinn v. State, 35 Ind. 485.

**11. Unnecessary averments.** An indictment under the statute of New York, for a misdemeanor in voting at a general election after conviction of crime, need not contain the words "knowingly, willfully and corruptly," and if inserted they will be regarded as surplusage; the word "unlawfully" being all that is necessary. Hamilton v. People, 57 Barb. 625.

**12.** An indictment for illegal voting at a town meeting is sufficient, which states that the meeting was duly holden, without setting forth the authority by which the meeting

was called, or the manner of calling it. State v. Marshall, 45 New Hamp. 281.

**13. Form of indictment.** In Maine, the following indictment for double voting at a State election (R. S. ch. 4, § 61), was held good: "That on the 14th day of September, 1868, at, &c., a meeting of the inhabitants of &c., for the election of (certain State and county officers specified), and representatives of the Legislature for said, &c., was then and there duly held; and at said election, a list of the voters of, &c., was necessary; that the defendant did then and there at the meeting and election aforesaid, willfully, knowingly, and unlawfully cast and give in more than one vote, ballot and list of persons then and there to be elected and chosen into the said offices at one balloting, at the choice and selection aforesaid, against the peace," &c. State v. Boyington, 56 Maine, 512.

(c) *Evidence.*

**14. In behalf of prosecution.** The essence of the offense of illegal voting is, that the defendant voted knowing that he was disqualified. Under the indictment, any disability may be shown; or the prosecution may prove from the admissions of the defendant or otherwise that he knew he was disqualified, and was in fact disqualified, without showing in what the disqualification consisted. State v. Douglass, 7 Iowa, 413.

**15.** Where an indictment for illegal voting at an election for State officers, did not allege that the defendant was a deserter from the United States army, it was held that the fact of such desertion could not be proved on the trial, by the admissions of the defendant, nor by the roll of the company to which he belonged. State v. Symonds, 57 Maine, 148.

**16. For defense.** Where on the trial of an indictment for a misdemeanor for voting at a general election, after conviction of felony, the prosecution introduces no proof beyond the act itself, to show that the conduct of the accused was willful or corrupt, the latter need not prove the absence of willfulness or corruption. Hamilton v. People, 57 Barb. 625.

**17.** On the trial of an indictment under a statute making it a felony for any person other than an inspector of elections to knowingly and willfully put, or cause to be put ballots into a ballot box at an election, the defendant admitted that he was not an inspector, and that he did put ballots into a ballot box at an election; but he sought to prove that he was acting as inspector instead of one C., who had by power of attorney appointed the defendant to act in his place. *Held* that the evidence was properly rejected. Hogan v. People, 2 N. Y. Supm. N. S. 535.

**18.** On the trial of an indictment for fraudulent voting, the defendant's statements under oath at the polls, on being challenged, and the decision of the judges of election in favor of his right to vote, are not competent evidence in his behalf. Morris v. State, 7 Blackf. 607.

**19.** Although ignorance of the law will not excuse, yet a person may be excused for having committed an act by reason of his ignorance of facts, which ignorance of facts he may prove to rebut the presumption of knowledge, and to show an innocent intent. Hamilton v. People, 57 Barb. 625.

**20.** On the trial of an indictment for a misdemeanor for voting at a general election, after conviction of felony, contrary to the statute of New York, the following evidence was deemed equivalent to an offer to prove ignorance of the law, and therefore inadmissible: That before the accused was discharged from State prison, he applied to the governor for pardon, and that the governor replied in writing that, on account of the prisoner's being a minor at the time of his discharge from prison, a pardon would not be necessary in his case; that he then stated his case to two counsel of the Supreme Court, and was advised by both of them that the right of voting was not taken away from him by the conviction, and that on his coming of age he would have a perfect right to vote. Ib.

**21.** It is no defense to an indictment for illegal voting, that the defendant was advised by a respectable person that he had a right to vote. State v. Boyett, 10 Ired. 336. But otherwise, if he made a true statement

of the facts of his case, to a person capable of advising him correctly. Com. v. Bradford, 9 Metc. 268.

**22.** On the trial of an indictment for voting twice at the same election, the defendant may show that he was intoxicated at the time. People v. Harris, 29 Cal. 678.

3. Betting at election.

**23. What deemed a bet.** A sale of property to be paid for at its fair value, or at more than its fair value, in a certain event of a pending election, and not to be paid for at all, or to be paid for at more or less than its real value, as understood between the parties in a different event of the same election, constitutes a bet. Com. v. Shouse, 16 B. Mon. 325.

**24. When not indictable.** In Tennessee, betting on an election to be held in another State, is not indictable; and the same is true as to betting on the result of an election in Tennessee, after the election is over. State v. McLelland, 4 Sneed, 437.

**25. Prosecution when barred.** When a bet is made upon several different results of the same election, the whole to be taken as one bet, a conviction for one will bar a prosecution for the rest. Ramsey v. State, 5 Sneed, 652.

**26. Indictment.** An indictment for betting on an election with reference to the success or defeat of a certain person, must allege that such person was a candidate, or was proposed or voted for, for an office. Com. v. Shouse, 16 B. Mon. 325. But it is otherwise as to an indictment for bribery at an election. Com. v. Stephenson, 3 Metc. Ky. 226.

**27.** An indictment for betting on an election for president and vice-president of the United States, is good, without referring to the electors. Porter v. State, 5 Sneed, 358; Somers v. State, Ib. 438.

**28. Evidence.** An indictment for betting on the result of an election charged that the bet was made before the election was held. The proof showed that the bet was made afterward, but before the result was known. *Held*, that the variance was not material. Miller v. State, 33 Miss. 356.

**29.** An indictment charged that the defendant bet money on the result of an election for State electors to vote for president and vice-president of the United States. It was proved that the defendant bet on the result of the State election between the then candidates for president and vice-president of the United States. *Held* that the variance was fatal. Gamble v. State, 35 Miss. 222.

**30. Decision of inspectors of election as to bet.** Whether or not a person offering a vote has bet on the result of the election, is a mixed question of law and fact, in the determination of which the inspectors act in a *quasi* judicial capacity; and if, in deciding it, they act honestly, and to the best of their ability, they are not liable. Byrne v. State, 12 Wis. 519.

*See* Bribery; Gaming.

# Warrant.

**1. Right and duty of magistrate to issue.** A magistrate cannot lawfully issue a warrant of arrest on a criminal charge, on information and belief, when positive testimony is accessible. Comfort v. Fulton, 39 Barb. 56.

**2.** A magistrate may issue a warrant on view, but except in that case, it is his duty before issuing it to require evidence on oath amounting to a direct charge, or creating a strong suspicion of guilt. Welch v. Scott, 5 Ired. 72.

**3.** Mere hearsay is not a ground for the issuing of a warrant, and even if it be alleged that the prisoner will escape before the necessary affidavit showing his guilt can be obtained, this will not be sufficient. Connor v. Com. 3 Binn. 38.

**4.** The verification of a positive charge by an oath will justify a magistrate in issuing his warrant of arrest. State v. Hobbs, 39 Me. 212. Where the affidavit for a warrant stated in substance that the defendant did designedly and by false pretenses obtain from the complainant a sulky of the value of $30 by falsely stating and representing to him that his sulky was hard to ride in, and

that he wished the complainant's sulky to ride to Albany, and would return it the next week, but that he shipped it from Albany to Fort Plain with intent to cheat and defraud the complainant—*Held* that the evidence upon which the warrant was issued was colorable, and sufficient to call upon the magistrate to exercise his judgment in determining the propriety of issuing it. Pratt v. Bogardus, 49 Barb. 89.

**5. Statement of time of issuing.** Where a warrant bore date April 2d, and the certificate of the oath was dated May 2d, and both were on the same piece of paper, and the complaint alleged that the offense was committed on the 30th of April, and the warrant referred to the complaint, it was held to be sufficient to show that the complaint preceded the warrant. Donahoe v. Shed, 8 Metc. 326.

**6. Need not contain facts stated to magistrate.** The complaint or warrant need not set forth the facts disclosed to the magistrate on oath, unless the case be one in which it is required by statute. State v. Hobbs, 39 Maine, 212.

**7. Necessary averments.** A warrant of arrest must specify the offense, the authority under which it is issued, the person who is to execute it, and the person to be arrested. Brady v. Davis, 9 Ga. 73.

**8. Need not state the proof.** A criminal warrant need not set out the evidence by which the charge is to be supported, but only "recite the accusation" in language which indicates with reasonable certainty the crime sought to be charged. Pratt v. Bogardus, 49 Barb. 89; State v. Everett, Dudley, S. C. 295.

**9. Name of defendant.** A warrant must state the name of the party to be arrested if known. If the name be unknown, the warrant must indicate clearly on whom it is to be served, by stating his occupation, personal appearance and peculiarities, the place of his residence, and other circumstances by which he can be identified. Com. v. Crotty, 10 Allen, 403.

**10.** Where a warrant described the person to be arrested as "A. and his associates," it was held void as to the latter. Wells v. Jackson, 3 Munf. 458.

**11. How to be directed.** The warrant must be directed to the sheriff or the constables of the county or town, or some individual officer, or to some other person by name. Abbott v. Booth, 51 Barb. 546.

**12. Directing to person not an officer.** At common law a warrant may be directed to some indifferent person who is not an officer, but a magistrate should not do this when an officer can be conveniently found. Ibid.

**13. Substitution of person not an officer.** Where a warrant in the body of it was directed to the sheriff or any constable of the county, and the magistrate undertook to confer an authority on a person who was not an officer by an indorsement in the nature of a permission to make the arrest, it was held not to be a valid warrant. Ibid.

**14.** Where a warrant was issued to bring a person before the court to give sureties of the peace, and the magistrate had designated an officer to execute it, it was held that if such officer's name was erased and some other person's name who was not a sworn officer inserted by the prosecutor, an arrest made by such person was void. Wells v. Jackson, 3 Munf. 458.

**15. Command.** A warrant should contain a command or a requirement in the nature thereof to the person to whom the warrant is directed to make the arrest. A mere authority in the nature of a license, or permission to make the arrest is not sufficient. Abott v. Booth, *supra*.

**16.** The mandatory part of the warrant is that which gives it efficacy as process, and under that the officer must justify. Therefore a warrant which recites a complaint against John R. Miller, and commands the officer to arrest the said William Miller, will be no protection to the officer in arresting John R., although he was the person intended. Miller v. Foley, 28 Barb. 630.

**17. Must be under seal.** As the common law required a warrant to be under seal, the same is essential in all cases in which warrants are not expressly authorized to be is-

sued without seal. People v. Holcomb, 3 Parker, 656.

**18.** In Maine, warrants issued for the arrest or imprisonment of persons must be under seal. State v. Drake, 36 Maine, 366. In North Carolina, there must be a seal to every warrant issued by a magistrate to arrest any person upon a criminal charge, and if there be no seal, the precept will afford no protection to the officer attempting to execute it. State v. Worley, 11 Ired. 242; Welch v. State, Ib. 72.

**19. To be shown and explained to party arrested.** Where an arrest is made by virtue of a warrant, the warrant being demanded, should be produced. But the arrest, the explanation, and the reading of the warrant when demanded, are obviously successive steps. In the case of a known officer, the explanation must follow the arrest; and the explanation and perusal of the warrant must come after the authority of the officer has been acknowledged. If the officer is not known as such, he should show his warrant before making the arrest. U. S. v. Jailer of Fayette County, 2 Abb. 265.

*See* ARREST; OFFICER; SEARCH WARRANT.

# Weapons.

*See* CONCEALED WEAPONS.

# Weights and Measures.

**Fraud in the use of.** It is indictable at common law to deprive another of his property by using false weights or measures; but not to get possession of another's goods merely by falsehood without any other fraudulent act. Com. v. Warren, 6 Mass. 72.

# Witness.

1. PERSONS WHO ARE COMPETENT OR INCOMPETENT TO TESTIFY.
2. PROCURING ATTENDANCE.
3. INTRODUCING.
4. EXAMINATION.
   - (*a*) *In general.*
   - (*b*) *Attacking credibility of witness.*
   - (*c*) *Sustaining credibility of witness.*

## 1. PERSONS WHO ARE COMPETENT OR INCOMPETENT TO TESTIFY.

**1. In general.** All persons who are disinterested and not infamous, are competent witnesses, and are presumed to be so until the contrary is shown. Cornelius v. State, 7 Eng. 782.

**2.** On the trial of an indictment for perjury, a person who heard all but a small portion of the alleged false testimony was held to be a competent witness. Com. v. Farley, Thach. Crim. Cas. 654.

**3.** A person who is acquainted with the dividing line between two towns, has lived near it, and run it when measuring his own land, is competent to prove on which side of the line a tenement is situated. Com. v. Heffron, 102 Mass. 148.

**4. Young child.** A child under the age of seven years, if it has sufficient knowledge of the nature and circumstances of an oath, may be a witness. This is to be determined by the court. State v. Morea, 2 Ala. 275; and it is not in general the subject of exception. Com. v. Mullins, 2 Allen, 295. On a trial for murder, a girl seven or eight years of age being offered as a witness and interrogated to test her capacity, stated that "if she told a story she would be put in jail as a punishment." *Held* not error to permit her to testify. Peterson v. State, 47 Ga. 524; s. c. 1 Green's Crim. Reps. 576.

**5.** A child of any age that is capable of distinguishing between right and wrong, may be examined as a witness; and the credit due to the testimony is to be left to jury. State v. Whittier, 2 Mo. 341.

**6.** In South Carolina, the evidence of a child of seven years which was corroborated by circumstances, was held sufficient to sustain a conviction. State v. Le Blanc, 3 Brev. 339.

**7.** On the trial of an indictment for rape, the prosecuting witness was a child six years of age, and the offense was committed sixteen months previous. The court examined

the witness as to her competency, and not being satisfied, appointed two persons who retired with the child to a private room, and after some time returned and reported to the court that, "in their opinion, her testimony ought to be heard, but received with great allowance." Whereupon she was allowed to testify against the defendant's objection. *Held* that the court should have acted on its own judgment, and that the defendant was entitled to a new trial. Simpson v. State, 31 Ind. 90.

8. A boy nine years old was called to testify, who stated that he did not know the nature of an oath or the obligations of a witness, and had never been sworn. The court ruled that he was not competent as a witness, and declined to instruct him as to the nature and obligations of an oath. *Held* correct. Jones v. People, 6 Parker, 126.

9. **Lunatic.** The fact that a witness is a lunatic is not enough *per se* to exclude him. If he has such a share of understanding as enables him to remember the events of which he testifies, and gives him a knowledge of right and wrong, he is competent. Coleman v. Com. 25 Gratt. 865.

10. **Persons disregarding order of court excluding them from the court room.** Where the witnesses are sent out by order of the court, and one of them, by accident or design, gets back into the court room, he is not for that reason to be prevented from testifying; but it is a matter going to his credit. Gregg v. State, 3 West Va. 705; People v. Boscovitch, 20 Cal. 436.

11. **Competency not affected by religious belief.** A person who disbelieves in a future state of rewards and punishments, but that they are dispensed in this life, is a competent witness. U. S. v. Kennedy, 3 McLean, 175; Bennett v. State, 1 Swan, 411; Noble v. People, Breese, 29. In California, the constitutional provision (Const. art. 1, § 4), permitting a witness to testify irrespective of his opinion on matters of religious belief, is applicable to a person who makes a dying declaration. People v. Sanford, 43 Cal. 29, Crockett, J., *dissenting;* s. c. 1 Green's Crim. Reps. 682.

12. In Virginia, a person is not disqualified from testifying as a witness on account of religious unbelief. Perry's Case, 3 Gratt. 632.

13. **Persons interested.** The officer who arrested the prisoner is a competent witness, although liable as a trespasser, if the arrest should prove to have been wrongful. Com. v. Merrill, Thach. Crim. Cas. 1.

14. On a trial for murder, a person who aided in arresting the prisoner, and received a reward therefor, is a competent witness for the prosecution. Baxter v. People, 3 Gilman, 368.

15. On a trial for forgery, the person whose name was forged may testify to the forgery, although actions are pending against him, to which his only defense is the forgery. Com. v. Peck, 1 Metc. 428. And the person to whom the forged instrument was passed is a competent witness. State v. Nettleton, 1 Root, 308. But the forged instrument should be produced. Com. v. Hutchinson, 1 Mass. 7.

16. A person from whom goods have been stolen may be a witness as to any facts within his knowledge. Com. v. Moulton, 9 Mass. 30; State v. Cassados, 1 Nott & McCord, 91. But not when he is entitled to treble the value of the property stolen, upon the conviction of the prisoner. State v. Prey, 14 New Hamp. 464.

17. **Prisoner's counsel.** The attorney who acted for the defendant on the preliminary examination before the magistrate, but who is not retained at the trial, may be sworn to prove what a witness at such examination testified, although he is obliged to refresh his recollection from his minutes, and cannot give the testimony verbatim. Com. v. Goddard, 14 Gray, 402; s. c. 2 Allen, 148; 4 Ib. 312.

18. **Prosecutor.** A prosecutor has been held a competent witness for the State, notwithstanding his liability for costs, in case the prosecution fail. State v. Blannerhassett, Walker, 7. But in Kentucky, it was held otherwise as to one who had undertaken to indemnify the prosecutor in case he had the costs to pay. Com. v. Gore, 3 Dana, 475

19. **Informer.** An informer is a compe-

tent witness, although he is to receive part of the penalty. U. S. v. Patterson, 3 McLean, 53, 299.

**20. Accomplice.** An accomplice should not be made a witness without an order from the court; and the application ought to show that there is no other witness by whom the offense can be proved; that the accomplice is not more guilty than the person on trial, and that the testimony can be corroborated. Ray v. State, 1 Greene, Iowa, 316; People v. Whipple, 9 Cow. 707; Byrd v. Com. 2 Va. Cas. 493; U. S. v. Henry, 4 Wash. C. C. 428.

**21.** An accomplice, after conviction, and before judgment, or after plea of guilty, may be a witness for his codefendant when they are tried separately. Garrett v. State, 6 Mo. 1. The principal may be a witness against the accessory. People v. Lohman, 2 Barb. 216; 1 N. Y. 379.

**22.** An accomplice testifying as a witness is not to be discredited from the mere fact of his being such accomplice. U. S. v. Kepler, 1 Baldw. 22. The prisoner may be convicted upon the uncorroborated testimony of an accomplice. People v. Costello, 1 Denio, 86. But such testimony ought, in general, to be corroborated. U. S. v. Troax, 3 McLean, 431. See *ante*, EVIDENCE, tit. 13.

**23.** In Alabama, a partner of one of the players in his winnings or losses in the game in which the defendant played and advanced money to the defendant, which was used by him in betting on the game, is an accomplice within the statute (Code, § 3600), which forbids a conviction on the uncorroborated testimony of an accomplice. English v. State, 35 Ala. 428.

**24.** The testimony of one accomplice cannot be corroborated by that of another accomplice. Johnson v. State, 4 Greene, 65.

**25.** It is for the jury to determine whether or not a witness jointly indicted with the defendant is an accomplice. State v. Schlagel, 19 Iowa, 169.

**26.** A detective is not an accomplice; and the question whether a person acted in that capacity is to be determined by the jury. State v. McKean, 36 Iowa, 343.

**27. Accomplice not privileged from testifying.** When an accomplice testifies in behalf of the prosecution, he cannot shield himself, on cross-examination, from making a full disclosure of his connection with the offense which is being tried. Foster v. People, 18 Mich. 266. But he is not obliged to disclose his criminality in other transactions. Pitcher v. People, 16 Ib. 142.

**28.** When a codefendant turns State's evidence he has no right to claim any privilege concerning any of the facts bearing upon the issue; and his waiver of privilege includes confidential communications to counsel. Hamilton v. People, 29 Mich. 173, referring to Alderman v. People, 4 Ib. 414, and Foster v. People, 18 Ib. 266.

**29. Accomplice not entitled to favor.** An accomplice who voluntarily gives his evidence, is not thereby discharged from punishment, nor is he entitled to a pardon. His competency as a witness depends on the ancient principles of the common law. Sumpter v. State, 11 Fla. 247.

**30.** An accomplice, after testifying, may be tried for another crime; and the fact that he is charged with a distinct felony is good cause to reject him as a witness. People v. Whipple, 9 Cow. 707.

**31. Codefendant.** In general, a defendant cannot be a witness for his codefendant until he has ceased to be a party to the proceeding, either by a verdict of acquittal, an entry of a *nolle prosequi* as to him, or a judgment against him upon his confession or otherwise. State v. Young, 39 New Hamp. 283; People v. Bill, 10 Johns. 95; State v. Roberts, 15 Mo. 28; People v. Williams, 19 Wend. 377; State v. Champ, 16 Mo. 385.

**32.** Where one of several jointly indicted is found guilty, he may be a witness for the others before sentence, or after sentence, if not thereby rendered infamous. And it is the same when he pleads guilty. State v. Jones, 51 Maine, 125.

**33.** A defendant, in an indictment for a felony where a separate trial is demanded and allowed, is not entitled to have his codefendant, who is a party to the record, but who is not on trial, sworn as a witness. McIntyre agst. People, 9 N. Y. 38. One jointly

indicted with another is a competent witness against his codefendant. Mackesey v. People, 6 Parker, 114.

34. When persons indicted are all put on trial together, neither can be a witness for or against the others. But when they are tried separately, though jointly indicted, the prosecution, with the permission of the court, may call those not on trial, though not convicted or acquitted, or otherwise discharged. They cannot, however, be called as witnesses for each other, though separately tried, while the indictment is pending against them. If acquitted, they may be examined, and even if convicted, unless for a crime which disqualifies, and then sentence must have followed conviction. Wixon v. People, 5 Parker, 119, *disapproving* People v. Donnelly, 2 Parker, 182.

35. Where the prosecution called one of several defendants as a witness, which was objected to, and the objection overruled, it was held that this was tantamount to a formal application for leave to swear the witness, and a determination by the court to accede to the request. Ib.

36. In Georgia, where one of several jointly indicted is tried separately, a codefendant is a competent witness in his behalf. Jones v. State, 1 Kelly, 610. In Mississippi, where, under a joint indictment against two, one of them is found guilty of an offense not infamous, he may be a witness for his codefendant; and where several are charged with separate and distinct offenses in the same indictment, they are competent witnesses for each other before conviction or acquittal. Strawhern v. State, 37 Miss. 422. When several jointly indicted for the same offense are tried separately, they are competent witnesses against each other. George v. State, 39 Ib. 570.

37. **Defendant testifying in his own behalf.** Although the defendant, when he offers himself as a witness in his own behalf, may be cross-examined, yet the prosecution cannot make him its own witness against his consent. State v. Cohn, 9 Nev. 179.

38. The fact that the defendant offers himself as a witness in his own behalf, does not as to him, change or modify the rule as to the proper limits of cross-examination, so as to permit the prosecution to make him a witness against himself. People v. McGungill, 41 Cal. 429.

39. In Indiana, it has been held that the defendant in his capacity of witness is entitled to the same rights and is subject to the same rules as any other witness. Fletcher v. State, 49 Ind. 124. But it has been decided differently in New York. In the latter State, on a trial for grand larceny, the prisoner was examined as a witness in his own behalf under the provisions of the statute of May 7th, 1869 (Sess. Laws of 1869, ch. 678), which provides that a party accused of crime shall at his own request, and not otherwise, be deemed a competent witness in his own behalf. On his cross-examination, he was asked if he had been in the State prison. He said he had, and served out his term. The district attorney requested the court to charge the jury to disregard the defendant's testimony, on the ground that having served as a felon he was not competent to testify as a witness. *Held* that such instruction was improper, the law intending to allow the prisoner the benefit of testifying, irrespective of any matter which could disqualify a witness under ordinary circumstances, and the degree of credit to which he was entitled being for the jury and not the court. Newman v. People, 63 Barb. 630.

40. In the United States courts the prisoner cannot testify in his own behalf, although by the statute of the State in which the offense is committed he may be permitted to do so. U. S. v. Hawthorne, 1 Dillon C. C. 422.

41. **Husband.** Where the wife is a party to the record, her husband is not a competent witness against her *particeps criminis*, on his separate trial, although a *nolle prosequi* has been entered as to the wife, but if she has been tried and acquitted it is otherwise. People v. Colbern, 1 Wheeler's Crim. Cas. 479.

42. Where two are jointly indicted, the husband of one is not a competent witness for the other before conviction or acquittal. Puller v. People, 1 Doug. 48; Shoeffler v.

State, 3 Wis. 823. But see Moffett v. State, 2 Humph. 99.

43. In Maine, under the statute (Laws of 1873, ch. 137, § 5) in criminal cases, a husband or wife may be compelled to testify either for or against the other. State v. Black, 63 Maine, 210.

44. The rites of matrimony had never been performed between an Indian man and woman, but they had cohabited together as man and wife in accordance with an ancient custom of their tribe, according to which couples were recognized as husband and wife, but could dissolve such relation at pleasure. *Held* not to be marriage, and that they could be compelled to testify against each other. State v. Ta-cha-na-tah, 64 N. C. 614.

45. **Wife testifying in behalf of husband.** The act of New York of 1869 (ch. 678), allowing persons charged with crime to be witnesses in their own behalf, relates only to the accused, and does not render his wife competent to testify in his behalf. People v. Reagle, 60 Barb. 527.

46. Under a statute permitting the wife to testify for her husband, it is error to charge the jury that "her testimony at all events should be received with great caution," she being entitled to have her credibility tested by the same rules that apply to other witnesses. State v. Guyer, 6 Iowa, 263; State v. Rankin, 8 Ib. 355, Wright, Ch. J., *dissenting*. And see State v. Nash, 10 Ib. 81.

47. A woman who has cohabited with the prisoner as his wife, but was never married to him, is a competent witness in his behalf. State v. Johnson, 9 La. An. 308.

48. **Wife testifying against husband.** The wife of the prisoner is not a competent witness against him. Wilke v. People, 53 N. Y. 525. But where the husband testified in behalf of the prosecution, it was held that his wife was a competent witness for the defense to show that he was prejudiced against the defendant. Cornelius v. State, 7 Eng. 782.

49. In a proceeding by a wife against her husband for abandonment without providing her with the means of support, she is a competent witness. State v. Newberry, 43 Mo. 429.

50. In North Carolina, the wife cannot be a witness against her husband to prove a battery on her person by him, unless a lasting injury is inflicted or threatened to be inflicted upon her. State v. Hussey, Busbee, 123.

51. **Wife of accomplice.** Where it is proper to allow an accomplice to be sworn, his wife is also a competent witness. Wixson v. People, 5 Parker, 119; State v. Moore, 25 Iowa, 128.

52. Although the wife of an accomplice cannot corroborate his particular statements, yet she is a competent witness to prove any independent facts not sworn to by her husband and not forming any part of his acts, although such facts fasten a guilty knowledge on the defendant. U. S. v. Horn, 5 Blatchf. 102.

53. **Wife of codefendant.** On the trial of several defendants jointly indicted, the wife of one of them is not a competent witness for the others, and in such case it is not material that the defendants asked for and were denied separate trials. Com. v. Robinson, 1 Gray, 555.

54. The fact that the husband is a party to the record, does not of itself exclude the wife as a witness on behalf of other parties; but the rule of exclusion is only to be applied to cases in which the interest of the husband is to be affected by the testimony of the wife. Thompson v. Com. 1 Metc. Ky. 13. The wife cannot testify if the effect of her testimony is to injure or benefit her husband; but it is otherwise when her husband can derive no benefit, or receive any detriment therefrom. State v. Waterman, 1 Nev. 543.

55. On the trial of an indictment for a conspiracy to charge the wife of one of the defendants with adultery, such wife is not a competent witness. State v. Burlingham, 15 Maine, 104.

56. When several are jointly indicted for an offense which may be committed by one or more, and they are tried separately, the wife of one defendant is a competent witness for the others; and on separate trials, they are entitled to the benefit of her testimony

in all cases except in conspiracy, or other joint offenses. State v. Burnside, 37 Mo. 343; State v. McCarron, 51 Ib. 27.

57. But where under a joint indictment against two, one is tried separately, the wife of the other is not a competent witness as to matters tending to criminate her husband. State v. Bradley, 9 Rich. 168.

58. Where on the trial of a joint indictment against two for an assault, a default is entered against one, on his recognizance, his wife is a competent witness for the others. State v. Worthing, 31 Maine, 62.

59. **Convicted criminal.** A person convicted of an infamous crime is a competent witness before sentence. U. S. v. Dickinson, 2 McLean, 325. To render him incompetent there must have been a judgment. State v. Valentine, 7 Ired. 225.

60. In Alabama, a person convicted of libel in another State is not an incompetent witness. Campbell v. State, 23 Ala. 44.

61. A person convicted of forgery in another State is not a competent witness in North Carolina. State v. Candler 3 Hawks, 393.

62. In New York, a person convicted of perjury is not competent to be a witness, until the judgment is reversed, although pardoned. Houghtaling v. Kelderhouse, 1 Parker, 241.

63. In New York, under the statute (Laws of 1869, ch. 678), a person convicted of a felony who has not been pardoned, is a competent witness in his own behalf upon a trial on an indictment subsequently found against him for a criminal offense. Delamater v. People, 5 Lans. 332; Newman v. People, 6 Ib.460.

64. The statute of New York (Laws of 1847, ch. 460), providing that a convict shall be a competent witness against a fellow prisoner for any offense actually committed whilst in prison, permits convicts to testify to facts material to the issue upon the trial of any such offense, and is not restricted to the particular acts constituting the crime. Donohue v. People, 56 N. Y. 208.

65. In New York, a person convicted of petit larceny as a first offense, is not incompetent to testify. Shay v. People, 22 N. Y. 317; 4 Parker, 353.

66. In Virginia, a person may be a witness although he has been convicted of petit larceny in another State. Uhl v. Com. 6 Gratt. 706. In Massachusetts, the conviction of a person before a justice of the peace of larceny, renders him incompetent to testify, notwithstanding the complaint in the proceedings before the justice was defective. Com. v. Keith, 8 Metc. 531.

67. **Member of court.** A court retains its jurisdiction, notwithstanding one of its members leaves the bench and is sworn and testifies as a witness. People v. Dohring, 59 N. Y. 374; overruling s.c. 2 N. Y. Supm. N. S. 458. But his becoming a witness is error which if objected to, will be ground for reversing the judgment. Ib.

68. **Juror.** When facts are in the personal knowledge of a juror, they may be proved by him. State v. Powell, 2 Halst. 244.

69. **Grand jurors.** The testimony of grand jurors is admissible to prove that a witness for the prosecution swore differently on his examination before them. Com. v. Mead, 12 Gray, 167.

70. A grand juror is competent to testify on the trial that a person was not a witness before the grand jury. Com. v. Hill, 11 Cush. 137. And when necessary to promote justice, a grand juror may be compelled to testify what the witnesses before the grand jury testified. State v. Wood, 53 New Hamp. 484.

71. Where a person is charged with perjury before a grand jury, members of such jury are competent to testify as to the facts sworn to by the defendant before them. Crocker v. State, 1 Meigs, 127.

72. **Persons incompetent by statute.** The statute of California, which provides that "no Indian, or person having one-half or more Indian blood, or Mongolian, or Chinese, shall be permitted to give evidence in favor of or against any white man," is not in conflict with the 14th Amendment of the Constitution of the United States. People v. Brady, 40 Cal. 198.

73. Under a statute precluding negroes and Indians from testifying either for or against a white person, the *indicium* of color cannot be relied on as an infallible test of

competency, but only when it is so decided as to leave no doubt of the particular race to which the witness belongs. People v. Elyea, 14 Cal. 144.

**74. Expert.** There is no rule of law fixing the precise amount of experience or degree of skill necessary to constitute an expert. The judge must in the first instance pass upon the admissibility of the witness; and if admitted, the jury determine the credit to be given to his testimony. Com. v. Williams, 105 Mass. 62.

**75.** Where a physician called as a witness on a trial for murder, to which the defense of insanity was interposed, testified that he had made the subject of mental disease a study, but not a special study; that he had considered the matter only so far in his general practice as to determine whether a patient was in such a condition as to require treatment for insanity, it was held that he was not competent to testify as an expert upon a hypothetical case put to him. Com. v. Rich, 14 Gray, 335.

**76.** There is no precise standard fixing the degree of knowledge which a person must possess of another's handwriting in order to testify as to the authenticity of a particular paper. The witness must have seen the party write and acquired a knowledge more or less perfect of the character of the hand. Hartung v. People, 4 Parker, 319.

**77.** When a witness examined as an expert has expressed an opinion based on facts assumed by the party introducing him to have been proved, or upon a hypothetical case put by such party, the other party may cross-examine him by taking his opinion based on any other set of facts assumed by him to have been proved, or upon a hypothetical case. Davis v. State, 35 Ind. 496. For other decisions relating to the testimony of experts, see *ante*, EVIDENCE, tit. 14.

**78. Interpreter.** Where a witness in consequence of debility is not able to speak loud enough to be heard by the court and jury, the court may appoint a person to interpret what the witness communicates to him in whispers. Conner v. State, 25 Ga. 515.

2. PROCURING ATTENDANCE.

**79. Defendant's witnesses when to be procured by prosecution.** It is the duty of the United States court, on the application of the prisoner, to send for witnesses within the jurisdiction of the court, at the expense of the government, upon his showing that he is poor, and unable to defray the expense. U. S. v. Kenneally, 5 Bis. 122.

**80.** In Maine, the prosecution is not required to pay the expenses incurred by persons accused of crime in procuring the attendance of witnesses, but only to furnish the process for summoning the witnesses. State v. Waters, 39 Maine, 54.

**81. Attachment.** The issuing of an attachment against a witness in behalf of the prisoner, after his counsel has announced that they have no other witnesses, and after arrangements have been made for summing up the cause on both sides, is in the discretion of the court. Stephens v. People, 4 Parker, 396; affi'd 19 N. Y. 549.

**82. Keeping witness away.** It is a crime at common law to induce a witness to absent himself from a court where he is legally bound to appear to give testimony upon a criminal process there pending, and an attempt to do so, though not accomplished, will subject the offender to an indictment. State v. Ames, 64 Maine, 386.

**83.** On the trial of an indictment for getting a witness out of the way, it need not be proved that the testimony of the witness was material. State v. Early, 3 Harring. 562.

3. INTRODUCING.

**84. Calling witness in discretion of court.** Where a witness disobeys the order of the court to withdraw, and remains and hears the testimony of the other witnesses, it is in the discretion of the court whether he shall afterward be permitted to testify in the case. Laughlin v. State, 18 Ohio, 99; Sartorius v. State, 24 Miss. 602.

**85.** The court has discretion to allow witnesses to be examined at any time before the verdict, notwithstanding they were removed before their first examination, and have since been together. State v. Silver, 3 Dev. 332.

86. When, on the trial of several jointly indicted, there is evidence against one, the court may deny the motion of his codefendants to introduce him as a witness, on the ground that there was no evidence against him to authorize him to be put on his defense, and "to direct and allow the jury to return a verdict of acquittal as to him, on the ground that there was not sufficient evidence of his guilt to require him further to defend." Brister v. State, 26 Ala. 107.

87. The calling of a witness by the prosecution, in corroboration of previous testimony, is in the discretion of the court. Stephens v. People, 4 Parker, 396; 19 N. Y. 549.

88. The prosecution, after resting, cannot be compelled to call and examine other witnesses. People v. Cunningham, 6 Parker, 398.

89. **Administering oath.** In Illinois, an oath administered with the uplifted hand, no objection being made, was held valid, although the witness did not state that he had conscientious scruples against being sworn on the Gospels. McKinney v. People, 2 Gilman, 540.

90. The provision of the statute of Massachusetts as to the form of administering an oath is directory only, and, therefore, when a commission issued in another State to take a deposition in Massachusetts directs the oath to be administered in a different form, such oath will be valid. Com. v. Smith, 11 Allen, 243 (Genl. Stats. ch. 131, § 8).

4. Examination.

(*a*) *In general.*

91. **Right of court to control examination of witness.** On the trial of an indictment for assault with intent to murder, during the cross-examination of one of the State's witnesses, H., one of the defendant's attorneys, asked the witness a question which the court deemed improper, and so told the attorney, to which he replied: "This is a cross-examination, and if we cannot examine our witness, he can stand aside." The court directed D., another of the defendant's attorneys, to cross-examine the next witness, which he declined to do, and it was thereupon demanded that H. be permitted to cross-examine the witness, but the court would not allow it. The judge then proposed to ask the witness the proper questions, to which the defendant objected, and refused to have the witness cross-examined unless it was done by H., which the judge would not permit. *Held* that the action of the court was proper. Redman v. State, 28 Ind. 205.

92. The extent of the cross-examination of a witness upon matters immaterial to the issue, is in the discretion of the judge before whom the trial is conducted. La Beau v. People, 34 N. Y. 223.

93. The court may, in its discretion, permit the re-examination of the witnesses as to facts not in reply or rebuttal. Sartorius v. State, 24 Miss. 602.

94. The court has the discretionary power, on the application of either party, to require the witnesses to be examined out of the hearing of each other. McLean v. State, 16 Ala. 672; West v. State, 2 Zabr. 213.

95. **Objecting to witness.** A party who objects to the competency of a witness may examine him on his *voir dire*, or prove the alleged incompetency by evidence *aliunde*. If he adopts the former mode, he makes the witness his, so far as the question of competency is concerned, and is concluded by his testimony, unless it leaves the question in doubt, in which case he may resort to other evidence. If he adopt the latter mode, and fails because his evidence is rejected as inadmissible, he may still resort to the former mode, and if he has two distinct grounds of objection, he may adopt one mode of proof as to one ground, and the other mode as to the other ground. People v. Anderson, 26 Cal. 129.

96. **Leading questions.** When a witness appears adverse in interest to the party calling him, the court usually permits such party to put to him leading questions, their admission being in the discretion of the court. State v. Lull, 37 Maine, 246; State v. Benner, 64 Ib. 267. An interrogatory put to a witness by the judge cannot be objected to as leading. Com. v. Galavan, 9 Allen, 271.

97. On a trial for murder, S., the mother of the prisoner, upon her cross-examination by the prosecution, was asked whether she knew M., and whether she did not meet her the next morning after the homicide and make certain statements to her, to which S. replied that she did not. M. was afterward called to contradict her, and she was asked whether she saw S. on the morning in question. *Held* that the question was proper, and not objectionable on the ground that it was leading. Shufflin v. People, 6 N. Y. Supm. N. S. 215.

98. The following questions were held leading and improper: "State whether or not you examined the horse tracks toward Crogin's;" and "State whether or not you had any difficulty in following the tracks." Hopper v. Com. 6 Gratt. 684.

99. On the trial of an indictment for rape, the following questions were held leading and improper: "Did the prisoner then, or at any subsequent time, say anything to you in relation to this matter to dissuade you from disclosing it? State when, where and what he said. Did the prisoner, at any time subsequent to the transaction, say anything to you about what judgment the law would inflict on you, or him, or both? If the prisoner in any of his antecedent conversations offered property, or any other advancement to you, in order to attach you to him, say so." Turney v. State, 8 Smed. & Marsh. 104, Clayton, J., *dissenting*.

100. **Witness refreshing his memory.** A witness may refresh his recollection from a memorandum made by another person, but which the witness dictated. Hill v. State, 17 Wis. 675.

101. Where a witness refreshes his memory from a memorandum, the opposite party has a right to inspect the memorandum, unless it appears to the court that the party furnishing the memorandum has a reasonable ground of belief that he will subject himself to personal injury by allowing it to be examined. State v. Bacon, 41 Vt. 526.

102. A written memorandum signed with the mark of a witness who can neither read or write, which is used to refresh his recollection, should not be read in court, but the witness should retire with one of the counsel on each side, and the paper be read to him without comment. Com. v. Fox, 7 Gray, 585.

103. Where the written deposition of a witness had been previously taken, and she was asked on cross-examination, whether she at that time mentioned the name of one M.—*Held* proper for the court to direct that the witness be allowed to examine the deposition before answering, although it appeared that the name of M. was not in it. State v. Taylor, 3 Oregon, 10.

104. Where a witness after examining a memorandum made by him, as to a material fact, stated that his memory was not so refreshed that he could then swear, from recollection, but that when the memorandum was made, it was true, it was held that his testimony was admissible. State v. Colwell, 3 R. I. 132.

105. **Privileged communications.** On a trial for larceny, a witness from whom the property is alleged to have been stolen need not disclose the names of persons in his employment who gave the information which led him to take measures for the detection of the thief. State v. Soper, 16 Maine, 293.

106. Where a witness privileged to answer, testifies to part of a transaction, he is obliged to testify as to the whole. State v. Foster, 3 Fost. 348; People v. Lohman, 2 Barb. 216.

107. **Answer tending to criminate.** Where the answer to a question may furnish evidence to convict the witness of a crime, he is not bound to answer, unless exempt from liability by statute. Floyd v. State, 7 Texas, 215; Wood v. State, 2 Mo. 98; Murphy v. Com. 23 Gratt. 960; s. c. 2 Green's Crim. Reps. 662.

108. If a witness object to a question on the ground that an answer would criminate him, he must allege in substance, that his answer would tend to prove him guilty of a criminal offense. If it could not be used against him, because forbidden by statute, the witness is not privileged. People v. Hackley, 24 N. Y. 74.

109. On a trial for seduction, the defendant put a witness upon the stand and asked him

if he had ever had sexual intercourse with the prosecutrix. The witness declined to answer for the reason that it might tend to criminate him. *Held* that the court did not err in refusing to compel him to testify, although a prosecution for seduction was barred by the statute of limitations; it not appearing that he had not already been complained of, and a prosecution for rape being not yet barred. People v. Brewer, 27 Mich. 134; s. c. 2 Green's Crim. Reps. 562.

**110.** A party cannot object that an answer to the question asked may involve the witness in a criminal prosecution. The objection must come from the witness. It is not the duty of the court, independently of any objection on the part of the witness to inform him that he is not obliged to criminate himself. Com. v. Shaw, 4 Cush. 594. And the witness cannot claim such privilege, when the question is necessary to understand the facts already voluntarily stated. People v. Carroll, 3 Parker, 73.

**111.** If a witness has stated part of a transaction, or of a series of transactions, which implicate the defendant, the latter may show by a cross-examination of the same witness, that the fault, and even the criminality, were on the part of the witness, and not of the accused. Ib.

**112.** If a witness consents to testify so as to criminate himself as well as the defendant, he must answer all questions legally put to him concerning that matter. Com. v. Price, 10 Gray, 472. And where the defendant offers himself as a witness, he cannot object to any question pertinent to the issue on the ground that the answer may tend to criminate him. Com. v. Lannan, 13 Allen, 563; Com. v. Mullen, 97 Mass. 545; Com. v. Bonner, Ib. 587.

**113.** The testimony of a husband which may tend to criminate his wife, or the testimony of a wife which may tend to criminate her husband, is admissible in a collateral proceeding when it cannot afterward be used against either. State v. Briggs, 9 R. I. 361.

**114.** Whether the answer may tend to criminate the witness, is a point which the court will determine under all the circumstances of the case, and without requiring the witness to explain how he may be criminated by the answer. State v. Staples, 47 New Hamp. 113; Com. v. Brainard, Thach. Crim. Case, 146; Ward v. State, 2 Mo. 98; People v. Mather, 4 Wend. 231; Richmond v. State, 2 Greene, 532.

**115.** An accomplice testifying in behalf of the prosecution, is privileged equally with other witnesses from answering questions tending to impute crime to him or to disgrace him. State v. Staples, 47 New Hamp. 113.

**116.** Although a witness in the United States courts prior to the act of Congress of Feb. 25th, 1868, (15 St. 37), could decline to answer a question when the answer would tend to criminate him, yet now he may be compelled to answer when the inquiry is pertinent to any judicial proceeding; but the testimony cannot be used against the witness. U. S. v. Brown, 1 Sawyer, 531.

**117.** Where a witness objects to testify on the ground that it will criminate him, but is erroneously compelled to testify, the defendant may object that the conviction was founded upon incompetent evidence. Com. v. Kimball, 23 Pick. 366.

**118. Answer tending to disgrace witness.** The court may in its discretion allow or disallow a question which tends not to criminate but only to degrade or disgrace the witness. State v. Blansky, 3 Minn. 246.

**119.** A witness is privileged to decline to answer a question which tends to disgrace him unless the answer would bear directly upon the issue. Lohman v. People, 1 Comst. 379; Howel v. Com. 5 Gratt. 634. See People v. Rector, 19 Wend. 569; Clementine v. State, 14 Mo. 112; Barnes v. State, 19 Conn. 398.

**120.** To excuse the witness from answering, it is not sufficient that his answer will have a tendency to expose him to infamy or disgrace; the question must be such that the answer to it which he may be required by the obligation of his oath to give will directly show his infamy. People v. Mather, 4 Wend. 229.

**121.** A witness may be asked upon cross-examination whether he has been in jail or

State prison, or any other place that would tend to impair his credibility, and how much of his life he has passed in such places. Real v. People, 42 N. Y. 270.

**122.** It is competent to ask a witness on cross-examination, with a view to impeach his general character and thereby affect his credibility, whether he has not been guilty of adultery, and whether he has not had the venereal disease since his marriage. If, however, the question calls for facts wholly collateral to the issue, the witness may refuse to answer it, and no inference unfavorable to his character will be drawn from such refusal. People v. Blakeley, 4 Parker, 176; La Beau v. People, 6 Ib. 371, *contra*.

(*b*) *Attacking credibility of witness.*

**123. Value of affirmative testimony.** An affirmative witness of equal knowledge and credibility is to be believed in preference to many negative witnesses. Johnson v. State, 14 Ga. 55.

**124.** Where witnesses testified to what they saw on a certain starlight night, aided by the light from neighboring houses, it was held not competent to show by other witnesses that on a similar starlight night they made experiments between the same hours and with the same degree of light, and were unable to see objects distinctly at the distance sworn to by the first witnesses. Sealy v. State, 1 Kelly, 213.

**125. Contradictory statements of witness.** When a witness upon being asked whether he did not make certain statements, replies that he has no recollection of having made them, it may be proved that he did in fact make them. Garret v. State, 6 Mo. 1; Shriedley v. State, 23 Ohio, N. S. 130; s. c. 2 Green's Crim. Reps. 530.

**126.** Before a witness can be impeached by proof of previous contradictory statements, he must first be given an opportunity to explain such statements. Powell v. State, 19 Ala. 577; Clementine v. State, 14 Mo. 112; State v. Cazeau, 8 La. An. 109; People v. Devine, 44 Cal. 452; s. c. 2 Green's Crim. Reps. 405; Jackson v. Com. 23 Gratt. 919; s. c. 2 Green's Crim. Reps. 650.

**127.** A witness may be contradicted by a person who heard him testify on a former hearing, whether such person took minutes of the testimony of the witness or not. State v. Archer, 54 New Hamp. 465.

**128.** When a witness for the prisoner testifies differently from what he did before the grand jury, a member of the grand jury may be called to contradict him. State v. Benner, 64 Maine, 267.

**129.** It is not competent for the purpose of impeaching a witness to ask him as to his testimony at a former time if that testimony was inadmissible. Mitchum v. State, 11 Ga. 615. And a witness cannot be impeached by asking him questions irrelevant to the issue in order to contradict his answers. U. S. v. Dickinson, 2 McLean, 325.

**130.** When a witness after he has testified declares that what he swore to was false, such declaration may be given in evidence to impeach him. People v. Moore, 15 Wend. 419.

**131. When contradictory statements of witness cannot be shown.** Upon cross-examination, the prosecution may, for the purpose of impairing the credit of a witness, interrogate him as to collateral matters, but after asking and obtaining answers, other witnesses cannot be called to prove such answers false. Stokes v. People, 53 N. Y. 164; State v. Benner, 64 Maine, 267; People v. Devine, *supra*.

**132.** Where a witness for the prosecution was asked whether the public prosecutor had not paid him for coming from another State to be a witness, and answered that he had not, it was held that the defense could not introduce witnesses to prove that he had said that he had been so paid. State v. Patterson, 3 Ired. 346.

**133. When contradictory statements in respect to collateral matters may be shown.** An exception to the rule that contradictory statements of a witness in respect to collateral matters testified to by him on cross-examination cannot be shown to impeach his credit, arises when the cross-examination is as to matters which although collateral tend to show the temper, disposi-

tion or conduct of the witness toward the subject of inquiry or the parties. State v. Patterson, *supra*.

**134. A party may not contradict his own witness.** A party cannot discredit his own witness by asking him whether he had not sworn differently on a former occasion. People v. Safford, 5 Denio, 112; Sanchez v. People, 4 Parker, 535; 22 N. Y. 147.

**135.** When, however, the witness is hostile to the party calling him, it is proper to allow the direct examination to take the character of a cross-examination. People v. Mather, 4 Wend. 231. Where a witness testifies contrary to what the party introducing him had a right to expect, he may be cross-examined by such party as to what he had stated in regard to the matter on former occasions, and thus refresh the memory of the witness and give him an opportunity to set the party introducing him right before the jury, but not for the purpose of discrediting the witness. And the party is not allowed to prove such contradictory statements if denied by the witness. Howard v. State, 32 Ind. 478.

**136.** Where the prosecution has called and examined a witness, it cannot, upon the witness being recalled by the defendant, seek to impeach him on cross-examination. Com. v. Hudson, 11 Gray, 64.

**137. Testimony of defendant may be impeached.** Where the prisoner takes the stand as a witness in his own behalf, he is subject to the same rules of examination as any other witness, and may be contradicted. It is therefore competent to show that his testimony as to being unconscious of what he did while committing the crime, and for some time afterward, was not true. Fralich v. People, 65 Barb. 48.

**138.** Where the prisoner testifies in his own behalf, the court may interrogate him as fully as may be needful, to test the truth of his direct testimony. Gill v. People, 5 N. Y. Supm. N. S. 308.

**139. Showing that witness is interested.** The defense may ask a witness whether any person, on behalf of the prosecution, has made the witness any offer of reward in relation to the testimony which he might give in a certain class of cases, including the case on trial. Com. v. Sackett, 22 Pick. 394.

**140.** The fact that a witness for the prosecution has contributed funds to carry it on, goes only to his credibility. People v. Cunningham, 1 Denio, 524.

**141. Showing hostility of witness.** A witness may be interrogated as to the state of his feelings toward the prisoner in order to show bias; but he cannot be asked the cause of his hostility. Bishop v. State, 9 Ga. 121.

**142.** It is always proper to show the relations existing between a witness and the party against, as well as the person for whom he is called; and the party against whom a witness is called may show the hostility of the witness by proving his declarations; as that the witness threatened to kill the defendant before the commission of the alleged offense, although the witness, on cross-examination, denied having made such threats. Starks v. People, 5 Denio, 106.

**143. Showing defect of religious belief.** The want of religious belief, as affecting the competency of a witness, must be established by other means than an examination of the witness on the stand. Com. v. Smith, 2 Gray, 516; Com. v. Burke, 16 Ib. 33. Disability from such a cause is not to be presumed, but must be proved. The question is to be decided by the court, and is not subject to exception. Com. v. Hills, 10 Cush. 530.

**144. Showing intoxication of witness.** It may be shown that the witness was drunk at the time of the transaction relative to which he testifies. Fleming v. State, 5 Humph. 564.

**145. Attacking character of witness.** A witness may be discredited by showing his bad moral character. State v. Shields, 13 Mo. 236; Deer v. State, 14 Ib. 348.

**146.** When a person on trial puts his general character in issue by his own act, he takes the risk of its being proved bad, and of every presumption which such proof legitimately raises against him. And so, where a prisoner testifies as a witness in his own behalf, he puts his general character

and credibility in issue, and may be impeached the same as any other witness. Burdick v. People, 58 Barb. 51.

**147.** Where the prisoner is a witness in his own behalf, a record of his conviction of petit larceny is admissible to impeach him. People v. Satterlee, 12 N. Y. Supm. N. S. 167.

**148.** A witness cannot be impeached by proving that he has been guilty of stealing. Free v. State, 1 McMullan, 494; Howel v. Com. 5 Gratt. 664; nor by proving that several indictments for libel are pending against him. Campbell v. State, 23 Ala. 44.

**149. Method of impeaching character of witness.** The party impeaching a witness should ask the attacking witness whether he has the means of knowing the general character of the witness sought to be impeached. State v. O'Neal, 4 Ired. 88.

**150.** A witness examined as to the general character of a person, in respect to his habits, should first state that he is acquainted with that person's general character in the particular to which he deposes; but if his testimony shows that fact, it will be sufficient. Elam v. State, 25 Ala. 53.

**151.** In order to impeach a witness, it is not competent to prove his general bad character disconnected from veracity. The proper inquiry is what is his general character for truth in the place where he resides, and whether, from the witness' knowledge of his general character, he would believe him under oath. U. S. v. Vansickle, 2 McLean, 219; State v. Bruce, 30 Maine, 71; Bucklin v. State, 20 Ohio, 18; Uhl v. Com. 6 Gratt. 706.

**152.** The proper question to be put to a witness called to impeach another, is whether he would believe him on oath; and the opposite party may then cross-examine as to the grounds of the unfavorable opinion. People v. Mather, 4 Wend. 231; Hamilton v. People, 29 Mich. 173; Keator v. People, 32 Ib 484. In New Hampshire the inquiry is, what is the general reputation of the witness as to truth, and whether, from such general reputation, the person would believe such witness under oath, as soon as men in general. State v. Howard, 9 New Hamp. 485.

**153.** In Ohio, in impeaching the credit of a witness, the inquiry into the general reputation, or character of the witness, is restricted to his reputation for truth and veracity, and does not extend to his entire moral character. Craig v. State, 5 Ohio, N. S. 605. In Tennessee, in impeaching a witness, the inquiry is not restricted to general reputation for veracity, but involves the whole moral character of the witness. Gilliam v. State, 1 Head, 38.

**154.** Where a person testifies that public rumor gave a witness sought to be impeached, a bad moral character as to drinking, fighting, murder, shooting at men, and as to certain publications reputed false in his newspaper, he cannot be asked, on re-examination, "What other moral delinquencies public rumor attributed to him; nor what rumor said in regard to those publications; nor whether he did not know, of his own knowledge, that they were false." Campbell v. State, 23 Ala. 44.

**155.** An unmarried woman may be asked, on cross-examination, subject to her privilege to refuse to answer, whether she has any children. Ibid.

**156.** For the purpose of impeaching the credibility of the prosecuting witness, he may be asked whether he did not offer to compound the felony. Pleasant v. State, 8 Eng. 360.

**157.** The prisoner is entitled to the same right of cross-examination as if no ruling had been made in regard to the number of witnesses on the subject of impeachment; otherwise the limit would be itself improper. People v. Haynes, 55 Barb. 450.

### (c) *Sustaining credibility of witness.*

**158. Character of witness must have been first assailed.** A party cannot prove the general good character of his own witness, until the character of the witness has been attacked by the other side. Starks v. People, 5 Denio, 106.

**159.** But where a witness is impeached,

either by witnesses called for that purpose, or on his own cross-examination, the party calling him may introduce testimony in support of his character for truth and veracity. People v. Rector, 19 Wend. 569.

160. After a witness has been impeached by proof of statements made by him contradictory to what he swore to, evidence is admissible of his general good character. Clem v. State, 33 Ind. 418.

161. **Who competent to testify as to character of witness.** When a witness has been impeached, a person who is well acquainted with him, and has never heard his character for truth and veracity called in question, or spoken of, is competent to sustain him. Lemons v. State, 4 West Va. 755.

162. **Negativing imputed hostility of witness.** When a witness has been examined as to the part he has taken in the prosecution, he may be asked, on re-examination, whether he feels so unfriendly towards the prisoner as to wish to see an innocent man convicted. Campbell v. State, 23 Ala. 44.

163. Where it is sought to be shown on the cross-examination of the principal witness that the prosecution was the result of a conspiracy, in which the witness was concerned, it is competent to sustain the witness by proving that another person wrote to the public authorities, and was the cause of the prosecution being instituted. Lohman v. People, 1 Comst. 379.

164. **Corroborating testimony of witness.** Where a witness is impeached by proof of previous statements contradicting his evidence, he may be supported by showing other statements corresponding with it. Beauchamp v. State, 6 Blackf. 299.

165. Where a witness is asked on cross-examination when he was first questioned concerning what he has sworn to on his direct examination, he may be asked on re-examination if he did not previously relate the same thing to others. Com. v. Wilson, 1 Gray, 337.

166. When the testimony of a witness is impeached, his confession taken by the magistrate on a complaint against another person is admissible in evidence to sustain his testimony and to impair the testimony of the magistrate in the account given by him of the facts testified to by the witness on such complaint. People v. Moore, 15 Wend. 419.

167. Where an accomplice, on his cross-examination, testified that the examining magistrate told him that he should not be prosecuted if he would disclose all he knew of the transaction, it was held that the testimony of the magistrate corroborating this statement was admissible in evidence to support the general credit of the accomplice. Com. v. Bosworth, 22 Pick. 397.

168. Where it is proved that a witness has made statements in conflict with his testimony, he may, upon re-examination, explain the circumstances under which such statements were made. State v. Reed, 62 Maine, 129; s. c. 2 Green's Crim. Reps. 468.

169. When a witness has been cross-examined as to his former statements, in order to impeach him, he may be asked, on re-examination in chief, his motive in making those statements. Campbell v. State, 23 Ala. 44.

170. **Credibility of witness to be determined by jury.** It is erroneous to instruct the jury that although a witness is impeached, yet if his testimony is corroborated by the testimony of witnesses unimpeached, they are bound to believe his testimony, the credibility of witnesses being wholly a matter for the jury. People v. Eckert, 16 Cal. 110.

171. In impeaching the general character of an accomplice, the jury are to determine his credibility at the time he testifies, and not whether he was truthful at the time of the commission of the offense. People v. Haynes, 55 Barb. 450.

*See* Evidence; Trial.

# Writ of Error.

1. When it will lie.
2. When it will not lie.
3. Proceedings in obtaining.
4. What to contain.
5. Return.
6. Hearing.

## 1. When it will lie.

**1. Must be judgment.** A writ of error can only be brought by a defendant to review a final judgment rendered upon the whole indictment. People agst. Merrill, 14 N. Y. 74.

**2.** The prisoner cannot review the proceedings upon his trial by a writ of error until a record of judgment has been made up and filed, unless the giving of judgment has been stayed. Hill agst. People, 10 N. Y. 463. In New York, where there was nothing brought before the Supreme Court but the rough minutes of the arraignment and trial of the plaintiff in error in the Court of Sessions, together with a copy of a memorandum, which was not a part of the minutes, and a certificate that the indictment could not be found, and the return did not disclose the fact of any judgment or sentence, the writ of error was quashed. Dawson v. People, 5 Parker, 118.

**3.** Where, after conviction for grand larceny in the New York General Sessions, judgment was stayed, and the Supreme Court ordered a new trial, but no judgment on the indictment was given for the defendant in either court, it was held that the prosecution was not entitled to a writ of error to review the order of the Supreme Court granting a new trial. It is only judgments for the defendant upon an indictment to which the terms of the statute (N. Y. Laws of 1852, ch. 82) extend. People v. Nestle, 19 N. Y. 583.

**4. What deemed a judgment.** The reversal by the Supreme Court of a conviction in the Oyer and Terminer, and granting a new trial, is a judgment within the meaning of the statute of New York (Laws of 1852, p. 76), and a writ of error lies to review it. People v. Bennett, 49 N. Y. 137.

**5.** To constitute a judgment record, it must be signed by a judge of the court. The statute of New York which authorizes a defendant, who shall have been convicted or acquitted, to require the district attorney to make up a record of judgment, and provides that on his neglect to do so, it may be done by the defendant, does not dispense with such necessity. Weed v. People, 31 N. Y. 465.

**6. In case of decision on demurrer.** Exceptions cannot be taken to the judgment or order of the court upon a demurrer, the remedy for erroneous decisions upon demurrer in criminal cases being by a writ of error. People v. Reagle, 60 Barb. 527. But see Paige v. People, 6 Parker, 683.

**7. Must have been exception.** It is only in a capital case, and where the *minimum* punishment is imprisonment in the State prison for life, that the accused is relieved under the statute of New York (Laws of 1855, ch. 339, § 3), from the necessity of taking an exception in the court in which he is tried, in order that he may have the right of review in an appellate court. Wilke v. People, 53 N. Y. 525.

**8. Objection once raised need not be renewed.** If a court, before the impaneling of the jury, entertains and decides material legal questions which belong to, and are properly a part of the trial, and the parties act upon them, such decisions are to be deemed incorporated into the proceedings on the trial, and it is unnecessary to renew the objection afterward. Starin v. People, 45 N. Y. 333.

**9. Not taken away by appeal.** The remedy by appeal does not take away the remedy by writ of error. Barnett v. State, 36 Maine, 198.

**10. In behalf of prosecution.** In Indiana, where the defendant pleaded guilty to the first count of the indictment, and the second count was quashed, it was held, after judgment for the defendant, that a writ of error in behalf of the prosecution might be brought on the judgment quashing the second count. State v. Dark, 8 Blackf. 526.

2. When it will not lie.

**11. In case of acquittal.** A writ of error cannot be maintained by the prosecution after judgment for the prisoner. People v. Corning, 2 Comst. 1; Com. v. Cummings, 3 Cush. 212; Com. v. Harrison, 2 Va. Cas. 202; State v. Royal, 1 Scam. 557; State v. Dill, Ib. 257; *contra*, State v. Graham, 1 Ark. 428.

**12. Where decision is on question of practice.** In Wisconsin, a writ of error will not lie in behalf of the prosecution to reverse a judgment in favor of the defendant upon a question of practice. State v. Kemp, 17 Wis. 669.

**13. In case of objection to evidence.** Where an objection to evidence is sustained, error will not lie if the objection is good on any ground. And if the objection is one that might have been removed if pointed out, which is not done, but purposely avoided, and other groundless objections are raised, the former will be deemed to have been waived, and cannot be insisted on to sustain the ruling upon appeal. Haight v. People, 50 N. Y. 391. A writ of error will not lie for the improper admission of evidence unless the evidence be objected to on the trial. Clark v. State, 12 Ohio, 483.

**14. Decision in relation to certiorari, contempt, or continuance.** A writ of error cannot be obtained for the refusal of an inferior court to grant a certiorari. State v. Wood, 3 Zabr. 560. Nor to an order punishing for contempt. Johnston v. Com. 1 Bibb, 598. Nor for the refusal of the court to grant a continuance. Holmes v. People, 5 Gilman, 478.

**15.** In New York, when an indictment is brought into the Supreme Court by certiorari, to take the advice of the court, and the proceedings are sent back to the court below, with directions to proceed to judgment, a writ of error will not lie to the Supreme Court. People v. Stearns, 23 Wend. 634.

**16. Misconduct of jury.** Irregularities of the jury in relation to their verdict cannot be examined by writ of error. U. S. v. Gillies, 3 Wheeler's Crim. Cas. 308.

**17. In case of discharge of jury.** In New York, it has been held that the discharge of the jury upon their failure to agree, is not subject to review upon writ of error. People v. Green, 13 Wend. 55.

3. Proceedings in obtaining.

**18. In case of several defendants.** Prisoners jointly indicted, may unite in a writ of error. Sumner v. Com. 3 Cush. 521.

**19. How objections which are the subjects of, may be presented.** The New York Revised Statutes have in effect abolished all assignments of error and allegations of diminution on writs of error and *certiorari* in criminal cases. When objections relate to matters extrinsic of the judgment record, the remedy is by motion. In most cases before conviction, they can be presented either by plea in abatement or bill of exceptions, either of which would introduce them upon the record and thus subject them to review upon writ of error after judgment. Hayen v. People, 3 Parker, 175; People v. McCann, Ib. 272.

**20. By whom allowed.** In New York, by the Revised Statutes, a writ of error in a capital case is allowed by a judge of the Supreme or Circuit Court, upon notice to the prosecuting attorney. But it is the duty of the judge to disallow the writ when he has no reason to doubt the legality of the conviction. Colt v. People, 1 Parker, 617; Carnal v. People, Ib. 262. Under the judiciary act of 1847, the power to allow the writ and direct a stay of proceedings is extended to a judge of the Court of Appeals and to a county judge. Where it is probable that an error has been committed, or a doubt is entertained as to the correctness of the decision which is sought to be reviewed, the writ is to be allowed and the order granted; but in no other case. Stout v. People, 4 Parker, 132.

**21. Stay of proceedings.** A stay of proceedings after conviction, until a decision on writ of error, is in the discretion of the court. People v. Holmes, 3 Parker, 567.

**22.** In New York, a writ of error when allowed, does not stay or delay the execution of the judgment or of the sentence thereon, unless it is expressly directed in the

allowance that the writ shall operate as a stay of proceedings. Stout v. People, 4 Parker, 132.

23. Considerations for the allowance of a writ of error and stay of proceedings in a capital case. Sullivan v. People, 1 Parker, 347; People v. Hendrickson, Ib. 396.

4. What to contain.

**24. Command.** It is sufficient if a writ of error to remove a case from the New York Court of Sessions to the Supreme Court commands that the record and proceedings (which include the judgment, if any be given), be certified to the Supreme Court. Phillips v. People, 57 Barb. 353; 42 N. Y. 200.

25. The objections to a writ of error that it does not require the return of the judgment below, or a return of the proceedings on the indictment "if judgment be thereupon given," and that there is no return of any record or judgment in the case, are technical and without force. Ibid.

5. Return.

**26. What brought up by.** The return to a writ of error brings up the indictment, the pleas interposed by the defendant, and the trial and judgment upon those pleas, together with the bill of exceptions. Grant v. People, 4 Parker, 527; Phillips v. People, *supra;* Gaffney v. People, 50 N. Y. 416.

27. In New York, where the Court of Oyer and Terminer, by its return to a writ of certiorari, abided by the return made to a writ of error as containing the only authentic record of its judgment in the premises, and declined in any way to alter and amend its minutes, without the direction, order or permission of the Supreme Court, because the record of judgment was before the latter court by the return to the writ of error, it was held that the court of Oyer and Terminer had mistaken the law and practice, the record not being sent up on a writ of error, but only a transcript, and for the purposes of amendment, the record remaining in the court below. Graham v. People, 63 Barb. 468.

**28. Presumption from, that prisoner was present during trial.** Where the return to a writ of error ater conviction for grand larceny, stated that the prisoner appeared in his own proper person, and was, in due form of law tried and convicted, it was held that it would be presumed that he was present during the whole of the trial. Hildebrand v. People, 3 N. Y. Supm. N. S. 82; 8 Ib. 19.

**29. Must state that the prisoner was asked why judgment should not be pronounced against him.** Upon a writ of error to the Court of Oyer and Terminer after conviction for murder, it must be distinctly stated in the record sent up as a part of the return, that the accused was interrogated after he was found guilty why judgment should not be pronounced against him. Graham v. People, 63 Barb. 468.

30. Where the return made to writs of error and certiorari differed in regard to the essential matter whether the prisoner was asked if he had anything to say why sentence should not be pronounced, it was held that as the return to the writ of error was signed by the judge of the Oyer and Terminer and the district attorney, and showed that it had been inspected by the court, while this was not the case with respect to the return to the certiorari, the return to the writ of error was to be deemed to contain the authentic judgment of the court below. Ib.

**31. Expunging interpolated matter.** Where the return of the court below shows that a part of it is not the record, but is in legal effect a forgery, the court of review will regard the interpolated matter as having been expunged. Graham v. People, *supra.*

32. A motion to amend the record of a Court of Oyer and Terminer after a return to a writ of error should not be made in the Supreme Court. It is the duty of the former court to expunge from its minutes matter which has been interpolated without its authority, and thus prevent the return of the interpolated matter as part of its record. Ib.

6. Hearing.

**33. Accused need not be present.** Upon a writ of error sued out by a person con-

victed of a felony, his personal presence in the appellate court is not necessary to give jurisdiction. Donnelly v. State, 2 Dutch. 601.

34. **Not to be had on reporter's minutes.** Where there is no bill of exceptions, the Supreme Court upon the return of a writ of error, cannot lawfully order the cause to be heard on the reporter's minutes taken on the trial, the prisoner objecting thereto. Messner v. People, 45 N. Y. 1, Peckham, J., *dissenting*.

35. **Confined to questions of law.** In New York, a review upon writ of error (1 R. S. p. 736, § 23), is confined to questions of law arising upon exceptions taken upon the trial, and errors that appear in the record. The testimony constitutes no part of the record, and must be disregarded by the court, except for the purpose of determining the materiality of exceptions. People v. Thompson, 41 N. Y. 1; Donohue v. People, 56 Ib. 208; Eggler v. People, 3 N. Y. Supm. N. S. 796.

36. **Confined to causes of error assigned.** Where there is a general assignment of error, and also an assignment of special causes of error, the defendant cannot insist upon other special causes under the general assignment. Crandall v. State, 10 Conn. 339.

37. **Burden of proof.** The burden of showing error lies upon the plaintiff in error; and when the bill of exceptions does not purport to contain all the evidence, it will ordinarily be presumed, that if set forth it would sustain the ruling and charge of the court. Dillion v. People, 8 Mich. 357.

38. **Proceedings in court below presumed regular.** Where upon the return to a writ of error, there was nothing before the court excepting the indictment and the clerk's minutes of the trial, which showed the impaneling of the jury, the verdict and sentence, it was held that the court would not entertain the question of reversal on the ground that it did not appear that the defendant was present at the trial, or when sentence was pronounced, or was asked what he had to say why sentence should not be pronounced against him. Thompson v. People, 3 Parker, 208.

39. A return to a writ of error after conviction of burglary, contained the indictment, the testimony, the charge of the court, the verdict, and the sentence; but no record was made up. It was urged that the judgment should be reversed because it did not appear that the prisoner was present on the trial or that before sentence he was asked what he had to say why judgment should not be pronounced against him. *Held* that as the case did not present the necessary facts on which the prisoner's objections were based, he could not avail himself of them. Dent v. People, 1 N. Y. Supm. N. S. 655.

40. Where no record of the proceedings was contained in the case, showing what transpired between the conviction and sentence, it was held that the objection, that the prisoner was not asked if he had anything to say why sentence should not be pronounced against him, could not be entertained. Hildebrand v. People, 3 N. Y. Supm. N. S. 82; 8 Ib. 19.

41. Where no objection was raised at the trial in the New York Court of Sessions, that the trial was had after the close of the third week of the term, and it was raised in the Supreme Court on writ of error, solely on the ground that no order for the continuance of the term appeared on the record of judgment, it was held that as every intendment was in favor of the regularity of the proceedings and the omission to incorporate the order in the proceedings did not show that it was not duly entered on the minutes of the court, there was nothing to call for a new trial. Ferris v. People, 48 Barb. 17.

42. **Evidence in court below presumed sufficient.** In the absence of all the evidence given upon the trial, the appellate court will assume that the evidence not returned justified the verdict. Where therefore a witness on the trial exhibited to the jury by physical action, the mode and manner of a robbery, it was held that the court on writ of error would presume that the representation sufficiently proved the violence to bring the prisoner within the statute. Mahoney v. People, 5 N. Y. Supm. N. S. 329.

43. **Error relieved against notwithstanding no exception was taken.** Where

there is a review of a judgment of the General Sessions by the New York Supreme Court upon writ of error, even if there were no request or no exception, the court ought, under the statute (Laws of 1855, ch. 337, § 3), if they discover any error which might have prejudiced the prisoner, to give him the benefit of it. McNevins v. People, 61 Barb. 307.

**44. Error which might possibly have injured, ground of relief.** The rule that when although it appears to the appellate court, that error has been committed, yet that when the error could not have prejudiced the party complaining, it will not be made a ground of reversal, is only applicable where the error could not by any possibility have produced injury. Stokes v. People, 53 N. Y. 164.

*See* APPEAL; BILL OF EXCEPTIONS.

# ADDENDA.

*(In arranging the work the following cases were accidentally omitted.)*

## Habeas Corpus.

**When demandable as a right.** In New York, the right to be relieved from imprisonment by means of the writ of *habeas corpus*, is not a statutory right, but is a part of the common law of the State. The writ, in cases within the relief afforded by it as known and used at common law, is placed beyond the pale of legislative discretion, except that it may be suspended when public safety requires, as provided by the Constitution. The design of the various statutes of the State has been to increase, rather than to impair, the efficiency of the writ. People ex rel. Tweed v. Liscomb, 60 N. Y. 559.

To bar the applicant from a discharge from arrest by virtue of a judgment or decree, or an execution thereon, under the statute (2 R. S. 563, § 22), the court in which the judgment or decree is given, must have had jurisdiction to render such judgment under some circumstances. Ibid.

**Nature and extent of injury.** The prohibition of the 42d section of the *habeas corpus* act (2 R. S. 568) forbidding an inquiry by the court or officer into the legality or justice of any previous judgment, decree or execution specified in the 22d section, does not deprive the court or officer of the power, or relieve him from the duty, of determining whether the judgment, decree or execution emanated from a court of competent jurisdiction, and whether the court had the power to render such judgment. The terms "legality and justice," as used in the statute, were not intended to include questions of jurisdiction or power. If the record shows that the judgment is not merely erroneous, but such as could not under any circumstances have been given, the case is not within the exception of the statute, and the prisoner must be discharged. Ibid.

Although errors of a court having power to render judgment, committed prior to the judgment, can only be reviewed by writ of error, yet the fact that the court had jurisdiction of the person of the prisoner and of the offense, is not alone conclusive. The jurisdiction of the court to give the judgment by virtue of which the prisoner is held, is a proper subject of inquiry upon the return of the writ of *habeas corpus;* and the court will determine upon the whole record, whether the judgment was warranted by law, and was within the jurisdiction of the court. Ibid.

The presumption in favor of the jurisdiction of a court of general jurisdiction, is one of fact, and may be rebutted. Where, however, the jurisdiction depends upon the existence of certain facts, and the court has passed upon those facts, the determination is conclusive until the judgment has been reversed. Ibid.

**Duty of court when part of judgment is void.** Where the judgment exceeds the jurisdiction of the court, it is void for the excess; and if the valid part of the judgment has been executed, the court, upon writ of *habeas corpus*, has power, and it is its duty to discharge the prisoner. Ibid.

The relator was tried at a Court of Oyer and Terminer upon an indictment containing 220 counts, each charging separate and distinct misdemeanors of the same grade,

and was found guilty upon 204 of the counts. He was sentenced upon twelve of the counts to as many successive terms of imprisonment of one year each, and to fines of $250 each; and upon other counts, to fines amounting in the aggregate to $12,500. The extreme limit of punishment prescribed by the statute under which he was indicted for a single misdemeanor of the character charged, was imprisonment for one year, and a fine of $250. The relator having served out one year's imprisonment, and paid one fine of $250, made application upon writ of *habeas corpus* to be discharged. *Held* that he was entitled to the relief asked. Ibid.

*See post*, SENTENCE.

**When not proper remedy.** Whether it is error to join in the same indictment counts for several distinct offenses, or whether the court should have compelled the prosecutor to elect between the several counts, are questions which, as they do not go to the jurisdiction of the court, cannot be determined upon a writ of *habeas corpus* to inquire into the legality of imprisonment under the judgment rendered upon the trial of the indictment. Ibid.

**Effect of decision.** A previous decision in a proceeding on *habeas corpus* will not prevent the issuance of a new writ on the application of a relator who is restrained of his liberty; and the refusal to discharge him under one writ will not be an answer to a second writ issued by another court or officer. People ex rel. Lawrence v. Brady, 56 N. Y. 182; citing *ex parte* Kaine, 3 Blatchf. 1; and distinguishing Mercein v. The People, 25 Wend. 64.

## Sentence.

**Under indictment containing several counts.** Where several separate and distinct offenses, each amounting to a misdemeanor, are charged in one indictment, in separate counts, and the prisoner put upon his trial for all the alleged offenses at the same time before the same jury, and a general verdict of guilty rendered on all the counts, or a verdict of guilty rendered on various specified counts, the court has no power to pronounce a separate sentence on each count upon which the prisoner is found guilty, and thus aggregate sentences on a single indictment and trial, in excess of the maximum punishment prescribed by statute for the grade of offense for which the prisoner was indicted and tried. People ex rel. Tweed v. Liscomb, 60 N. Y. 559.

The statute of New York (2 R. S. 700, § 11), directing that upon the conviction of a person for two or more offenses, before sentence shall have been pronounced upon him for either, the imprisonment to which he shall be sentenced upon the second or subsequent conviction, shall commence at the termination of the first or second term of imprisonment, as the case may be, has reference to separate convictions upon independent trials on distinct indictments. Ibid.

## Witness.

**Defendant testifying in his own behalf.** Where the intent constitutes the vital element of the offense for which the prisoner is on trial, it is competent for him, when examined as a witness in his own behalf, to testify as to his intention in doing an act, which act is claimed by the prosecution to be a material circumstance bearing upon the question of criminal intent. Where, therefore, on the trial of an indictment for an assault with a deadly weapon (an axe), with intent to kill, the prisoner, while testifying, was asked by his counsel, "What was your intention in taking the axe from the shed to the house?" and the question being objected to, was ruled out on the ground that the prisoner could only speak to his intent at the time of striking the blow, it was held error. Kerrains v. People, 60 N. Y. 221.

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